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COURT FILE NUMBER	BK01 095189
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
MATTER	IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL UNDER THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, C. B-3, AS AMENDED, OF TRADESMEN ENTERPRISES LIMITED PARTNERSHIP AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL UNDER THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, C. B-3, AS AMENDED, OF TRADESMEN ENTERPRISES INC.
APPLICANTS	TRADESMEN ENTERPRISES LIMITED PARTNERSHIP AND TRADESMEN ENTERPRISES INC.
DOCUMENT	**BENCH BRIEF OF THE APPLICANTS**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	LAWSON LUNDELL LLP Barristers and Solicitors 1100, 225 – 6 Avenue SW Calgary, Alberta T2P 1N2 **Attention:** **Alexis Teasdale** Tel: (403) 218-7564 Fax: (403) 269-9494 Email: ateasdale@lawsonlundell.com File No.: 29768-155647

APPLICATION BEFORE THE HONOURABLE JUSTICE P.R. JEFFREY

MARCH 16, 2021 AT 10:00 AM ON THE COMMERCIAL LIST

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I. INTRODUCTION

1. This is the Bench Brief of the Applicants, Tradesmen Enterprises Limited Partnership ("**TELP**") and its general partner, Tradesmen Enterprises Inc. ("**TEI**" and, together with TELP, "**Tradesmen**"), in support of their application returnable before this Honourable Court on March 16, 2021 for relief relating to the liquidation of Tradesmen's fixed assets.

2. In particular, Tradesmen seeks an Order:

   a) abridging the time for service of the Application and the supporting materials and deeming service thereof to be good and sufficient;

   b) approving, authorizing and ratifying the Liquidation Services Agreement dated March 3, 2021, between Tradesmen and Ritchie Bros. Auctioneers (Canada) Ltd. (the "**Liquidator**" and the "**Liquidation Services Agreement**", respectively), the NMG Sale and the Commission Sale (each as defined herein and together, the "**Sales**"), and all transactions contemplated thereunder (collectively, the "**Transactions**");

   c) vesting all of the Applicants' right, title and interest in and to the Auction Assets and the Additional Equipment (each as defined in the Liquidation Services Agreement), as applicable, free and clear of any and all encumbrances, in and to the applicable buyer;

   d) Sealing Confidential Exhibit "1" and Confidential Exhibit "2" to the Affidavit No. 3 of Dean Kato on the court file; and

   e) approving the Applicants' redaction of the sensitive commercial information contained in the Liquidation Services Agreement.

3. The Applicants' application is principally supported by the following materials:

   a) Notice of Application of Tradesmen, returnable March 16, 2021, filed March 8, 2021 (the "**Application**");

   b) Affidavit No. 3 of Dean Kato, sworn and filed March 8, 2021 (the "**Kato Affidavit No. 3**");

c) Third Report of KSV Restructuring Inc. in its capacity as Proposal Trustee of Tradesmen (in such capacity, the "**Proposal Trustee**") dated March 8, 2021 (the "**Third Report**").[1]

4. The purpose of this Bench Brief is to outline for the Court the legislation and jurisprudence relevant to the relief being sought in the Application returnable March 16, 2021. Capitalized terms used but not defined herein have the meanings given to them in the Kato Affidavit No. 3.

II. ISSUES

5. This Bench Brief sets out the case law and legislation governing the following issues:

a) Whether this Honourable Court should approve the Liquidation Services Agreement and all transactions contemplated thereunder, and grant an order vesting all of the Applicants' right, title, and interest in and to the Assets to the ultimate purchaser(s) thereof.

b) Whether this Honourable Court should grant an order sealing Confidential Exhibits "1" and "2" to the Kato Affidavit No. 3 on the Court File.

III. LAW AND ARGUMENT

A. An Approval and Vesting Order Should be Granted

6. This Honourable Court's authority to grant an approval and vesting order in the context of proposal proceedings is codified in subsections 65.13(1) and (7) of the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3, as amended (the ***BIA***),[2] which provide as follows:

> **Restriction on disposition of assets**
>
> 65.13(1) An insolvent person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) may not sell or otherwise dispose of assets outside the ordinary course of

[1] Further background facts regarding Tradesmen's business, the Teck Contract and the Project, and the history of these proceedings can be found in the Affidavit No. 1 of Dean Kato, sworn February 1, 2021, the Affidavit No. 2 of Dean Kato, sworn February 24, 2021, the First Report of the Proposal Trustee dated February 2, 2021, and the Second Report of the Proposal Trustee dated February 24, 2021.

[2] *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, as amended [***BIA***], at ss 65.13(1) and (7) [**Authorities, Tab 1**].

> business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.
>
> **Assets may be disposed of free and clear**
>
> (7) The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the insolvent person or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

7. Section 65.13(4) of the *BIA* provides the following non-exhaustive list of factors to be considered in deciding whether to authorize a sale of the insolvent person's assets outside the ordinary course of business:[3]

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

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

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

d) the extent to which the creditors were consulted;

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

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

[3] *BIA*, s 65.13(4) [**Authorities, Tab 1**].

8. The presentation of a proposal to creditors is not a condition to the court's authority under subsection 65.13 to approve a sale of the insolvent person's assets, as stated by the Ontario Superior Court of Justice in *Komtech Inc (Re)*:

> Although different legislation, the similarity of language of s. 65.13 of the *BIA* and s. 36 of the *CCAA*, including the listed factors for court consideration as to a sale of assets outside the ordinary course of business notwithstanding: (a) the filing of an NOI, or (b) an order under the *CCAA*, together with the factors listed above, leads me to conclude that the presentation of a Proposal to creditors, is not a condition to this Court's authority to approve, if appropriate, a sale of assets under s. 65.13 of the *BIA*.[4] [emphasis added]

9. *Komtech* was recently cited by Justice Grosse of this Honourable Court in *OEL Projects Ltd (Re)* for the same principle.[5]

10. The criteria in subsection 65.13(4) overlap with the factors to be considered in approving a sale of an insolvent person's assets set out in *Royal Bank of Canada v Soundair Corp* ("***Soundair***"):[6]

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.

11. The Alberta Court of Appeal has recently confirmed that *Soundair* sets forth the leading authorities and principles for the approval of a sale of assets in insolvency proceedings.[7]

12. For the following reasons, it is clear that the criteria set out in *Soundair* and subsection 65.13(4) of the *BIA* have been met, such that the Liquidation Services Agreement and all

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[4] *Komtech Inc (Re)*, 2011 ONSC 3230 at para 33 [***Komtech***] [**Authorities, Tab 2**].
[5] *OEL Projects Ltd (Re)*, 2020 ABQB 365, at para 30 [***OEL***] [**Authorities, Tab 3**]
[6] *Royal Bank of Canada v Soundair Corp*, [1991] OJ No 1137 (ONCA) at para 16 [**Authorities, Tab 4**].
[7] *Athabasca Workforce Solutions Inc v Greenfire Oil & Gas Ltd*, 2021 ABCA 66 at para 22 [**Authorities, Tab 5**].

Transactions contemplated thereunder should be approved, and an order vesting all of the Applicants' right, title and interest in and to the Assets should be granted.

(i) The process leading to the Liquidation Services Agreement was reasonable in the circumstances.

13. Due to the termination by Teck Coal Limited ("**Teck**") of Tradesmen's principal and essentially, only, contract for the construction of a water treatment facility at Teck's site near Elkford, British Columbia (the "**Project**"), and Tradesmen's resulting liquidity crisis, its operations as a general contractor have also ceased. Tradesmen's principal focus is now its litigation against Teck and others, and it no longer requires its fixed assets to carry on business while these proceedings, and the Litigation, are ongoing.[8]

14. As such, immediately following the filing of Tradesmen's Notices of Intention to Make a Proposal under the *BIA*, the Proposal Trustee, in consultation with Tradesmen, assembled a list of parties who may be interested in making a proposal to liquidate Tradesmen's fixed assets (the "**Prospective Liquidators**"), and on February 2, 2021, the Proposal Trustee distributed the Proposal Solicitation Letter to six Prospective Liquidators.[9] The Prospective Liquidators were given until February 18, 2021 to submit a proposal to liquidate Tradesmen's fixed assets.[10]

15. Four of the Prospective Liquidators submitted offers in response to the Proposal Solicitation Letter.[11] The Offer from the Liquidator was the highest of the four Offers submitted.[12]

16. The Proposal Trustee is of the view that the process to solicit liquidation proposals was conducted on a commercially reasonable basis.[13]

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[8] Kato Affidavit No. 3, paras 5-7 and 10-11.
[9] Kato Affidavit No. 3, paras 12-13, Exhibit "A".
[10] Kato Affidavit No. 3, para 13, Exhibit "A".
[11] Kato Affidavit No. 3, para 16, Confidential Exhibit "1"; Third Report, section 3.2.1.
[12] Kato Affidavit No. 3, para 17; Third Report, section 3.2.3.
[13] Third Report, section 4.2.1(a).

(ii) The Proposal Trustee supports the relief sought by Tradesmen.

17. The Proposal Trustee recommends that the Liquidation Services Agreement and the transactions contemplated thereby be approved by this Honourable Court.[14]

(iii) Tradesmen's creditors were consulted with respect to, or notified of, the liquidation process.

18. Tradesmen's principal economic stakeholders, BMO and PEF 2010 (A) Limited Partnership, PEF 2010(B) Limited Partnership, and PEF 2010(C) Limited Partnership, all consent to the relief sought by Tradesmen.[15]

19. Regarding Tradesmen's unsecured creditors, Madam Justice Grosse considered the issue of consultation with unsecured creditors in *OEL*, and held that "it is at least fair to consider whether creditors should have an opportunity to know about the transaction, scrutinize it, and take any position that might be available to them."[16] Tradesmen has given notice of this application to its subcontractors, and any equipment lessors who made Alberta Personal Property Registry registrations. These parties are aware of the proposed liquidation, and they are entitled to attend before this Honourable Court to put forward their views on the process, if any.

(iv) The proposed liquidation will be beneficial to Tradesmen's creditors and other interested parties.

20. The Sales and Transactions contemplated by the Liquidation Services Agreement will be beneficial to Tradesmen's creditors because they will generate sale proceeds for Tradesmen and reduce the costs associated with storing, maintaining, and transporting the Assets, which are not necessary to Tradesmen's business during these proceedings and its pursuit of the Litigation.[17] The Liquidation Services Agreement will also enable Tradesmen to vacate its leased premises in Grande Prairie by April 30, 2021, resulting in a significant reduction in monthly occupancy costs.[18]

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[14] Kato Affidavit No. 3, para 28; Third Report, section 4.2.
[15] Kato Affidavit No. 3, para 28.
[16] *OEL*, *supra*, at para 25 [**Authorities, Tab 3**].
[17] Kato Affidavit No. 3, para 26.
[18] Kato Affidavit No. 3, para 26; Third Report, section 4.1.2(d).

21. Further, the Liquidation Services Agreement provides a mechanism for Tradesmen to realize on the Additional Equipment remaining at Teck's Project site. Without the Liquidation Services Agreement, Tradesmen would be unable to realize on the Additional Equipment. This would be detrimental to Tradesmen's creditors.[19]

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

22. The Liquidation Services Agreement provides for the sale of all of the Auction Assets and the Additional Equipment on the open market in a fair and efficient manner, and presents minimal risk to Tradesmen as the Liquidator has agreed to pay the Guaranteed Amount.[20] Further, the auction processes contemplated by the Liquidation Services Agreement provide Tradesmen with the best opportunity to attain the highest value for the Assets.[21]

23. The Proposal Trustee is of the view that the Liquidation Services Agreement provides for the greatest recovery available to Tradesmen for the Assets to be sold thereunder,[22] and further, is of the view that the terms of the Liquidation Services Agreement are reasonable, including the amount of the Guaranteed Amount and the associated payment mechanism, the Sale Expenses, the sharing formula for the Overage, and the Liquidator's commission on the Additional Equipment.[23]

B. The Sealing Order Should be Granted

24. The Applicants seek an Order sealing Confidential Exhibits "1" and "2" to the Kato Affidavit No. 3, which are, respectively, a summary of the Offers received in response to the Proposal Solicitation Letter, and an unredacted copy of the Liquidation Services Agreement.

25. The test for sealing documents as set out in *Sierra Club of Canada v Canada (Minister of Finance)* is as follows: (a) the order is necessary to prevent risk to an important interest, including

[19] Third Report, section 4.2.1(e).
[20] Kato Affidavit No. 3, paras 24 and 25.
[21] Kato Affidavit No. 3, para 24.
[22] Third Report, section 4.2.1(b).
[23] Third Report, section 4.2.1(c).

a commercial interest, because reasonable alternative measures will not prevent the risk; and (b) the salutary effects outweigh the deleterious effects.[24]

26. The Liquidation Services Agreement and the schedules thereto contain commercially sensitive information which may negatively impact the value attained on the realization of the Assets if the transaction contemplated by the Liquidation Services Agreement does not close, which would necessitate a further tender process.[25] Accordingly, Tradesmen's view is that any effort to remarket the Assets may be impaired if either of the Confidential Exhibits are made public.[26] The Proposal Trustee supports the Applicants' request for this relief.[27]

27. For the foregoing reasons, Tradesmen respectfully submits that this Honourable Court should exercise its discretion to grant the requested order sealing Confidential Exhibits "1" and "2" to the Kato Affidavit No. 3.

CONCLUSION

28. For the reasons set out in this Bench Brief, Tradesmen respectfully requests that this Honourable Court grant the Order substantially in the form attached as Schedule "A" to Tradesmen's Application delivered on March 8, 2021.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, THIS 11th DAY OF MARCH, 2021

LAWSON LUNDELL LLP

Solicitors for the Applicants,
Tradesmen Enterprises Limited Partnership
and Tradesmen Enterprises Inc.

[24] *Sierra Club of Canada v Canada (Minister of Finance)*, [2002] 2 SCR 522 at para 53 [**Authorities, Tab 6**].
[25] Kato Affidavit No. 3, para 29; Third Report, section 4.1.1.
[26] *Ibid*.
[27] Third Report, section 4.1.2.

TABLE OF AUTHORITIES

TAB DOCUMENT

TAB 1

CANADA

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 February 24, 2021

Last amended on November 1, 2019

À jour au 24 février 2021

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Order to disclose information

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

Unrevised collective agreements remain in force

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

Parties

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

2005, c. 47, s. 44.

Restriction on disposition of assets

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

Individuals

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

Notice to secured creditors

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

Ordonnance visant la communication de renseignements

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

Maintien en vigueur des conventions collectives

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

Parties

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

2005, ch. 47, art. 44.

Restriction à la disposition d'actifs

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

Personne physique

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

Avis aux créanciers

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

Factors to be considered

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

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

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

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

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

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

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

Additional factors — related persons

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

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

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

Related persons

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

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

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

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

Facteurs à prendre en considération

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

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

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

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

d) la suffisance des consultations menées auprès des créanciers;

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

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

Autres facteurs

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

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

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

Personnes liées

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

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

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

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

Assets may be disposed of free and clear

(7) The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the insolvent person or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

Restriction — employers

(8) The court may grant the authorization only if the court is satisfied that the insolvent person can and will make the payments that would have been required under paragraphs 60(1.3)(a) and (1.5)(a) if the court had approved the proposal.

Restriction — intellectual property

(9) If, on the day on which a notice of intention is filed under section 50.4 or a copy of the proposal is filed under subsection 62(1), the insolvent person is a party to an agreement that grants to another party a right to use intellectual property that is included in a sale or disposition authorized under subsection (7), that sale or disposition does not affect the other party's right to use the intellectual property — including the other party's right to enforce an exclusive use — during the term of the agreement, including any period for which the other party extends the agreement as of right, as long as the other party continues to perform its obligations under the agreement in relation to the use of the intellectual property.

2005, c. 47, s. 44; 2007, c. 36, s. 27; 2018, c. 27, s. 266.

Insolvent person may disclaim or resiliate commercial lease

65.2 (1) At any time between the filing of a notice of intention and the filing of a proposal, or on the filing of a proposal, in respect of an insolvent person who is a commercial lessee under a lease of real property or an immovable, the insolvent person may disclaim or resiliate the lease on giving thirty days notice to the lessor in the prescribed manner, subject to subsection (2).

Lessor may challenge

(2) Within fifteen days after being given notice of the disclaimer or resiliation of a lease under subsection (1), the lessor may apply to the court for a declaration that subsection (1) does not apply in respect of that lease, and the court, on notice to any parties that it may direct, shall, subject to subsection (3), make that declaration.

Autorisation de disposer des actifs en les libérant de restrictions

(7) Le tribunal peut autoriser la disposition d'actifs de la personne insolvable, purgés de toute charge, sûreté ou autre restriction, et, le cas échéant, est tenu d'assujettir le produit de la disposition ou d'autres de ses actifs à une charge, sûreté ou autre restriction en faveur des créanciers touchés par la purge.

Restriction à l'égard des employeurs

(8) Il ne peut autoriser la disposition que s'il est convaincu que la personne insolvable est en mesure d'effectuer et effectuera les paiements qui auraient été exigés en vertu des alinéas 60(1.3)a) et (1.5)a) s'il avait approuvé la proposition.

Restriction à l'égard de la propriété intellectuelle

(9) Si, à la date du dépôt de l'avis d'intention prévu à l'article 50.4 ou du dépôt d'une copie de la proposition prévu au paragraphe 62(1), la personne insolvable est partie à un contrat qui autorise une autre partie à utiliser un droit de propriété intellectuelle qui est compris dans la disposition d'actifs autorisée en vertu du paragraphe (7), cette disposition n'empêche pas l'autre partie d'utiliser le droit en question ni d'en faire respecter l'utilisation exclusive, à condition que cette autre partie respecte ses obligations contractuelles à l'égard de l'utilisation de ce droit, et ce, pour la période prévue au contrat et pour toute prolongation de celle-ci dont elle se prévaut de plein droit.

2005, ch. 47, art. 44; 2007, ch. 36, art. 27; 2018, ch. 27, art. 266.

Résiliation d'un bail commercial

65.2 (1) Entre le dépôt d'un avis d'intention et celui d'une proposition relative à une personne insolvable qui est un locataire commercial en vertu d'un bail sur un immeuble ou un bien réel, ou lors du dépôt d'une telle proposition, cette personne peut, sous réserve du paragraphe (2), résilier son bail sur préavis de trente jours donné de la manière prescrite.

Contestation

(2) Sur demande du locateur, faite dans les quinze jours suivant le préavis, et sur préavis aux parties qu'il estime indiquées, le tribunal déclare le paragraphe (1) inapplicable au bail en question.

TAB 2

2011 ONSC 3230
Ontario Superior Court of Justice

Komtech Inc., Re

2011 CarswellOnt 6577, 2011 ONSC 3230, 106 O.R. (3d) 654, 205 A.C.W.S. (3d) 24, 81 C.B.R. (5th) 256

In the Matter of the Proposal of Komtech Inc. pursuant to the Law of the Province of Ontario, with a Head Office in the City of Kanata, in the Province of Ontario

Paul Kane J.

Heard: April 27, 2011
Judgment: July 8, 2011
Docket: 33-1469781

Counsel: Keith A. MacLaren for Komtech Inc.
John O'Toole, André Ducasse for Business Development Bank of Canada
Karen Perron for Hubbell Canada LP

Subject: Insolvency; Estates and Trusts; Corporate and Commercial

Related Abridgment Classifications

Bankruptcy and insolvency
XIV Administration of estate
XIV.6 Sale of assets
XIV.6.f Jurisdiction of court to approve sale

Headnote

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

Where no proposal — Company became insolvent — Company issued notice of intent to make proposal under Bankruptcy and Insolvency Act — Company sought auction for sale of assets — Company brought motion for approval of sale — Motion granted — Trustee and primary lenders of company approved of sale process — Proposed process was likely to see higher price than forced sale of assets — Company made reasonable efforts in search of alternate financing, equity partnership or purchaser of business — Company cooperated with trustee to identify and engage prospective purchasers — Position of creditors would not improve if motion dismissed — Sale could still be authorized under s. 65.13 of Act despite fact that proposal had not been filed, as court had jurisdiction to do so.

Table of Authorities

Cases considered by *Paul Kane J.*:

Brainhunter Inc., Re (2009), 62 C.B.R. (5th) 41, 2009 CarswellOnt 8207 (Ont. S.C.J. [Commercial List]) — considered

Hypnotic Clubs Inc., Re (2010), 68 C.B.R. (5th) 267, 2010 CarswellOnt 3463, 2010 ONSC 2987 (Ont. S.C.J. [Commercial List]) — considered

Nortel Networks Corp., Re (2009), 2009 CarswellOnt 4467, 55 C.B.R. (5th) 229 (Ont. S.C.J. [Commercial List]) — considered

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

s. 14.06(7) [en. 1997, c. 12, s. 15(1)] — referred to

s. 50.4 [en. 1992, c. 27, s. 19] — referred to

s. 50.4(1) [en. 1992, c. 27, s. 19] — pursuant to

s. 64.1 [en. 2005, c. 47, s. 42] — referred to

s. 64.2 [en. 2005, c. 47, s. 42] — referred to

s. 65.13(1) [en. 2005, c. 47, s. 44] — considered

s. 65.13(3) [en. 2005, c. 47, s. 44] — considered

s. 65.13(4) [en. 2005, c. 47, s. 44] — referred to

s. 65.13 [en. 2005, c. 47, s. 44] — considered

s. 81.4(4) [en. 2005, c. 47, s. 67] — referred to

s. 81.6(2) [en. 2005, c. 47, s. 67] — referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — referred to

s. 36 — considered

Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts, Act to establish the, S.C. 2005, c. 47

Generally — referred to

MOTION by company for approval of sale of assets.

***Paul Kane J.*:**

1 The applicant, Komtech Inc., ("Komtech") designs and manufactures plastic injection products at two facilities in Ontario and employs approximately 150 employees. Faced with serious financial difficulties, Komtech filed a Notice of Intention ("NOI") to make a proposal ("Proposal") under s. 50.4 (1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, ("*BIA*") on March 2, 2011. A. Farber & Partners Inc. was appointed Proposal Trustee ("Trustee").

2 This Court on March 31, 2011, granted an extension to file the Proposal until May 16, 2011.

3 On April 20, 2011, Komtech by motion sought approval of a bidding process ("Bid Process") for the auction of its assets and the preliminary approval of the Stalking Horse Asset Purchase Agreement, the ("APA") between itself as vendor and 2279591 Ontario Inc. as purchaser. Pursuant to the APA, most of the assets of the vendor including, accounts receivable, inventory equipment, assigned contracts, intellectual property, products and prepaid expenses, are to be sold subject to the Bid Process, for a purchase price of $2,800,000 ("the Purchase Price", or the "MBA").

4 All secured creditors of Komtech were served with this motion pursuant to s. 65.13(3) of the *BIA*. Section 65.13(3) of the Act does not require service on unsecured creditors.

5 The two primary secured lenders support this motion namely: the Business Development Bank of Canada ("BDB") and HSBC Canada ("HSBC"). Demand for payment by each of these secured lenders has been made of Komtech. Komtech has been unsuccessful in obtaining alternative credit facilities. Combined, these two secured lenders are presently owed approximately $6,000,000. The NOI dated February 26, 2011, lists approximately $3,600,000 additional debt owing to other creditors of Komtech in addition to BDB and HSBC.

6 The Purchase Price may be increased in an auction under the Bid Process. The Trustee recommends that the motion be granted and in support thereof, filed a Second Report dated April 19, 2011, and a supplement to the Second Report dated April 27, 2011. The Trustee expresses the opinion that the greatest chance of return to creditors of Komtech is proceeding with the APA coupled with an auction using the APA and the Purchase Price as the floor.

7 The Trustee in the Second Report confirms that the purchaser under the APA will carry on the business now being operated by Komtech and continue the employment of most of the 150 unionized and non-unionized employees of Komtech.

Evaluation of the APA and Bid Process

8 I have reviewed the asset realization value estimate of Komtech's assets, the analysis prepared by the Trustee as well as an independent manufacturing equipment evaluation dated April 8, 2011. This estimate of liquidation value strongly supports the recommendation of the Trustee that Komtech be authorized to execute the APA as it represents consideration materially in excess of the liquidation value likely obtainable on a forced sale of assets.

9 I am satisfied on the material filed that Komtech has made reasonable efforts in search of alternate financing, equity partnership or a purchaser of the business. I am further satisfied that Komtech has cooperated with the Trustee to identify and engage prospective purchasers of the company and its assets.

10 In the event this motion is granted, the Trustee has undertaken to conduct further marketing in the hope of obtaining higher bids from prospective purchasers above that contained in the APA. That potential may increase consideration and payment to secured and unsecured creditors.

11 It is my understanding that 2279591, as purchaser in the APA, is not a related party to Komtech.

12 The position of Komtech's secured and unsecured creditors will not improve if this motion is dismissed given the past unsuccessful attempts to sell the business and the estimate of the realizable value of the company's assets. The use of the Stalking Horse APA in the marketing and Bid Process represents the only remaining potential recovery for creditors beyond BDB and HSBC.

13 The Trustee in his reports has satisfied the requirements under s. 65.13(4). Alternative sources of financing were sought and are unavailable. A process was undertaken to identify and seek interest from potential purchasers under the direction of the Proposal Trustee. Negotiations took place with the knowledge of BDB and HSBC which led to the presentation for approval of the APA.

14 Involvement by the BDB since April 20, 2011 has increased the level of consideration payable under the APA by $100,000.

15 The APA represents continued employment to a large majority of the existing employees of Komtech. The APA represents a lower level of financial disruption to the existing customer base and suppliers of Komtech.

16 Given the realization value estimate, it appears that the consideration to be paid under the APA is reasonable and fair considering the book value, the market value and the estimate of liquidation value of such assets.

17 It is contemplated that a motion seeking a vesting order will be brought in the next several weeks. The Trustee has undertaken to provide all secured creditors and a representative group of the largest unsecured creditors with notice of that motion. That motion will provide creditors with an opportunity to express concerns regarding this initial approval of the APA, the auction bid process and amounts.

18 There is also value to suppliers and the greater community if this business is continued by a purchaser under the APA or the Bid Process.

19 Subject to the issue stated below, the moving party has satisfied me as to the requisite elements under s. 65.13 of the *BIA*.

Remaining Issue

20 On the facts in this case, it is unlikely that Komtech will be able to present a Proposal for approval by its creditors. The issue is whether court approval of the sale of assets is available under s. 65.13 of the *BIA* when the debtor is unable to present a Proposal to its creditors.

21 Parliament enacted s. 65.13 of the *BIA* at the same time as enacting s. 36 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). Both amendments were enacted in 2005.

22 The wording of s. 65.13 under the *BIA* and s. 36 under the *CCAA*, are remarkably similar.

23 Section 65.13(1) of the *BIA* prohibits the sale and disposition of assets outside the ordinary course of business in respect of an insolvent person which has filed an NOI under s. 50.4, unless authorized by the court to do so.

24 *Hypnotic Clubs Inc., Re* (2010), 68 C.B.R. (5th) 267 (Ont. S.C.J. [Commercial List]) involved an NOI by the debtor under the *BIA* and a motion for approval of a sale of assets to a related third party under s. 65.13. The trustee was this Proposal Trustee. The Court refused to approve that asset purchase agreement as it was not satisfied that good faith efforts had been made to sell the debtor's assets to unrelated parties. In coming to that conclusion, the court at paras. 36 and 37 states:

> **36** Given these circumstances, and taking into account the underlying policy of the *BIA* of letting creditors vote as they choose in respect of accepting or rejecting a proposal, in my view, the factor of required good faith efforts stipulated by s. 65.13(5)(a) has not been met.
>
> **37** It is obvious that a deemed assignment into bankruptcy by s. 50.1(8), consequential to no proposal having being made, will quite probably result in Ms. Telios and the other unsecured creditors not recovering anything at all. However, that is a consequence that should be determined by the unsecured creditors through a vote upon a proposal without a prior disposition of Hypnotic's assets through the proposed Revised APA.

25 Under s. 65.13, the court's jurisdiction to authorize the sale of assets outside of the ordinary course of business is not expressed as limited to cases where the debtor is capable of presenting a Proposal to its creditors. The ability to present a Proposal is not one of the listed factors to be considered on a motion under s. 65.13(4). Parliament could have, but did not include language in s. 65.13 requiring the presentation of or the ability to present a Proposal and the vote thereon by creditors, as a condition to the exercise of the court's jurisdiction to authorize a sale of assets.

26 A comparable issue under the *CCAA* with wording remarkably similar to s. 65.13 of the *BIA* has concluded that the court has jurisdiction to authorize the sale of business assets absent a formal plan of compromising arrangement under s. 36 of the *CCAA*.

27 Section 36 of the *CCAA* reads as follows:

> **Restriction on disposition of business assets**
>
> **36.** (1) A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.
>
> **Notice to creditors**
>
> (2) A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.
>
> **Factors to be considered**
>
> (3) In deciding whether to grant the authorization, the court is to consider, among other things,
>
> (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
>
> (b) whether the monitor approved the process leading to the proposed sale or disposition;

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

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

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

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

Additional factors — related persons

(4) If the proposed sale or disposition is to a person who is related to the company, the court may, after considering the factors referred to in subsection (3), grant the authorization only if it is satisfied that

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

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

Related persons

(5) For the purpose of subsection (4), a person who is related to the company includes

(a) a director or officer of the company;

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

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

Assets may be disposed of free and clear

(6) The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the company or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

Restriction — employers

(7) The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(4)(*a*) and (5)(*a*) if the court had sanctioned the compromise or arrangement.

28 In *Nortel Networks Corp., Re* (2009), 55 C.B.R. (5th) 229 (Ont. S.C.J. [Commercial List]), the court found jurisdiction under the *CCAA* absent a plan of an arrangement which was described as "skeletal in nature". That court held that an important consideration, in addition to whether the business continues under the debtor stewardship or under a new equity structure, is whether the business can be continued as a going concern in the form of a sale by the debtor.

29 Following the amendments creating s. 36 of the *CCAA*, the Court in *Brainhunter Inc., Re* (2009), 62 C.B.R. (5th) 41 (Ont. S.C.J. [Commercial List]), determined that s. 36 of the *CCAA* expressly permits the sale of substantially all of the debtor's assets even in the absence of the presentation and vote upon a plan of arrangement.

30 Section 65.13 of the *BIA* and s. 36 of the *CCAA* were introduced in 2005 in "An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts" (Bill C-55).

31 There were two Senate Committee meetings. At one of those, the Honourable Jerry Pickard, Parliamentary Secretary to the Minister of Industry, stated:

> It is widely accepted that inadequate provisions exist for workers whose employers becomes bankrupt. Previous attempts to bring about better protection for workers have failed, as the Minister of Labour has pointed out. ...
>
> Experience has shown that restructuring provides much greater protection than liquidations through bankruptcy. Jobs are saved, creditors obtain better recovery and more competition is stimulated. Therefore, it is a cornerstone of Bill C-55 to promote restructuring. Bill C-55 encourages a culture of restructuring by increasing transparency in the proceedings, providing better opportunities for affected parties to participate, and improving the system of checks and balances to create greater fairness and efficiency.
>
> To achieve its aims, the bill provides the courts with legislative guidance to ensure greater certainty and predictability with reference to such items as interim financing, the disclaimer and assignment of agreements, the sale of assets out of the ordinary course of business, governance arrangements of the debtor company, and the application of regulatory measures during the restructuring process. These issues were addressed in recommendations contained in your 2003 committee report and are largely reflected in the provisions of this bill.
>
> (Emphasis added)

32 The resulting Senate Committee Report discusses how a sale of assets, at times, is necessary to effect a successful restructuring, resulting in added protection for both creditors and employees.

33 Although different legislation, the similarity of language of s. 65.13 of the *BIA* and s. 36 of the *CCAA*, including the listed factors for court consideration as to a sale of assets outside the ordinary course of business notwithstanding: (a) the filing of an NOI, or (b) an order under the *CCAA*, together with the factors listed above, leads me to conclude that the presentation of a Proposal to creditors, is not a condition to this Court's authority to approve, if appropriate, a sale of assets under s. 65.13 of the *BIA*.

Interim Charges

34 The Stalking Horse Bidders Charge as security for the breakup fee and expense reimbursement under the APA, the Director's and Officer's charge to indemnify against statutory liability and the administration charge related to the fees of the Proposal Trustee and the debtor as presented, are authorized under s. 64.1 and s. 64.2 of the *BIA*. They are appropriate priorities and charges in this case subject to ss. 14.06(7); 81.4(4); and 81.6(2) of the *BIA*.

35 For the above reasons, the relief sought in this motion is granted.

Motion granted.

TAB 3

2020 ABQB 365
Alberta Court of Queen's Bench

OEL Projects Ltd (Re)

2020 CarswellAlta 1155, 2020 ABQB 365, [2020] A.W.L.D. 2299,
[2020] A.W.L.D. 2300, 319 A.C.W.S. (3d) 537, 79 C.B.R. (6th) 219

In the Matter of the Bankruptcy and Insolvency Act, R.S.C. 1985, C. B-3, as amended

And In the Matter of the Notice of Intention to Make a Proposal of OEL Projects Ltd.

April D. Grosse J.

Heard: May 27, 2020
Judgment: June 19, 2020
Docket: Calgary 25-2646438

Counsel: R.S. Van de Mosselaer, K. Armstrong, for OEL Projects Ltd.
J.L. Oliver, for Trustee
J.H. Wilson, for Three Former Employees
R. Jaipargas, for CIBC

Subject: Civil Practice and Procedure; Estates and Trusts; Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency
VI Proposal
VI.1 General principles
Bankruptcy and insolvency
XIV Administration of estate
XIV.6 Sale of assets
XIV.6.f Jurisdiction of court to approve sale

Headnote

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

Debtor filed notice of intention to make proposal (NOI) under Bankruptcy and Insolvency Act — Next day, prior to expiry of 30-day period for making proposal, debtor entered into asset and share purchase agreement with purchaser — Proposed purchaser was newly created subsidiary of debtor's parent company — Proposed sale was supported by proposal trustee and by debtor's two secured creditors, one of which was debtor's parent company — Two largest unsecured creditors were notified of proposed sale and were represented by counsel but other unsecured creditors did not get notice of proposed sale and many might not have even received NOI — Debtor brought application for approval of proposed asset sale as well as vesting and distribution orders — Application granted — Gap between valuation of debtor or its assets and secured debt was so large that there was no scenario in which unsecured creditors would be paid — Many unsecured trade creditors would be better off since their accounts would be assumed by purchaser if proposed sale went ahead — Proposed sale had potential to save 34 jobs at least in short term — Debtor's landlords had notice of application and did not oppose it — Secured creditors supported proposed sale and they were not being paid in full — Proposed purchase price was more than would be achieved in liquidation — Good faith efforts were made to consider whether sales process to try to solicit non-related party purchasers was feasible.

Bankruptcy and insolvency --- Proposal — General principles

Debtor filed notice of intention to make proposal (NOI) under Bankruptcy and Insolvency Act — Next day, prior to expiry of 30-day period for making proposal, debtor entered into asset and share purchase agreement with purchaser — Proposed

purchaser was newly created subsidiary of debtor's parent company — Proposed sale was supported by proposal trustee and by debtor's two secured creditors, one of which was debtor's parent company — Two largest unsecured creditors were notified of proposed sale and were represented by counsel but other unsecured creditors did not get notice of proposed sale and many might not have even received NOI — Debtor brought application for approval of proposed asset sale as well as vesting and distribution orders — Application granted — Gap between valuation of debtor or its assets and secured debt was so large that there was no scenario in which unsecured creditors would be paid — Many unsecured trade creditors would be better off since their accounts would be assumed by purchaser if proposed sale went ahead — Proposed sale had potential to save 34 jobs at least in short term — Debtor's landlords had notice of application and did not oppose it — Secured creditors supported proposed sale and they were not being paid in full — Proposed purchase price was more than would be achieved in liquidation — Good faith efforts were made to consider whether sales process to try to solicit non-related party purchasers was feasible.

Table of Authorities

Cases considered by *April D. Grosse J.*:

Hypnotic Clubs Inc., Re (2010), 2010 ONSC 2987, 2010 CarswellOnt 3463, 68 C.B.R. (5th) 267 (Ont. S.C.J. [Commercial List]) — considered

Komtech Inc., Re (2011), 2011 ONSC 3230, 2011 CarswellOnt 6577, 106 O.R. (3d) 654, 81 C.B.R. (5th) 256 (Ont. S.C.J.) — considered

Target Canada Co., Re (2015), 2015 ONSC 2066, 2015 CarswellOnt 5211, 30 C.B.R. (6th) 335 (Ont. S.C.J. [Commercial List]) — considered

Tool-Plas Systems Inc., Re (2008), 2008 CarswellOnt 6258, 48 C.B.R. (5th) 91 (Ont. S.C.J. [Commercial List]) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

s. 50.4 [en. 1992, c. 27, s. 19] — considered

s. 65.13 [en. 2005, c. 47, s. 44] — considered

s. 65.13(3) [en. 2005, c. 47, s. 44] — considered

s. 65.13(4) [en. 2005, c. 47, s. 44] — considered

s. 65.13(4)(c) [en. 2007, c. 36, s. 27] — considered

s. 65.13(4)(d) [en. 2007, c. 36, s. 27] — considered

s. 65.13(5) [en. 2005, c. 47, s. 44] — considered

s. 65.13(5)(a) [en. 2007, c. 36, s. 27] — considered

s. 65.13(5)(b) [en. 2007, c. 36, s. 27] — considered

s. 81.4 [en. 2005, c. 47, s. 67] — considered

APPLICATION by debtor for approval of proposed asset sale, and vesting and distribution orders.

***April D. Grosse J.* (orally):**

Context

1 OEL Projects Ltd. filed a Notice of Intention to Make a Proposal under section 50.4 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 on May 20, 2020. BDO Canada Limited is acting as the Proposal Trustee.

2 The 30-day period for making a proposal has not yet expired; however, on May 21, 2020, OEL entered an Asset and Share Purchase Agreement with McIntosh Perry Energy Limited, which I will refer to as the Purchaser.

3 OEL now seeks approval and a vesting order in respect of that transaction, pursuant to section 65.13 of the *Bankruptcy and Insolvency Act*. OEL also seeks a distribution order with respect to the sale proceeds.

4 The Proposal Trustee supports OEL's application and recommends the transaction. OEL has two secured creditors: CIBC and its parent, McIntosh Perry Engineering Consulting Engineering Limited, which I will refer to as McIntosh Perry. Both approve of the transaction.

5 OEL's application came on for hearing before me yesterday. We adjourned to allow for some further information to be provided to the Court, and for me to have an opportunity to reflect on the submissions made by counsel. We reconvened this morning, and counsel have provided further submissions, and I have told them that I am now prepared to give an oral decision.

OEL and its Stakeholders

6 I am going to start by giving some more information about OEL and its stakeholders. OEL is an engineering services firm operating in Alberta and surrounding provinces in the energy sector. It is a private company, wholly owned by McIntosh Perry since 2017.

7 OEL has been experiencing declining revenues and operations given the downturn in the Canadian energy sector. The recent collapse in oil and gas prices, COVID-19 restrictions, and associated impacts on usual OEL clients in the energy sector have only made the situation more difficult for OEL. The record shows that OEL is projected to have negative cash flow this fiscal year without this transaction. Four years ago, OEL had approximately 115 employees. By March 15, 2020, OEL was down to about 54 employees. In preparation for filing its NOI, OEL gave notice of termination to another approximate 20 employees earlier this month. The remaining 34 employees have been offered employment by the Purchaser, if the transaction goes ahead.

8 OEL is a party to an Amended and Re-stated Credit Agreement with CIBC, along with McIntosh Perry and related companies. To my understanding, the credit facilities under the Credit Agreement are not maxed out, and are also secured by the other entities in the McIntosh Perry family. CIBC has not taken steps to enforce its security. OEL also owes net approximately $7.9 million to its parent, McIntosh Perry, pursuant to an Amended and Re-stated Promissory Note dated April 1, 2017. The debt is secured pursuant to a General Security Agreement, also dated April 1, 2017. On May 8, 2020, McIntosh Perry issued a formal demand to OEL, calling the amount owing under the Promissory Note. The Proposal Trustee has obtained a legal opinion confirming the validity of the McIntosh Perry security. I am advised that other than CIBC and McIntosh Perry, OEL has no other secured creditors.

9 In its materials, OEL identified two liabilities, or potential liabilities, in particular that pose a great difficulty to OEL moving forward in its current structure.

10 First, OEL rents two office spaces for which it pays a total of almost $1.6 million per month. The leases were entered into in 2013 and 2014, when the energy industry -- and Calgary in general -- were enjoying more prosperity. OEL's lease rates are high compared to the current market, and with its reduced staff, OEL does not need near so much space. Counsel for OEL confirmed that OEL has been in discussions with both landlords, and both were served with the notice for this application. The notice time was short, service having been affected by email on May 21, for a May 26 hearing. However, they were served to email addresses of specific representatives, not general email boxes, and the landlords did not seek to participate or contact OEL or its counsel to oppose the application. Apparently, negotiations have already commenced with one of the landlords for a new lease for continued operations if the transaction proceeds. I am satisfied that the landlords had notice and do not oppose the transaction before the Court. I understand that rent was paid up to May 1.

11 The second particular difficulty identified by OEL is that three senior employees have filed claims against OEL, based on their recent termination or lay offs. I understand that these employees have been paid their wages, but that they claim

contractual severance and perhaps other relief. Their claims total approximately $491,000 at present, and are, both individually and collectively, by far the largest unsecured claims on the list of creditors attached by the Proposal Trustee to the NOI. These parties are represented by Mr. Wilson, who was notified of the application and participated in the hearing. These three gentlemen are obviously not happy with the situation, but they neither consented nor opposed OEL's application, recognizing the reality in the numbers.

12 With respect to employees more generally, I am advised that all employees have been paid their wages up to date, and employees who have been terminated were also paid up on vacation pay. The Purchaser has agreed to pay any outstanding vacation pay for employees to whom the Purchaser has made offers of employment. The Proposal Trustee is satisfied that there are no claims that would otherwise be afforded a security interest in current assets pursuant to section 81.4 of the *Act*.

13 Because the Notice of Intention was only filed on May 20, 2020, the other unsecured creditors do not yet have effective notice of the NOI, let alone the application. The NOI was mailed to them on May 25, so they could not have received it prior to the application. In any event, the NOI itself does not mention the application. So, this is not a case where creditors have had an opportunity to file proofs of claim, and accordingly, the unsecured debt of OEL is not fully fleshed out. However, according to the list of creditors used by the Proposal Trustee, once the claims of McIntosh Perry and another related entity are removed, and then the claims of Mr. Wilson's clients are removed -- which I have already discussed -- there is approximately $91,500 in unsecured debt. Out of those amounts, all individual amounts are under $5,000, except for $27,000, and some to Beck Engineering Limited, and approximately $12,500 to M5 Engineering Inc.

14 Based on the further information provided after our adjournment yesterday, I understand that all but approximately $3,000 of those amounts are considered trade debt that will be assumed by the Purchaser, if the transaction goes ahead. That includes the larger amounts owing to the two engineering firms I have just mentioned.

15 The parties have provided me with various financial statements and the cash-flow statement for OEL. On the record, OEL is insolvent.

Section 65.13 of the Bankruptcy and Insolvency Act

16 Section 65.13 of the *BIA* precludes a person who is the subject of an NOI from selling or disposing of assets outside the ordinary course of business, without authorization of the Court. Section 65.13(4) sets out the factors the Court must consider. It is a non-exclusive list. I will not read all of the factors into the record.

17 Important in this case is section 65.13(5), which applies where a proposed sale or disposition is to a person who is related to the insolvent person. That is the case here. The Purchaser is a newly created subsidiary of McIntosh Perry.

18 Pursuant to section 65.13(5), after considering the factors that apply to all transactions under subsection (4), the Court may only grant authorization for the sale if it is satisfied that:

> (a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the insolvent person; and.
>
> (b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

19 In applying section 65.13 to the facts of this case, as I outlined to counsel during the hearing yesterday, the concern I wanted to make sure was addressed in this case was the potential combined effect of three factors.

20 First, not all of the unsecured creditors were given notice of the application. In fact, they likely do not even have notice of the NOI yet. OEL and the Proposal Trustee argue that in this particular case, the unsecured creditors really have no material interest because with or without this transaction, and regardless of whether the company is sold as a going concern to the Purchaser or any other entity, or liquidated, all the figures show that the unsecured creditors stand to be paid zero. The

delta between the secured debt and available funds is so high that there is no realistic scenario where the remaining unsecured creditors get paid. That is the argument.

21 The second factor that goes into this combination is that the proposed sale is to a related party. Again, this on its own is not a disqualifying factor, and is specifically contemplated by section 61.13(5). However, it brings additional scrutiny to bear.

22 The third factor is that there was no sale process, per se. The Board of OEL hired FTI in March to do an analysis of the return that might be expected in both a going concern sale scenario and a liquidation of assets scenario. The going concern sale was expected to yield a higher return, and the Purchaser is paying at the high end of the range estimated by FTI. However, there was no bid or other sale process. There is no evidence of even approaches to potential buyers.

23 OEL's evidence is that its Board considered a sale process, and determined that it was not feasible. The company's circumstances, combined with a highly mobile clientele and workforce -- both of whom could simply go elsewhere in the face of a sales process -- meant that the Board did not consider a third-party sale process to be realistic. The Board considered that the likely departure of employees and clients would probably mean that the sale process would erode the value that OEL still had. The company also lacks the liquidity to fund a sale process, and would lose an estimated $600,000 during the process. In other words, from the Board's perspective, as I understand it, it was not just a case of having nothing to lose by giving a third-party sale process a try, even if the prospects of finding a buyer were slim. The Board considered that the sale process itself would erode the value that was left in OEL, and there would be nothing left to sell at the end.

24 In its report, the Proposal Trustee does not specifically endorse nor disagree with the Board's reasoning, per se. However, the Proposal Trustee is of the view that it is unlikely that incurring the costs of a public marketing process would yield sufficient funds to otherwise render funds available for unsecured creditors, and the Proposal Trustee also notes that OEL no longer has the ability to fund its operations, or the time available to administer a protracted public sales process, in light of the calling of the Promissory Note by McIntosh Perry.

25 I appreciate that section 65.13(3) only references notice to secured creditors. There is no specific requirement, per se, that all unsecured creditors be served. However, the *Bankruptcy and Insolvency Act* is, to a great extent, focused on addressing creditor claims and rights, when a party has become insolvent. Here, there is no realistic chance of there being a proposal if the transaction proceeds. Creditors would still have their rights in bankruptcy, but any value in OEL will be gone. It is at least fair to consider whether creditors should have an opportunity to know about the transaction, scrutinize it, and take any position that might be available to them. The extent to which creditors were consulted is an express factor for consideration under section 65.13(4)(d). In reviewing some of the reported decisions under section 65.13, it seems that in most cases, at least representatives of the unsecured creditors were notified or will be notified somewhere before a final vesting order is granted.

26 The role of the creditor takes on more potential importance in a circumstance where there is a proposed sale to a related party, with no actual third-party sale process. Their involvement would provide one more potential source of scrutiny in terms of whether the assessment by the company and the Proposal Trustee of the merits of a third-party sale process, and the merits of the proposed transaction are fair and reasonable. It is fine to say that under any scenario, the unsecured creditors will not get paid. However, perhaps they should be able to at least test that proposition.

27 On the particular facts of this case, my concern as I just outlined has been answered, and am satisfied that I can and should approve the transaction and grant the relief sought by OEL. My reasons, including my analysis of the factors and requirements of section 65.13(4) and (5) follow in bullet form:

- While not all unsecured creditors had notice of the application, the largest unsecured creditors were notified and were represented by counsel. These are not just any unsecured creditors. They are unsecured creditors whose claims are not trade debt being assumed by the Purchaser under the proposed transaction, and they are senior employees, presumably familiar with the engineering business. If anyone were in a position to critique the analysis of OEL, FTI, or the Proposal Trustee, it would be them. While they do not consent, they have raised no particular opposition. I think it would be safe to say that after analyzing the materials, they are resigned to the situation in terms of this transaction. I appreciate that they

may well be pursuing whatever rights are available to them going forward. The unsecured creditors, and those not being taken on as assumed debt by the Purchaser, may never recover or may never recover their full amounts. But if that is the case, I am satisfied on the record that it will not be as a result of this transaction, but rather, would be a result of the more general circumstances facing the company.

• OEL's landlords, who will be materially impacted by the proposed transaction, have been consulted, and had notice of the application. They did not come to Court to oppose.

• The number and value of non-served unsecured claims is relatively small. All but one such unsecured claim for just under $3,000 is being taken on as assumed trade debt by the Purchaser. So for the most part, with that one exception, the unserved unsecured creditors are not prejudiced by the transaction.

• In any event, the delta between the valuation of OEL or its assets, and the secured debt is so large that unless there have been serious errors by OEL, FTI, and the Proposal Trustee, there is no scenario where the unsecured creditors would be paid, unless their debt was assumed by a purchaser. In other words, the proposed transaction does not prejudice them. In fact, arguably, most of them are better off, given the assumption of their accounts by the Purchaser.

• The process leading to the transaction was not as robust as we would often expect to see, particularly for a related-party transaction. There was no public or even private third-party marketing process. However, I find that this was reasonable in the circumstances. The Board did have the independent advice of FTI, both on going concern and liquidation value. The Board's reasoning as to why a sales process is not feasible in this particular set of circumstances makes sense, particularly given the financial circumstances of the company, the lack of liquidity to fund the sale process, the portable nature of the employees and clients, and the circumstances in which a process would have to take place, including the very depressed price of oil, which has a direct impact on work available to engineering consultants who only work in the energy sector, like OEL, and COVID-19 restrictions.

• The Proposal Trustee's opinion is not determinative; however, the Proposal Trustee is aware of his duties to all stakeholders and sees no scenario in which a third-party sale, or a third-party sales process, leads to a better result for OEL or any of its creditors, whether secured or unsecured. The Proposal Trustee approves the process leading up to the transaction and has filed the report required by section 65.13(4)(c) of the *Act*.

• The secured creditors are supportive, and they are not being paid in full.

• As already outlined, the unsecured creditors are not being prejudiced in fact. On the other hand, the transaction is designed to at least potentially preserve 34 jobs in at least the short term. Jobs are not easy to come by for engineers working in the oil and gas sector right now, so that is a relevant consideration.

• Based on both the FTI analysis and the Proposal Trustee's analysis, the Purchaser is paying consideration at the very highest end of the possible range of value that could be recovered for either the company as a going concern, or on a liquidation basis. And in fact, the purchase price is significantly more than would be achieved in a liquidation. Even though there was no bid process, the analysis of FTI and the Proposal Trustee do provide us with some independent benchmarks of value. I am satisfied that the consideration is reasonable and fair.

• The transaction is going to proceed quickly, so as to avoid further erosion of value. It does not contemplate any interim or debt financing, which would be required for any longer sale process. Such financing may or may not be available, and if it were, it would further add to the costs to OEL.

28 The wording of section 65.13(5) has given me some pause. On its face, subparagraph (a) contemplates that there must be some actual effort made to sell or dispose of the assets to unrelated parties. Subparagraph (b) follows up on this by referring to the consideration in the proposed transaction being superior to the consideration that would be received under any other offer made in accordance with the process. Again, the contemplation seems to be that there would be some process that could at least generate other offers.

29 The question is whether the Court can approve a sale under section 65.13(5), where there has been no actual sale process. While I am of the view that the Court should be cautious in so doing, I am persuaded that the Court may do so where the particular circumstances warrant. While section 65.13(5) refers to good faith efforts being made to sell, it does not actually mandate a particular sales process, or for that matter, any sales process at all. For instance, it does not say that the Court must be satisfied that there was a good faith sales process. Rather, the wording of the provision focuses on the efforts that were made. In most cases, I expect that the efforts would have to involve some actual approaches to other purchasers. However, I am not convinced that these are strictly required in every case in a proper interpretation of the provision.

30 Time has not permitted a thorough investigation into the legislative history of section 65.13(5); however, I note that in *Komtech Inc., Re*, 2011 ONSC 3230 (Ont. S.C.J.), Justice Kane reviewed the history of section 65.13. At paragraph 31, Justice Kane cited from some Senate committee meetings that were part of the process leading up to the introduction of the bill that included section 65.13. One of the comments in those meetings was that the bill in question is designed to promote restructuring , which had been found to provide greater protection than liquidations in bankruptcy. This does not mean that anything goes. In fact, the comments at the committee also confirmed that the bill sought to increase transparency, provide better opportunities for participation, and approve checks and balances. But I must keep in mind that the provision is designed to be facilitative of restructuring. In *Komtech*, Justice Kane found that a transaction could be approved under section 65.13, even when the insolvent party would not be in a position to actually make a proposal.

31 Counsel provided me with the decision of Justice Morawetz in *Target Canada Co., Re*, 2015 ONSC 2066 (Ont. S.C.J. [Commercial List]). Justice Morawetz was considering the analogous provision to section 65.13(5) under the CCAA. While the facts in *Target* are distinguishable in many ways, Justice Morawetz's decision did approve an asset sale where there had been no marketing process for the assets in question. In so doing, he held that the Court should not take a formulaic approach to the provision, and must be satisfied overall that: (as read)

> Sufficient safeguards were adopted to ensure that the related-party transaction is in the best interests of the stakeholders of the applicants, and that the risk to the estate associated with a related-party transaction have been mitigated.

And that's from paragraph 15.

32 In that case, he was satisfied that the risk theoretically associated with a related-party transaction had been addressed through the efforts to evaluate the saleability of the assets to an unrelated party. He also considered the particular circumstances of the assets in question.

33 It would be somewhat absurd from an interpretive perspective to suggest that, for example, a party could make one call to a potential purchaser, and that would bring the party's efforts at least into consideration under section 65.13(5), but that coming to a reasoned conclusion that such a call would actually harm the value that could be achieved for stakeholders, would disqualify the insolvent person from even having the transaction considered under section 65.13(5).

34 It is also noteworthy as well that in appropriate circumstances, courts approve pre-packaged and quick-flip transactions in the receivership context, where there is no sales process. This can occur even when a related party is involved. For example, see *Tool-Plas Systems Inc., Re*, [2008] O.J. No. 4218 (Ont. S.C.J. [Commercial List]), which is a decision of the Superior Court of Justice Commercial List by Justice Morawetz. I appreciate that these cases in the receivership context do not involve the specific legislative requirements of section 65.13(5), but they provide some analogous circumstances that assist in the interpretation of section 65.13(5).

35 In this particular case, the efforts that were made that I need to consider under section 65.13(5) include retaining FTI, considering categories of potential purchasers, and then with all of the financial information and the FTI estimated values in mind, considering whether a sales process to try to solicit purchasers was feasible. The nature of the business, including the portable nature of the both employees and clients is relevant. Whether it would be enough on its own need not be decided, because other factors are at play here. This review by OEL, in consultation with its secured creditors, took place in March and April 2020, after huge drops in oil prices and unprecedented public health lock downs due to COVID-19. A sale process

would have had to unfold in those difficult circumstances. The mix of secured and unsecured creditors and the evidence that the unsecured claims are relatively small in number of relatively small values, and were not going to be paid in any scenario, unless accepted as assumed debt by the Purchaser, is also relevant to whether the company's decision not to pursue a sales process amounts, in effect, to a good faith effort to sell or otherwise dispose, as required by section 65.13(5). Of course, the lack of liquidity in the company, and the cost and risk involved in the sales process are also relevant and were accounted for. In the particular circumstances of this case, I conclude that section 65.13(5) is satisfied.

36 I have had reference to the decision in *Hypnotic Clubs Inc., Re*, 2010 ONSC 2987 (Ont. S.C.J. [Commercial List]). The circumstances are analogous to the ones at bar in many respects; however, ultimately Justice Cumming found that the related-party purchaser had, in effect, created a situation where there was no other market for the asset through its control of the sublease. There is no such lack of good faith effort in the case before me. Further, the *Hypnotic* situation was one where the value of the unsecured claims was somewhat higher, and also where there was a history of significant litigation between some of the parties involved that Justice Cumming seemed to take into account. He did note, though, that even in that case, there was unlikely to be recovery by the unsecured creditors.

37 I am satisfied that the circumstances before me are sufficiently distinguishable so as to lead to a different result in this case. Also, I note that Justice Cumming did not find that section 65.13(5)(a) could never be met without a formal third-party sale process of some sort. Rather, he simply found that in the circumstances before him, the required good faith efforts had not been made.

38 So I am granting your application, Mr. Van de Mosselaer.

Application granted.

TAB 4

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.

Subject: Corporate and Commercial; Insolvency
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.

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

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

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

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

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

Table of Authorities

Cases considered:

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

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

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

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

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

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

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

Statutes considered:

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

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

Appeal from order approving sale of assets by receiver.

Galligan J.A. **:**

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

2 It is necessary at the outset to give some background to the dispute. Soundair Corporation ("Soundair") is a corporation engaged in the air transport business. It has three divisions. One of them is Air Toronto. Air Toronto operates a scheduled airline from Toronto to a number of mid-sized cities in the United States of America. Its routes serve as feeders to several of Air

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

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

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

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

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

13 I will deal with the two issues separately.

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

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

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

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

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

2. It should consider the interests of all parties.

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

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

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

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

18 Having regard to the fact that it was highly unlikely that a commercially viable sale could be made to anyone but the two national airlines, or to someone supported by either of them, it is my view that the receiver acted wisely and reasonably when it

negotiated only with Air Canada and Canadian Airlines International. Furthermore, when Air Canada said that it would submit no further offers and gave the impression that it would not participate further in the receiver's efforts to sell, the only course reasonably open to the receiver was to negotiate with Canadian Airlines International. Realistically, there was nowhere else to go but to Canadian Airlines International. In do ing so, it is my opinion that the receiver made sufficient efforts to sell the airline.

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

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

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

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

[Emphasis added.]

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

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

[Emphasis added.]

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

> 24. An asset purchase agreement was received by Ernst & Young on March 7, 1991 which was dated March 6, 1991. This agreement was received from CCFL in respect of their offer to purchase the assets and undertaking of Air Toronto. Apart from financial considerations, which will be considered in a subsequent affidavit, the *Receiver determined that it would not*

> *be prudent to delay acceptance of the OEL agreement to negotiate a highly uncertain arrangement with Air Canada and CCFL* . Air Canada had the benefit of an 'exclusive' in negotiations for Air Toronto and had clearly indicated its intention take itself out of the running while ensuring that no other party could seek to purchase Air Toronto and maintain the Air Canada connector arrangement vital to its survival. The CCFL offer represented a radical reversal of this position by Air Canada at the eleventh hour. However, it contained a significant number of conditions to closing which were entirely beyond the control of the Receiver. As well, the CCFL offer came less than 24 hours before signing of the agreement with OEL which had been negotiated over a period of months, at great time and expense.

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

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

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

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

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

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

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

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

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

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

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

[Emphasis added.]

30 What those cases show is that the prices in other offers have relevance only if they show that the price contained in the offer accepted by the receiver was so unreasonably low as to demonstrate that the receiver was improvident in accepting it. I

am of the opinion, therefore, that if they do not tend to show that the receiver was improvident, they should not be considered upon a motion to confirm a sale recommended by a court-appointed receiver. If they were, the process would be changed from a sale by a receiver, subject to court approval, into an auction conducted by the court at the time approval is sought. In my opinion, the latter course is unfair to the person who has entered bona fide into an agreement with the receiver, can only lead to chaos, and must be discouraged.

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

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

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

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

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

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

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

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

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

2. Consideration of the Interests of all Parties

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

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

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

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

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

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

> In dealing with the request for approval, the court has to be concerned primarily with protecting the interest of the creditors of the former bankrupt. A secondary but important considera tion is that the process under which the sale agreement is arrived at should be consistent with commercial efficacy and integrity.
>
> In that connection I adopt the principles stated by Macdonald J.A. of the Nova Scotia Supreme Court (Appeal Division) in *Cameron v. Bank of N.S.* (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303, 86 A.P.R. 303 (C.A.) , where he said at p. 11:
>
> > In my opinion if the decision of the receiver to enter into an agreement of sale, subject to court approval, with respect to certain assets is reasonable and sound under the circumstances at the time existing it should not be set aside simply because a later and higher bid is made. To do so would literally create chaos in the commercial world and receivers and purchasers would never be sure they had a binding agreement. On the contrary, they would know that other bids could be received and considered up until the application for court approval is heard — this would be an intolerable situation.
>
> While those remarks may have been made in the context of a bidding situation rather than a private sale, I consider them to be equally applicable to a negotiation process leading to a private sale. Where the court is concerned with the disposition of property, the purpose of appointing a receiver is to have the receiver do the work that the court would otherwise have to do.

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

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

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

[Emphasis added.]

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

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

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

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

4. Was there unfairness in the process?

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

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

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

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

53 I do not think that the conduct of the receiver shows any unfairness towards 922. When I speak of 922, I do so in the context that Air Canada and CCFL are identified with it. I start by saying that the receiver acted reasonably when it entered into exclusive negotiations with OEL. I find it strange that a company, with which Air Canada is closely and intimately involved, would say that it was unfair for the receiver to enter into a time-limited agreement to negotiate exclusively with OEL. That is precisely the arrangement which Air Canada insisted upon when it negotiated with the receiver in the spring and summer of 1990. If it was not unfair for Air Canada to have such an agreement, I do not understand why it was unfair for OEL to have a

similar one. In fact, both Air Canada and OEL in its turn were acting reasonably when they required exclusive negotiating rights to prevent their negotiations from being used as a bargaining lever with other potential purchasers. The fact that Air Canada insisted upon an exclusive negotiating right while it was negotiating with the receiver demonstrates the commercial efficacy of OEL being given the same right during its negotiations with the receiver. I see no unfairness on the part of the receiver when it honoured its letter of intent with OEL by not releasing the offering memorandum during the negotiations with OEL.

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

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

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

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

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

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

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

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

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

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

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

I agree.

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

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

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

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

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

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

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

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

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

TAB 5

2021 ABCA 66
Alberta Court of Appeal

Athabasca Workforce Solutions Inc v. Greenfire Oil & Gas Ltd

2021 CarswellAlta 357, 2021 ABCA 66

Athabasca Workforce Solutions Inc. (Applicant) and Greenfire Oil & Gas Ltd. and Greenfire Hangingstone Operating Corporation (Respondents) and Alvarez Marsal Canada Inc., in its capacity as Proposal Trustee of Greenfire Oil & Gas Ltd. and Greenfire Hangingstone Operating Corporation (Not a Party to the Application) and Trafigura Canada General Partnership, McIntyre Partners and Greenfire Acquisition Corporation (Respondents on Application)

Behrokh Azarian, Homayoun Hodaie, Mandana Rezaie, Mehran Pooladi-Darvish, Meysam Ovaici, Firooz Abbaszadeh, Mehran Joozdani, Layla Amjadi, Meer Taher Shabani-Rad, Zahra Ahmadi-Naghdehi, Afshin Shameli, Maryam Mohsen Zadeh, Parham Minoo, Haleh Peiravi, Mohammad Ahadzadeh Ardebili, Ramin Jalalpoor, Elham Vakili Azghandi, Tariq Mahmood Roshan, Amin Jalalpoor, Faisal Khan, Poonam Dharmani and Ali Nilforoush (Applicants) and Greenfire Oil & Gas Ltd. and Greenfire Hangingstone Operating Corporation (Respondents) and Alvarez Marsal Canada Inc., in its capacity as Proposal Trustee of Greenfire Oil & Gas Ltd. and Greenfire Hangingstone Operating Corporation (Not a Party to the Application) and Trafigura Canada General Partnership, McIntyre Partners and Greenfire Acquisition Corporation (Respondents on Application)

Marina Paperny J.A.

Heard: February 10, 2021
Judgment: February 18, 2021
Docket: Calgary Appeal 2101-0002-AC, 2101-0004-AC

Counsel: R. Zahara, J.J. Bourchier (no appearance), for Athabasca Workforce Solutions Inc.
D. LeGeyt, R.E. Algar, J.D. Murphy (no appearance), for Greenfire Oil & Gas Ltd. and Greenfire Hangingstone Operating Corporation
A.C. Maerov, K. Ryland (no appearance), for Alvarez Marsal Canada Inc.
K.L. Fellows, Q.C., J.J. Maslowski, R.L.R. Hamilton (no appearance), for Trafigura Canada General Partnership
K. Kashuba, J. Mann (no appearance), for McIntytre Partners
D.S. Nishimura, for Behrokh Azarian et al.
G.G. Plester, for Regional Municipality of Wood Buffalo
J.W. Reid, for ABC Funding LLC

Subject: Civil Practice and Procedure; Corporate and Commercial; Insolvency
Headnote
Bankruptcy and insolvency
Business associations

***Marina Paperny J.A.*:**

Introduction

1 The applicants seek a declaration that they, as proposed appellants, do not require leave to appeal the decision of a supervising judge under the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (BIA). If leave is required, they seek leave to appeal the decision.

2 The impugned decision approved a sale and vesting order (SAVO), an interim financing order, and an interim financing charge order (collectively, the IFO) over the assets of Greenfire Hangingstone Operating Corporation. The applicant Athabasca Workforce submits it is a creditor of Greenfire Hangingstone as well as a significant shareholder of its parent company, Greenfire Oil & Gas Ltd. (collectively, Greenfire). The second set of applicants are individual investors in Greenfire.

Background

3 On April 3, 2018, Greenfire purchased the Hangingstone Facility, a bitumen production plant in Alberta's oilsands region. On July 5, 2019, Athabasca and Greenfire Hangingstone entered into a transportation agreement related to the plant's operations. Athabasca Workforce says that, after Athabasca was required to purchase shares in the parent company, Greenfire failed to pay them for their services. On August 20, 2020, Athabasca Workforce filed an application that Greenfire be declared bankrupt. Greenfire disputed the bankruptcy, claimed that in fact it was a creditor of Athabasca Workforce, and, in an effort to keep the facility viable, filed a Notice of Intention to Make a Proposal under the BIA on October 8, 2020.

4 During this time, Greenfire sought interim financing from potential lenders. Greenfire was required to extend its time to submit a proposal on several occasions thereafter. Meanwhile, the Hangingstone facility was non-operational and began to accrue damage due to freezing temperatures and inactivity. In December 2020, Greenfire sought court approval of the SAVO and IFO. Absent an interim lender and therefore a resumption in operations, damage to the Hangingstone facility and associated environmental liability would continue to increase. With respect to the SAVO and IFO, Greenfire negotiated an Asset Purchase Agreement with an arm's length party, Greenfire Acquisition Co, and negotiated an Interim Financing Agreement with Trafigura Canada General Partnership (Trafigura), the terms of which were contingent on court approval. In December 2020, Greenfire filed an application to approve interim financing, grant Trafigura a priority charge (the interim lender), and approve the Asset Purchase Agreement.

5 On December 17, 2020, the chambers judge granted the requested orders. The applicants wish to appeal those orders and submit that leave is not required, or in the alternative, that leave ought to be granted in the circumstances.

6 For the reasons that follow, I have concluded that leave to appeal is required. I have considered the leave application and conclude that the test for leave has not been met.

Is leave to appeal required?

7 Under section 193 of the BIA, an appeal exists as of right from bankruptcy proceedings in limited circumstances:

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

8 While at first blush the section, and in particular s 193(c), appears broad, the provision has been narrowly interpreted. The provision, and the BIA generally, are to be interpreted purposively, to ensure bankruptcy proceedings are administered efficiently and expeditiously.

9 Applicants seeking to avoid the requirement for leave often rely on ss 193(a) and (c), and this appeal is no exception.

10 Looking first at s 193(a), the investors submit that the SAVO approves vesting title to assets free and clear of all charges and claims, including those of the investors, and thus their future rights are being negatively impacted. I do not accept that submission. Future rights are not procedural rights or commercial advantages, which is in reality what the investors assert. The

submission that they no longer have a claim against the assets of Greenfire overlooks the reality that they are not asserting future rights, but rather present rights, and that any proceeds of sale will be available for distribution to creditors in accordance with the BIA. See *Business Development Bank of Canada v Pine Tree Resorts Inc.*, 2013 ONCA 282 at para 15; *Ravelston Corp., Re*, 2005 CanLII 63802at para 17, [2005] OJ No 5351 (Ont CA); *Ditchburn Boats & Aircraft (1936) Ltd., Re* (1938), 19 C.B.R. 240 (Ont CA); *Dominion Foundry Co., Re* (1965), 1965 CanLII 596, 52 DLR (2d) 79 (Man CA); and *Fiber Connections Inc. v SVCM Capital Ltd.*, 2005 CanLII 15454, 10 CBR (5th) 201 (Ont CA).

11 The situation is similar to that in *2403177 Ontario Inc. v. Bending Lake Iron Group Limited*, 2016 ONCA 225. In *Bending Lake*, the Ontario Court of Appeal considered whether leave to appeal a sale and vesting order was required under s 193, it having been submitted that "future rights" were engaged. The court held that to the extent a SAVO affects the rights of those with an economic interest in the debtor, only the present, existing rights of the debtor's creditors and shareholders are affected, not their future rights (para 27). The court examined the applicant's real complaint - the "commercial advantages or disadvantages that may accrue from the order challenged on appeal" (para 28), for example eliminating shareholder equity or precluding efforts by the shareholders to raise financing (the precise circumstances here). The court determined that those are existing, not future rights. The same is true in this case.

12 Applicants also rely on s 193(c). They assert that the value of the property far exceeds the threshold of ten thousand dollars, because the value of the asset being sold exceeds that amount. This is a broad interpretation of "value of the property" within the meaning of s 193(c), and has been rejected. In *Dominion Foundry*, the Manitoba Court of Appeal noted that to allow an appeal as of right under subsection (c) where the property of the bankrupt exceeds this threshold would undermine the purpose of the BIA, which is to allow for the disposition of the bankrupt's assets and the distribution of the proceeds amongst creditors. Almost every case would qualify, making the requirement for leave meaningless and undermining one of the most important purposes of the act, expeditious determination and the prospect of finality.

13 The court in *Bending Lake* also considered the scope of s 193(c). Justice Brown adopted a contextual approach and identified two factors that should inform any interpretation of the subsections: first, the predecessor section to s 193(c) was enacted at a time when the BIA did not include the right to seek leave to appeal, and this prompted courts to give categories of appeals as of right a wide and liberal interpretation to avoid shutting out meritorious appeals. Second, Canada's other major insolvency statute, the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, requires leave under s. 13. No principled basis exists to distinguish the treatment of a sale by a receiver or trustee from that under the CCAA. Brown JA concluded that these factors militated against employing an expansive interpretation. He favoured an approach alive to the needs of modern, real time insolvency litigation. He concluded that s 193(c) does not apply to: (i) orders procedural in nature; (ii) orders that do not bring into play the value of the debtor's property; and (iii) orders that do not result in a loss.

14 In *Dominion Foundry*, an attempt to set aside a sale of assets by a trustee as being improvident was considered procedural, and therefore not falling within s. 193(c). In *Alternative Fuel Systems Inc. v EDO (Canada) Limited*, 1997 ABCA 273, 206 AR 295, this court concluded that where the issue was an order directing acceptance of a tender for the assets of a bankrupt estate, the order was procedural — it was a challenge to the method by which assets were sold. The same is true here. The issue before the supervising judge was whether the SAVO and IFO were appropriate methods of securing financing for the current operation and a purchase of the assets so as to ultimately monetize them to satisfy creditors to the extent possible.

15 In *Bending Lake*, an issue was raised as to whether a transaction ought to be postponed to let shareholders re-finance the company. The court held, and I agree, that such an appeal does not bring into play the value of the debtor's property. Rather, the effect of the SAVO is to generate sale proceeds that stand in place of the assets; it is a means to monetize the estate. As to whether the order results in a gain or loss, an approval and vesting order does not determine the entitlement of any party with an economic interest in the sale proceeds. No interested party has gained or lost as a result of the order.

16 For these reasons, I conclude that neither s 193(a) nor (c) apply to the proposed appeal, and leave to appeal is therefore required.

Should leave to appeal be granted?

17 The following factors are considered on an application for leave to appeal under s 193(e) of the BIA:

a) whether the point on appeal is of significance to the practice;

b) whether the point raised is of significance to the action itself;

c) whether the appeal is *prima facie* meritorious or frivolous; and

d) whether the appeal will unduly hinder the progress of the action.

18 In addition, leave should only be granted if the judgment appears to be contrary to law, amounts to an abuse of judicial power or involves an obvious error, causing prejudice for which there is no remedy: see *Alternate Fuel Systems* at para 12; *Dykun v Odishaw*, 1998 ABCA 220 at para 4; *West Edmonton Mall Property Inc. v Duncan & Craig*, 2001 ABCA 40 at para 9; *DGDP-BC Holdings Ltd. v Third Eye Capital Corporation*, 2020 ABCA 442 at para 18.

(a) Is the point on appeal significant to the practice?

19 The applicants submit the orders are novel in that approval of the IFO required the approval of the proposed sale of assets as a condition. Therefore, the SAVO was granted in the absence of a proper sale process being conducted and with inadequate evidence of value. I disagree. The approval of interim financing and sales of assets under sections 50.6 and 65.13 of the BIA are matters of judicial discretion and are highly fact dependent. The BIA includes a list of non-exhaustive factors to inform the exercise of that discretion. The reasons of the supervising judge demonstrate a balancing of interests of all stakeholders, having regard to the precarious financial situation, the already serious damage done to the asset, and the restarting and environmental risks. Having regard to the lack of other viable alternative proposals, the support of key stakeholders, the lack of prejudice to Greenfire's creditors as a result of the interim financing, and the attendant lenders charge, there is no basis on the record to suggest the appeal will have any broad significance to the practice.

(b) Is the point raised of significance to the action?

20 It would be a rare case where an interested party does not view a proposed appeal to be significant to the action. In most instances the answer to this question will be in the affirmative, and will be balanced against the other criteria. That is the case here.

(c) Is the proposed appeal prima facie meritorious?

21 The applicants submit that the supervising judge made several errors of law or palpable and overriding errors in his assessment of the facts. While they recognize that the granting of the SAVO and the interim financing orders are discretionary, they submit the conclusions were based on incorrect inferences relating to the parties' positions and upon unwarranted findings. For instance, they submit that the supervising judge erred in concluding: there was no better recovery for the creditors, Greenfire had the confidence of its major creditors, the interim financing enhanced the prospects of a viable proposal, the sale would benefit creditors, and if the interim financing orders were not approved, the most likely outcome would be the transfer of the assets to the Orphan Well Association.

22 The supervising judge reviewed the criteria that guides discretion under the BIA. He was aware of the leading authorities and principles for the approval of a sale of assets in insolvency proceedings as set forth in *Royal Bank of Canada v Soundair Corp*, 4 OR (3d), 83 DLR (4th) 76 (ONCA). He understood the purposes of the interim financing and appreciated that such financing would not be available absent a priority charge securing same. He considered the process that had been undertaken to secure that financing and that it eventually resulted in the Trafigura offer. He recognized that the granting of the order and charge was critical, failing which the facility faced enormous risk of damage and increased repair and restart costs. The record does not support the conclusion that the chambers judge misdirected himself or misapprehended the evidence when he concluded that the IFO and SAVO warranted his approval.

23 In addressing the consideration payable under the APA, the supervising judge found it to be fair and reasonable having regard to the *Soundair* principles. He recognized that there had not been a formal auction process, nor is one required or advisable in every case. He commented that Alberta courts have acknowledged that "pre-pack sales" resulting from processes conducted prior to insolvency proceedings can satisfy the *Soundair* requirements. He considered the relevant factors, including the deteriorating financial condition of the debtor; that other options were considered even though the sale would only provide returns to the debtor's primary secured creditors; the prospect of employment and utilization of existing trade creditors and the fairness of the consideration having regard to the price paid by Greenfire to acquire the facility less than three years earlier.

24 The supervising judge weighed the evidence before him, and his finding that any potential alternative source of interim financing was "too little too late" was grounded in that evidence. With respect to the applicants being denied an opportunity to test evidence through cross-examination, the critical information had already been filed in previous affidavits, and the supervising judge was aware of concerns with respect to the seventh affidavit. He put questions to Greenfire's counsel about this evidence and was satisfied with the responses. He recognized that this transaction was not "the usual" transaction, but that no one had provided any other viable alternative. Speculation about what might be possible did not replace the significance of a certain transaction.

25 The applicants do not point to any error of law in the analysis that would warrant judicial intervention. This was a discretionary decision that warrants a high degree of deference. The prospect of a successful appeal is doubtful.

(d) Will the appeal unduly delay the proceedings?

26 Not only will an appeal delay the proceedings, it will also create further jeopardy for the stakeholders of Greenfire. Pursuant to the interim financing agreement, Trafigura has already advanced $4 million between December 19 and 21, and a further $4.5 million between December 29 and January 19. That is, $8.5 million of a total of $20 million has already been advanced. Granting leave to appeal in these circumstances risks serious potential damage to the facility, given that the additional funds are required to perform repairs and for maintainance. Moreover, there is no reason to believe that the sanctioned transaction can be delayed pending the outcome of an appeal, or for that matter that there will be another viable transaction for anyone to consider. Repairing the damage and returning the facility to an operational state depends on the transaction closing.

Fresh evidence application

27 The applicant investors also seek leave to file an additional affidavit in which they put forward a term sheet to provide for further interim financing options. They submit the test for fresh evidence has been met because the affidavit material was not available before the chambers judge as it was yet to be completed, but now it could bear decisively on the issue before me — whether leave ought to be granted to appeal the decision to approve the interim financing and SAVO.

28 In my view such affidavit evidence ought not to be allowed. This court in *Roswell Group Inc. v 1353141 Alberta Ltd*, 2020 ABCA 428 reiterated the test. That this document was not available to the chambers judge was due to the fact that it had not yet been agreed to. This supports his conclusion of "too little too late". Moreover, I am persuaded that the conditional nature of the document would have been insufficient to displace the conclusion arrived at by the supervising judge. I also note that trying to bring an improved or better offer to the court on appeal is a dubious practice and may have the effect of undermining the principles of fairness articulated in *Soundair*.

Conclusion

29 I have concluded that leave to appeal is required. The test for leave has not been met, and leave to appeal is denied.

TAB 6

Atomic Energy of Canada Limited *Appellant*

v.

Sierra Club of Canada *Respondent*

and

The Minister of Finance of Canada, the Minister of Foreign Affairs of Canada, the Minister of International Trade of Canada and the Attorney General of Canada *Respondents*

Énergie atomique du Canada Limitée *Appelante*

c.

Sierra Club du Canada *Intimé*

et

Le ministre des Finances du Canada, le ministre des Affaires étrangères du Canada, le ministre du Commerce international du Canada et le procureur général du Canada *Intimés*

INDEXED AS: SIERRA CLUB OF CANADA *v.* CANADA (MINISTER OF FINANCE)

Neutral citation: 2002 SCC 41.

File No.: 28020.

2001: November 6; 2002: April 26.

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

RÉPERTORIÉ : SIERRA CLUB DU CANADA *c.* CANADA (MINISTRE DES FINANCES)

Référence neutre : 2002 CSC 41.

Nº du greffe : 28020.

2001 : 6 novembre; 2002 : 26 avril.

Présents : Le juge en chef McLachlin et les juges Gonthier, Iacobucci, Bastarache, Binnie, Arbour et LeBel.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Practice — Federal Court of Canada — Filing of confidential material — Environmental organization seeking judicial review of federal government's decision to provide financial assistance to Crown corporation for construction and sale of nuclear reactors — Crown corporation requesting confidentiality order in respect of certain documents — Proper analytical approach to be applied to exercise of judicial discretion where litigant seeks confidentiality order — Whether confidentiality order should be granted — Federal Court Rules, 1998, SOR/98-106, r. 151.

Sierra Club is an environmental organization seeking judicial review of the federal government's decision to provide financial assistance to Atomic Energy of Canada Ltd. ("AECL"), a Crown corporation, for the construction and sale to China of two CANDU reactors. The reactors are currently under construction in China, where AECL is the main contractor and project manager. Sierra Club maintains that the authorization of financial assistance

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

Pratique — Cour fédérale du Canada — Production de documents confidentiels — Contrôle judiciaire demandé par un organisme environnemental de la décision du gouvernement fédéral de donner une aide financière à une société d'État pour la construction et la vente de réacteurs nucléaires — Ordonnance de confidentialité demandée par la société d'État pour certains documents — Analyse applicable à l'exercice du pouvoir discrétionnaire judiciaire sur une demande d'ordonnance de confidentialité — Faut-il accorder l'ordonnance? — Règles de la Cour fédérale (1998), DORS/98-106, règle 151.

Un organisme environnemental, Sierra Club, demande le contrôle judiciaire de la décision du gouvernement fédéral de fournir une aide financière à Énergie atomique du Canada Ltée (« ÉACL »), une société de la Couronne, pour la construction et la vente à la Chine de deux réacteurs CANDU. Les réacteurs sont actuellement en construction en Chine, où ÉACL est l'entrepreneur principal et le gestionnaire de projet. Sierra Club soutient que

by the government triggered s. 5(1)(*b*) of the *Canadian Environmental Assessment Act* ("*CEAA*"), requiring an environmental assessment as a condition of the financial assistance, and that the failure to comply compels a cancellation of the financial arrangements. AECL filed an affidavit in the proceedings which summarized confidential documents containing thousands of pages of technical information concerning the ongoing environmental assessment of the construction site by the Chinese authorities. AECL resisted Sierra Club's application for production of the confidential documents on the ground, *inter alia*, that the documents were the property of the Chinese authorities and that it did not have the authority to disclose them. The Chinese authorities authorized disclosure of the documents on the condition that they be protected by a confidentiality order, under which they would only be made available to the parties and the court, but with no restriction on public access to the judicial proceedings. AECL's application for a confidentiality order was rejected by the Federal Court, Trial Division. The Federal Court of Appeal upheld that decision.

Held: The appeal should be allowed and the confidentiality order granted on the terms requested by AECL.

In light of the established link between open courts and freedom of expression, the fundamental question for a court to consider in an application for a confidentiality order is whether the right to freedom of expression should be compromised in the circumstances. The court must ensure that the discretion to grant the order is exercised in accordance with *Charter* principles because a confidentiality order will have a negative effect on the s. 2(*b*) right to freedom of expression. A confidentiality order should only be granted when (1) such an order is necessary 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 (2) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings. Three important elements are subsumed under the first branch of the test. First, the risk must be real and substantial, well grounded in evidence, posing a serious threat to the commercial interest in question. Second, the important commercial interest must be one which can be expressed in terms of a public interest in confidentiality, where there is a general principle at stake. Finally, the judge is required to consider not only whether reasonable alternatives are available to such an order but also to restrict the order as much as is reasonably possible while preserving the commercial interest in question.

l'autorisation d'aide financière du gouvernement déclenche l'application de l'al. 5(1)*b*) de la *Loi canadienne sur l'évaluation environnementale* (« *LCÉE* ») exigeant une évaluation environnementale comme condition de l'aide financière, et que le défaut d'évaluation entraîne l'annulation des ententes financières. ÉACL dépose un affidavit qui résume des documents confidentiels contenant des milliers de pages d'information technique concernant l'évaluation environnementale du site de construction qui est faite par les autorités chinoises. ÉACL s'oppose à la communication des documents demandée par Sierra Club pour la raison notamment qu'ils sont la propriété des autorités chinoises et qu'elle n'est pas autorisée à les divulguer. Les autorités chinoises donnent l'autorisation de les communiquer à la condition qu'ils soient protégés par une ordonnance de confidentialité n'y donnant accès qu'aux parties et à la cour, mais n'imposant aucune restriction à l'accès du public aux débats. La demande d'ordonnance de confidentialité est rejetée par la Section de première instance de la Cour fédérale. La Cour d'appel fédérale confirme cette décision.

Arrêt : L'appel est accueilli et l'ordonnance demandée par ÉACL est accordée.

Vu le lien existant entre la publicité des débats judiciaires et la liberté d'expression, la question fondamentale pour la cour saisie d'une demande d'ordonnance de confidentialité est de savoir si, dans les circonstances, il y a lieu de restreindre le droit à la liberté d'expression. La cour doit s'assurer que l'exercice du pouvoir discrétionnaire de l'accorder est conforme aux principes de la *Charte* parce qu'une ordonnance de confidentialité a des effets préjudiciables sur la liberté d'expression garantie à l'al. 2*b*). On ne doit l'accorder que (1) lorsqu'elle est nécessaire pour écarter un risque sérieux pour un intérêt important, y compris un intérêt commercial, dans le contexte d'un litige, en l'absence d'autres options raisonnables pour écarter ce risque, et (2) lorsque ses effets bénéfiques, y compris ses effets sur le droit des justiciables civils à un procès équitable, l'emportent sur ses effets préjudiciables, y compris ses effets sur la liberté d'expression qui, dans ce contexte, comprend l'intérêt du public dans la publicité des débats judiciaires. Trois éléments importants sont subsumés sous le premier volet de l'analyse. Premièrement, le risque en cause doit être réel et important, être bien étayé par la preuve et menacer gravement l'intérêt commercial en question. Deuxièmement, l'intérêt doit pouvoir se définir en termes d'intérêt public à la confidentialité, mettant en jeu un principe général. Enfin le juge doit non seulement déterminer s'il existe d'autres options raisonnables, il doit aussi restreindre l'ordonnance autant qu'il est raisonnablement possible de le faire tout en préservant l'intérêt commercial en question.

Applying the test to the present circumstances, the commercial interest at stake here relates to the objective of preserving contractual obligations of confidentiality, which is sufficiently important to pass the first branch of the test as long as certain criteria relating to the information are met. The information must have been treated as confidential at all relevant times; on a balance of probabilities, proprietary, commercial and scientific interests could reasonably be harmed by disclosure of the information; and the information must have been accumulated with a reasonable expectation of it being kept confidential. These requirements have been met in this case. Disclosure of the confidential documents would impose a serious risk on an important commercial interest of AECL, and there are no reasonably alternative measures to granting the order.

Under the second branch of the test, the confidentiality order would have significant salutary effects on AECL's right to a fair trial. Disclosure of the confidential documents would cause AECL to breach its contractual obligations and suffer a risk of harm to its competitive position. If a confidentiality order is denied, AECL will be forced to withhold the documents in order to protect its commercial interests, and since that information is relevant to defences available under the *CEAA*, the inability to present this information hinders AECL's capacity to make full answer and defence. Although in the context of a civil proceeding, this does not engage a *Charter* right, the right to a fair trial is a fundamental principle of justice. Further, the confidentiality order would allow all parties and the court access to the confidential documents, and permit cross-examination based on their contents, assisting in the search for truth, a core value underlying freedom of expression. Finally, given the technical nature of the information, there may be a substantial public security interest in maintaining the confidentiality of such information.

The deleterious effects of granting a confidentiality order include a negative effect on the open court principle, and therefore on the right to freedom of expression. The more detrimental the confidentiality order would be to the core values of (1) seeking the truth and the common good, (2) promoting self-fulfilment of individuals by allowing them to develop thoughts and ideas as they see fit, and (3) ensuring that participation in the political process is open to all persons, the harder it will be to justify the confidentiality order. In the hands of the parties and their experts, the confidential documents may be of great assistance in probing the truth of the Chinese environmental assessment process, which would assist the court in reaching accurate factual conclusions. Given the highly technical nature of the documents, the important value of the search for the truth which underlies

En l'espèce, l'intérêt commercial en jeu, la préservation d'obligations contractuelles de confidentialité, est suffisamment important pour satisfaire au premier volet de l'analyse, pourvu que certaines conditions soient remplies : les renseignements ont toujours été traités comme des renseignements confidentiels; il est raisonnable de penser que, selon la prépondérance des probabilités, leur divulgation compromettrait des droits exclusifs, commerciaux et scientifiques; et les renseignements ont été recueillis dans l'expectative raisonnable qu'ils resteraient confidentiels. Ces conditions sont réunies en l'espèce. La divulgation des documents confidentiels ferait courir un risque sérieux à un intérêt commercial important de ÉACL et il n'existe pas d'options raisonnables autres que l'ordonnance de confidentialité.

À la deuxième étape de l'analyse, l'ordonnance de confidentialité aurait des effets bénéfiques considérables sur le droit de ÉACL à un procès équitable. Si ÉACL divulguait les documents confidentiels, elle manquerait à ses obligations contractuelles et s'exposerait à une détérioration de sa position concurrentielle. Le refus de l'ordonnance obligerait ÉACL à retenir les documents pour protéger ses intérêts commerciaux et comme ils sont pertinents pour l'exercice des moyens de défense prévus par la *LCÉE*, l'impossibilité de les produire empêcherait ÉACL de présenter une défense pleine et entière. Même si en matière civile cela n'engage pas de droit protégé par la *Charte*, le droit à un procès équitable est un principe de justice fondamentale. L'ordonnance permettrait aux parties et au tribunal d'avoir accès aux documents confidentiels, et permettrait la tenue d'un contre-interrogatoire fondé sur leur contenu, favorisant ainsi la recherche de la vérité, une valeur fondamentale sous-tendant la liberté d'expression. Il peut enfin y avoir un important intérêt de sécurité publique à préserver la confidentialité de ce type de renseignements techniques.

Une ordonnance de confidentialité aurait un effet préjudiciable sur le principe de la publicité des débats judiciaires et donc sur la liberté d'expression. Plus l'ordonnance porte atteinte aux valeurs fondamentales que sont (1) la recherche de la vérité et du bien commun, (2) l'épanouissement personnel par le libre développement des pensées et des idées et (3) la participation de tous au processus politique, plus il est difficile de justifier l'ordonnance. Dans les mains des parties et de leurs experts, les documents peuvent être très utiles pour apprécier la conformité du processus d'évaluation environnementale chinois, et donc pour aider la cour à parvenir à des conclusions de fait exactes. Compte tenu de leur nature hautement technique, la production des documents confidentiels en vertu de l'ordonnance demandée favoriserait mieux l'importante valeur de la recherche de la vérité, qui

both freedom of expression and open justice would be promoted to a greater extent by submitting the confidential documents under the order sought than it would by denying the order.

Under the terms of the order sought, the only restrictions relate to the public distribution of the documents, which is a fairly minimal intrusion into the open court rule. Although the confidentiality order would restrict individual access to certain information which may be of interest to that individual, the second core value of promoting individual self-fulfilment would not be significantly affected by the confidentiality order. The third core value figures prominently in this appeal as open justice is a fundamental aspect of a democratic society. By their very nature, environmental matters carry significant public import, and openness in judicial proceedings involving environmental issues will generally attract a high degree of protection, so that the public interest is engaged here more than if this were an action between private parties involving private interests. However, the narrow scope of the order coupled with the highly technical nature of the confidential documents significantly temper the deleterious effects the confidentiality order would have on the public interest in open courts. The core freedom of expression values of seeking the truth and promoting an open political process are most closely linked to the principle of open courts, and most affected by an order restricting that openness. However, in the context of this case, the confidentiality order would only marginally impede, and in some respects would even promote, the pursuit of these values. The salutary effects of the order outweigh its deleterious effects and the order should be granted. A balancing of the various rights and obligations engaged indicates that the confidentiality order would have substantial salutary effects on AECL's right to a fair trial and freedom of expression, while the deleterious effects on the principle of open courts and freedom of expression would be minimal.

Cases Cited

Applied: *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326; *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *R. v. Mentuck*, [2001] 3 S.C.R. 442, 2001 SCC 76; *M. (A.) v. Ryan*, [1997] 1 S.C.R. 157; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927; *R. v. Keegstra*, [1990] 3 S.C.R. 697; **referred to:** *AB Hassle v. Canada (Minister of National Health and*

sous-tend à la fois la liberté d'expression et la publicité des débats judiciaires, que ne le ferait le refus de l'ordonnance.

Aux termes de l'ordonnance demandée, les seules restrictions ont trait à la distribution publique des documents, une atteinte relativement minime à la règle de la publicité des débats judiciaires. Même si l'ordonnance de confidentialité devait restreindre l'accès individuel à certains renseignements susceptibles d'intéresser quelqu'un, la deuxième valeur fondamentale, l'épanouissement personnel, ne serait pas touchée de manière significative. La troisième valeur joue un rôle primordial dans le pourvoi puisque la publicité des débats judiciaires est un aspect fondamental de la société démocratique. Par leur nature même, les questions environnementales ont une portée publique considérable, et la transparence des débats judiciaires sur les questions environnementales mérite généralement un degré élevé de protection, de sorte que l'intérêt public est en l'espèce plus engagé que s'il s'agissait d'un litige entre personnes privées à l'égard d'intérêts purement privés. Toutefois la portée étroite de l'ordonnance associée à la nature hautement technique des documents confidentiels tempère considérablement les effets préjudiciables que l'ordonnance de confidentialité pourrait avoir sur l'intérêt du public à la publicité des débats judiciaires. Les valeurs centrales de la liberté d'expression que sont la recherche de la vérité et la promotion d'un processus politique ouvert sont très étroitement liées au principe de la publicité des débats judiciaires, et sont les plus touchées par une ordonnance limitant cette publicité. Toutefois, en l'espèce, l'ordonnance de confidentialité n'entraverait que légèrement la poursuite de ces valeurs, et pourrait même les favoriser à certains égards. Ses effets bénéfiques l'emportent sur ses effets préjudiciables, et il y a lieu de l'accorder. Selon la pondération des divers droits et intérêts en jeu, l'ordonnance de confidentialité aurait des effets bénéfiques importants sur le droit de ÉACL à un procès équitable et à la liberté d'expression, et ses effets préjudiciables sur le principe de la publicité des débats judiciaires et la liberté d'expression seraient minimes.

Jurisprudence

Arrêts appliqués : *Edmonton Journal c. Alberta (Procureur général)*, [1989] 2 R.C.S. 1326; *Société Radio-Canada c. Nouveau-Brunswick (Procureur général)*, [1996] 3 R.C.S. 480; *Dagenais c. Société Radio-Canada*, [1994] 3 R.C.S. 835; *R. c. Mentuck*, [2001] 3 R.C.S. 442, 2001 CSC 76; *M. (A.) c. Ryan*, [1997] 1 R.C.S. 157; *Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 R.C.S. 927; *R. c. Keegstra*, [1990] 3 R.C.S. 697; **arrêts mentionnés :** *AB Hassle c.*

However, in order to adapt the test to the context of this case, it is first necessary to determine the particular rights and interests engaged by this application.

(2) The Rights and Interests of the Parties

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

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

pouvoir discrétionnaire d'accorder l'ordonnance soit exercé conformément aux principes de la *Charte*. Toutefois, pour adapter le critère au contexte de la présente espèce, il faut d'abord définir les droits et intérêts particuliers qui entrent en jeu.

(2) Les droits et les intérêts des parties

L'objet immédiat de la demande d'ordonnance de confidentialité d'ÉACL a trait à ses intérêts commerciaux. Les renseignements en question appartiennent aux autorités chinoises. Si l'appelante divulguait les documents confidentiels, elle manquerait à ses obligations contractuelles et s'exposerait à une détérioration de sa position concurrentielle. Il ressort clairement des conclusions de fait du juge des requêtes qu'ÉACL est tenue, par ses intérêts commerciaux et par les droits de propriété de son client, de ne pas divulguer ces renseignements (par. 27), et que leur divulgation risque de nuire aux intérêts commerciaux de l'appelante (par. 23).

Indépendamment de cet intérêt commercial direct, en cas de refus de l'ordonnance de confidentialité, l'appelante devra, pour protéger ses intérêts commerciaux, s'abstenir de produire les documents. Cela soulève l'importante question du contexte de la présentation de la demande. Comme le juge des requêtes et la Cour d'appel fédérale concluent tous deux que l'information contenue dans les documents confidentiels est pertinente pour les moyens de défense prévus par la *LCÉE*, le fait de ne pouvoir la produire nuit à la capacité de l'appelante de présenter une défense pleine et entière ou, plus généralement, au droit de l'appelante, en sa qualité de justiciable civile, de défendre sa cause. En ce sens, empêcher l'appelante de divulguer ces documents pour des raisons de confidentialité porte atteinte à son droit à un procès équitable. Même si en matière civile cela n'engage pas de droit protégé par la *Charte*, le droit à un procès équitable peut généralement être considéré comme un principe de justice fondamentale : *M. (A.) c. Ryan*, [1997] 1 R.C.S. 157, par. 84, le juge L'Heureux-Dubé (dissidente, mais non sur ce point). Le droit à un procès équitable intéresse directement l'appelante, mais le public a aussi un intérêt général à la protection du droit à un procès équitable. À vrai dire, le principe

demands as much. Similarly, courts have an interest in having all relevant evidence before them in order to ensure that justice is done.

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

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

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

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

A confidentiality order under Rule 151 should only be granted when:

(a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and

général est que tout litige porté devant les tribunaux doit être tranché selon la norme du procès équitable. La légitimité du processus judiciaire n'exige pas moins. De même, les tribunaux ont intérêt à ce que toutes les preuves pertinentes leur soient présentées pour veiller à ce que justice soit faite.

51 Ainsi, les intérêts que favoriserait l'ordonnance de confidentialité seraient le maintien de relations commerciales et contractuelles, de même que le droit des justiciables civils à un procès équitable. Est lié à ce dernier droit l'intérêt du public et du judiciaire dans la recherche de la vérité et la solution juste des litiges civils.

52 Milite contre l'ordonnance de confidentialité le principe fondamental de la publicité des débats judiciaires. Ce principe est inextricablement lié à la liberté d'expression constitutionnalisée à l'al. 2*b*) de la *Charte* : *Nouveau-Brunswick*, précité, par. 23. L'importance de l'accès du public et des médias aux tribunaux ne peut être sous-estimée puisque l'accès est le moyen grâce auquel le processus judiciaire est soumis à l'examen et à la critique. Comme il est essentiel à l'administration de la justice que justice soit faite et soit perçue comme l'étant, cet examen public est fondamental. Le principe de la publicité des procédures judiciaires a été décrit comme le « souffle même de la justice », la garantie de l'absence d'arbitraire dans l'administration de la justice : *Nouveau-Brunswick*, par. 22.

(3) Adaptation de l'analyse de *Dagenais* aux droits et intérêts des parties

53 Pour appliquer aux droits et intérêts en jeu en l'espèce l'analyse de *Dagenais* et des arrêts subséquents précités, il convient d'énoncer de la façon suivante les conditions applicables à une ordonnance de confidentialité dans un cas comme l'espèce :

Une ordonnance de confidentialité en vertu de la règle 151 ne doit être rendue que si :

a) elle est nécessaire pour écarter un risque sérieux pour un intérêt important, y compris un intérêt commercial, dans le contexte d'un litige, en l'absence d'autres options raisonnables pour écarter ce risque;

(b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

b) ses effets bénéfiques, y compris ses effets sur le droit des justiciables civils à un procès équitable, l'emportent sur ses effets préjudiciables, y compris ses effets sur la liberté d'expression qui, dans ce contexte, comprend l'intérêt du public dans la publicité des débats judiciaires.

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

Comme dans *Mentuck*, j'ajouterais que trois éléments importants sont subsumés sous le premier volet de l'analyse. En premier lieu, le risque en cause doit être réel et important, en ce qu'il est bien étayé par la preuve et menace gravement l'intérêt commercial en question.

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

De plus, l'expression « intérêt commercial important » exige une clarification. Pour être qualifié d'« intérêt commercial important », l'intérêt en question ne doit pas se rapporter uniquement et spécifiquement à la partie qui demande l'ordonnance de confidentialité; il doit s'agir d'un intérêt qui peut se définir en termes d'intérêt public à la confidentialité. Par exemple, une entreprise privée ne pourrait simplement prétendre que l'existence d'un contrat donné ne devrait pas être divulguée parce que cela lui ferait perdre des occasions d'affaires, et que cela nuirait à ses intérêts commerciaux. Si toutefois, comme en l'espèce, la divulgation de renseignements doit entraîner un manquement à une entente de non-divulgation, on peut alors parler plus largement de l'intérêt commercial général dans la protection des renseignements confidentiels. Simplement, si aucun principe général n'entre en jeu, il ne peut y avoir d'« intérêt commercial important » pour les besoins de l'analyse. Ou, pour citer le juge Binnie dans *F.N. (Re)*, [2000] 1 R.C.S. 880, 2000 CSC 35, par. 10, la règle de la publicité des débats judiciaires ne cède le pas que « dans les cas où le droit du public à la confidentialité l'emporte sur le droit du public à l'accessibilité » (je souligne).

56 In addition to the above requirement, courts must be cautious in determining what constitutes an "important commercial interest". It must be remembered that a confidentiality order involves an infringement on freedom of expression. Although the balancing of the commercial interest with freedom of expression takes place under the second

Outre l'exigence susmentionnée, les tribunaux doivent déterminer avec prudence ce qui constitue un « intérêt commercial important ». Il faut rappeler qu'une ordonnance de confidentialité implique une atteinte à la liberté d'expression. Même si la pondération de l'intérêt commercial et de la liberté d'expression intervient à la deuxième étape

branch of the test, courts must be alive to the fundamental importance of the open court rule. See generally Muldoon J. in *Eli Lilly and Co. v. Novopharm Ltd.* (1994), 56 C.P.R. (3d) 437 (F.C.T.D.), at p. 439.

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

B. *Application of the Test to this Appeal*

(1) Necessity

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

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

Pelletier J. noted that the order sought in this case was similar in nature to an application for a protective order which arises in the context of patent litigation. Such an order requires the applicant to demonstrate that the information in question has been treated at all relevant times as confidential and that on a balance of probabilities its proprietary, commercial and scientific interests could reasonably be harmed by the disclosure of the information: *AB Hassle v. Canada (Minister of National Health and Welfare)* (1998), 83 C.P.R. (3d) 428 (F.C.T.D.), at p. 434. To this I would add the requirement proposed

de l'analyse, les tribunaux doivent avoir pleinement conscience de l'importance fondamentale de la règle de la publicité des débats judiciaires. Voir généralement *Eli Lilly and Co. c. Novopharm Ltd.* (1994), 56 C.P.R. (3d) 437 (C.F. 1re inst.), p. 439, le juge Muldoon.

57 Enfin, l'expression « autres options raisonnables » oblige le juge non seulement à se demander s'il existe des mesures raisonnables autres que l'ordonnance de confidentialité, mais aussi à restreindre l'ordonnance autant qu'il est raisonnablement possible de le faire tout en préservant l'intérêt commercial en question.

B. *Application de l'analyse en l'espèce*

(1) Nécessité

58 À cette étape, il faut déterminer si la divulgation des documents confidentiels ferait courir un risque sérieux à un intérêt commercial important de l'appelante, et s'il existe d'autres solutions raisonnables que l'ordonnance elle-même, ou ses modalités.

59 L'intérêt commercial en jeu en l'espèce a trait à la préservation d'obligations contractuelles de confidentialité. L'appelante fait valoir qu'un préjudice irréparable sera causé à ses intérêts commerciaux si les documents confidentiels sont divulgués. À mon avis, la préservation de renseignements confidentiels est un intérêt commercial suffisamment important pour satisfaire au premier volet de l'analyse dès lors que certaines conditions relatives aux renseignements sont réunies.

60 Le juge Pelletier souligne que l'ordonnance sollicitée en l'espèce s'apparente à une ordonnance conservatoire en matière de brevets. Pour l'obtenir, le requérant doit démontrer que les renseignements en question ont toujours été traités comme des renseignements confidentiels et que, selon la prépondérance des probabilités, il est raisonnable de penser que leur divulgation risquerait de compromettre ses droits exclusifs, commerciaux et scientifiques : *AB Hassle c. Canada (Ministre de la Santé nationale et du Bien-être social)*, [1998] A.C.F. nº 1850 (QL) (C.F. 1re inst.), par. 29-30. J'ajouterais à cela