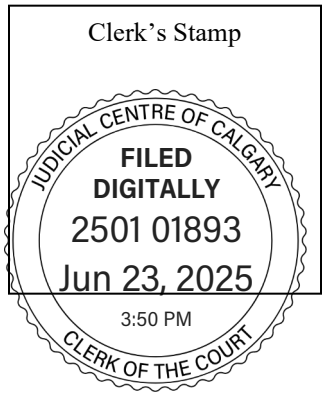
COURT FILE NUMBER	2501-01893
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
APPLICANT	APEX OPPORTUNITIES FUND LTD.
RESPONDENTS	BETA ENERGY CORP. and KADEN ENERGY LTD.
DOCUMENT	**BENCH BRIEF OF THE RECEIVER**



ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**Fasken Martineau DuMoulin LLP** Barristers and Solicitors 3400 First Canadian centre 350 – 7th Avenue SW Calgary, AB, T2P 3N9 **Attention: Robyn Gurofsky / Tiffany Bennett** Phone: (403) 261-9469 / (403) 261 5355 Email: rgurofsky@fasken.com / tbennett@fasken.com File Number.: 304091.00008

BENCH BRIEF OF THE RECEIVER

July 2, 2025 at 2:00 p.m.

Before the Honourable Justice R. A. Neufeld

CONTENTS

I. INTRODUCTION

1. The Applicant, FTI Consulting Canada Inc. ("**FTI**"), in its capacity as the Court-appointed receiver and manager (the "**Receiver**") of the undertakings, properties and assets of Beta Energy Corp. ("**Beta**") and Kaden Energy Ltd. ("**Kaden**" and, together with Beta, the "**Debtors**"), submits this Bench Brief to provide this Honourable Court with an overview of the law to be considered in the Receiver's Application, filed concurrently herewith (the "**Application**"), for *inter alia*, the following:

   (a) approval of a subscription agreement between the Receiver and New West Data Acquisition Corp. ("**NWD**" or the "**Purchaser**") dated June 20, 2025 (the "**Agreement**"), for the issue and sale by the Receiver, and the subscription and purchase by the Purchaser, of common shares in Kaden (the "**Shares**"), and the approval of the reverse vesting transaction contemplated in the Agreement (the "**Transaction**") by way of a reverse vesting order ("**RVO**");

   (b) a restricted court access order over the Confidential Appendices to the Second Report of the Receiver dated June 23, 2025 (the "**Second Report**"), which contain confidential information relating to the proposed Transaction; and

   (c) approval of the Receiver's conduct, activities and action, as more particularly set forth in the Second Report.

2. The Receiver respectfully submits that the RVO sought satisfies the well-known *Soundair* and *Harte Gold* tests and should be granted. Among other things:

   (a) the Transaction is commercially reasonable and results from a robust, Court-approved sales process;

   (b) the contemplated RVO structure is necessary to effect the Transaction in a commercially reasonable manner;

   (c) the Transaction represents the best outcome for the Debtors' creditors and their stakeholders in the circumstances. Indeed, the Receiver expects to conduct a claims

process and the creditors and stakeholders will be better off under the contemplated RVO structure than they would have been under an alternative scenario; and

(d) relatedly, the releases sought in the RVO in favour of Kaden, the Purchaser, and the Creditor Trust (and other related parties), as well as the Receiver and its legal counsel, should be granted.

II. FACTS

3. The factual background is set out in the Second Report, including the Confidential Appendices thereto. Unless otherwise indicated, capitalized terms used herein have the meanings ascribed to them in the Second Report or the notice of Application, as applicable.

III. ISSUES

4. The issues to be addressed on this Application are:

(a) should the Agreement and the Transaction be approved, and the requested reverse vesting order be granted;

(b) should the Confidential Appendices be temporarily sealed on the Court record; and

(c) should the Receiver's actions and activities be approved.

IV. LAW AND ARGUMENT

A. The Agreement and the Transaction Should Be Approved, and the RVO Granted

(a) Principles Governing Receivership Sales

5. The Receiver is authorized by section 243(1)(c) of the *Bankruptcy and Insolvency Act* (the "***BIA***") and the Receivership Order to market and sell the Debtors' property outside the ordinary course of business.[1] Specifically, paragraphs 3(k) and 3(l) of the Receivership Order provide that the Receiver is authorized "to market any or all of the Property,

[1] *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, as amended, s 243(1)(c) [**TAB 1**]; Receivership Order, dated February 18, 2025 at paras 3(k) and (l); *British Columbia v Peakhill Capital Inc*, 2024 BCCA 246 at paras 21-22, [2025] 3 WWR 420 [**TAB 2**].

including advertising and soliciting offers in respect of the Property or any part or parts thereof and negotiating such terms and conditions of sale as the Receiver in its discretion may deem appropriate…" and "to sell, convey, transfer, lease or assign the Property or any part or parts thereof out of the ordinary course of business…", subject to the approval of this Honourable Court.

6. It is well-established that this Court's discretion to approve or decline a proposed transaction is to be guided by the *Soundair* principles, being:

   (a) whether the receiver has made a sufficient effort to obtain 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.[2]

7. Courts are to apply the *Soundair* analysis flexibly, in a manner that gives deference to a receiver's commercial expertise in a given factual circumstance, including such things as the prevailing economic environment, and the risks/rewards associated with an extended or additional sales process.[3]

8. Furthermore, courts should give the recommendation of the receiver, as its officer, significant weight and should accept such recommendation absent exceptional circumstances.[4] Thus, the court should generally defer to the commercial judgment of a receiver, and exercise "considerable caution" before intervening in a sale transaction.[5]

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[2] *Sydco Energy Inc (Re)*, 2018 ABQB 75 at para 50, 64 Alta LR (6th) 156 [**TAB 3**], citing *Royal Bank v Soundair Corp*, 1991 CanLII 2727 (ONCA) at para 16, [1991] OJ No 1137 [*Soundair*] [**TAB 4**].

[3] *Sanjel Corp, Re*, 2016 ABQB 257 at para 112, [2016] AWLD 2474 [**TAB 5**]; *PricewaterhouseCoopers Inc v 1905393 Alberta Ltd*, 2019 ABCA 433 at paras 13-14, 98 Alta LR (6th) 1 [*190 Alberta*] [**TAB 6**].

[4] *Jaycap Financial Ltd v Snowdon Block Inc*, 2019 ABCA 47 at para 20, [2019] AWLD 951 [**TAB 7**]; *1705221 Alberta Ltd v Three M Mortgages Inc*, 2021 ABCA 144 at para 22, [2021] AWLD 4108 [**TAB 8**].

[5] *Soundair* at paras 21, 46 [**TAB 4**]; *B&M Handelman Investments Limited v Drotos*, 2018 ONCA 581 at para 43, 293 ACWS (3d) 758 [**TAB 9**].

Were the court to substitute its own view in place of the receiver's commercial expertise, court-supervised insolvency sales processes would be materially undermined.[6]

9. In this instance, the Agreement and the proposed Transaction are commercially reasonable and fair, and satisfy the *Soundair* principles, given that:

   (a) the Receiver, in consultation with the Sales Agent, conducted a robust sales process in accordance with the terms of a Court-approved SISP and, in so doing, has thoroughly canvassed the market to obtain the best value for the Property;[7]

   (b) the Transaction is the culmination of a two-phase sales process, and represents the best price offered for the Property;[8]

   (c) the Transaction provides cash consideration that will flow to the Creditor Trust for distribution to creditors; and[9]

   (d) the SISP was carried out in an efficient and fair manner, and there has been no unfairness in the process leading up to the Agreement and the proposed Transaction.[10]

(b) Principles Governing Reverse Vesting Transactions

10. In addition to the *Soundair* principles outlined above, courts have also considered the additional *Harte Gold* factors when the a transaction is structured as a "reverse vesting" transaction, being the following:

   (a) whether the RVO is necessary in the circumstances;

   (b) whether the RVO structure produces an economic result at least as favourable as any other viable alternative;

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[6] *Soundair* at paras 21, 46 [**TAB 4**]; *190 Alberta* at para 14 [**TAB 6**].
[7] Second Report of the Receiver dated June 23, 2025 at para 32 [**Second Report**].
[8] Second Report at paras 22-25.
[9] Second Report at paras 36-37.
[10] Second Report at para 32, 33.

(c) whether the general stakeholders are not worse off under the RVO structure than they would have been under any other viable alternative; and

(d) whether the consideration being paid for the debtor's business reflects the importance and value of the intangible assets being preserved under the RVO structure.[11]

11. While RVOs should not be the "norm", courts have found RVOs to be necessary and appropriate in circumstances where the debtor operates in a heavily regulated industry, and the licensing and permitting which are necessary to the debtor's business would be difficult to transfer or assign.[12]

12. In this instance, the RVO sought by the Receiver contemplates the creation of a creditor trust (as opposed to incorporation of a special purpose residual company) that is to hold all unassumed liabilities of Kaden upon closing of the proposed Transaction. While neither the *BIA* or the Receivership Order expressly provides for the creation of a creditor trust by court order as a residual vehicle, there is ample common law authority for this Court to approve the contemplated trust structure. For example, in the receivership proceedings of Vert Infrastructure Ltd., Justice Conway of the Ontario Superior Court endorsed the creation of a common law trust in the proposed reverse vesting transaction, stating:

> The transaction has been designed in a practical manner that uses judicial tools available to this court – a vesting order, channelling claims, and creation of a common law trust. […] Ultimately,… the Receiver of Vert, will be holding these assets in trust for the very same creditors of Vert – it mirrors the structure and rights/obligations that are in place under the receivership.[13]

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[11] *Harte Gold Corp (Re)*, 2022 ONSC 653 at para 38, 343 ACWS (3d) 284 [**TAB 10**].

[12] *Acerus Pharmaceuticals Corporation (Re)*, 2023 ONSC 3314 at para 13, 2023 ACWS 3438 [**TAB 11**]; *Just Energy Group Inc et al v Morgan Stanley Capital Group Inc et al*, 2022 ONSC 6354 at paras 33-34, 39, 45, 2022 ACWS 5355 [**TAB 12**].

[13] *Re Vert Infrastructure Ltd*, ONSC Court File No. CV-20-00642256-00CL, Endorsement of Conway J, dated June 8, 2021 [**TAB 13**]; also see, for example: See, for example: *Long Run Exploration Ltd (Re)*, 2024 ABKB 710 at paras 4, 120, [2025] AWLD 395 [**TAB 14**].

13. The Transaction and the RVO sought readily satisfy the *Harte Gold* test and should be approved. Among other things:

(a) the reverse vesting structure is necessary in order to (i) enable ongoing business operations without the inefficiencies, delays, and uncertainties associated with seeking approvals for license transfers from the Alberta Energy Regulator, (ii) preserve Kaden's tax attributes and the value of Kaden as a going concern, and (iii) facilitate the closing of the Transaction quickly and preserve value for the stakeholders. NWD has indicated that it is not prepared to proceed by way of an ordinary asset purchase transaction;[14]

(b) the Transaction represents the highest available recovery for creditors and, among other things, provides for the payment of cure costs to contractual counterparties and an injection of funds to the Creditor Trust to be distributed to stakeholders. The alternative is a bankruptcy, or a sale to an alternative bidder at a lower price;[15]

(c) no stakeholders are worse off as a result of the RVO structure. To the contrary, stakeholders would be better off with the contemplated Transaction as it provides the highest possible recovery;[16]

(d) the consideration being paid reflects the importance and value of the Debtors' intangible assets. Information on the regulatory licenses associated with the PN&G Assets and Kaden's tax attributes were made available in the Data Room for potential bidders.[17] The core of the Transaction, which is the best offer received, is the preservation of these intangible assets in a manner that allows for the Receiver to realize value of the Property in an efficient way; and[18]

[14] Second Report at paras 43, 46-48.
[15] Second Report at paras 43, 49.
[16] Second Report at paras 43, 50.
[17] Second Report at para 53.
[18] Second Report at paras 51-52.

(e) the creation of the Creditor Trust as a vehicle to address unassumed liabilities is uncontentious and fair to all stakeholders.[19]

(c) The Releases Sought in the RVO Should Be Granted

14. Courts have considered the factors set out in the Ontario Superior Court's decision *Lydian International Limited (Re)* when determining whether to approve releases in RVOs, which are as follows:

(a) whether the parties to be released from claims were necessary and essential to the restructuring of the debtor;

(b) whether the claims to be released were rationally connected to the purpose of the plan and necessary for it;

(c) whether the plan could succeed without the releases;

(d) whether the parties being released were contributing to the plan; and

(e) whether the release benefitted the debtors as well as the creditors generally.[20]

15. Here, paragraph 16 of the RVO contemplates a release in favour of Kaden, the Purchaser, and the Creditor Trust, and their respective directors, officers, employees, legal counsel, and advisors, as well as the Receiver and it's legal counsel (collectively, the "**Released Parties**") from all claims in respect of the entrance and commencement of these receivership proceedings, the entering into and execution of the Agreement, or the implementation of the Transaction.

16. The Receiver respectfully submits that the releases contemplated in the RVO should be granted as:

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[19] Second Report at para 50.

[20] *Lydian International Limited (Re)*, 2020 ONSC 4006 at para 54, 321 ACWS (3d) 618 [**TAB 15**], as cited in *Peakhill Capital Inc v Southview Gardens Limited Partnership*, 2023 BCSC 1476 at para 79, 2023 ACWS 4242 [**TAB 16**].

(a) the Released Parties are all necessary and essential to the realization of the value of the Property in favour of the Debtors' stakeholders, and have contributed to the Agreement and the contemplated Transaction;[21]

(b) the claims being released are rationally connected to the Transaction and the RVO, as any such claimant can seek recourse against the Creditor Trust, which is created pursuant to the RVO to address any existing claims which may be asserted in respect of unassumed liabilities;[22]

(c) the contemplated Transaction cannot succeed without the proposed releases, as no purchaser would be prepared to acquire any portion of the Property without certainty that the subject of the transaction would be free and clear of encumbrances and liabilities; and[23]

(d) the releases benefit the debtors and creditors generally. Creditors can still assert their claims against the Creditor Trust in the same priorities as would have been accorded to them in bankruptcy proceedings, and the release in favour of Kaden, in particular, will allow it to exit the receivership proceedings and continue business as a going concern to the benefit of all stakeholders.[24]

B. This Court Should Grant a Restricted Court Access Order for the Confidential Appendices

17. As clarified by the Supreme Court of Canada in *Sherman Estate* the test for a sealing order is predicated upon the following core requisites:

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

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

[21] Second Report at para 55(a).
[22] Second Report at para 55(b).
[23] Second Report at para 55(d).
[24] Second Report at para 55(c).

(c) as a matter of proportionality, the benefits of the order outweigh its negative effects.[25]

18. In insolvency matters decided since *Sherman Estate*, courts have continued to find that sealing orders are justified to protect the integrity of a receiver's sales or marketing efforts and to avoid the misuse of information by bidders in a subsequent process to obtain an unfair advantage.[26] For example, in the receivership proceedings of Yukon Zinc Corporation, Chief Justice Duncan of the Yukon Supreme Court held:

> In the insolvency context, <u>especially where there is a sale process, it is a standard practice to keep all aspects of the bidding or sales process confidential.</u> Courts have found this appropriately meets the *Sierra Club* test as modified by *Sherman Estate*, as sealing this information ensures the integrity of the sales and marketing process and avoids misuse of information by bidders in a subsequent process to obtain an unfair advantage. <u>The important public interest at stake is described as the commercial interest of the Receiver, bidders, creditors and stakeholders in ensuring a fair sales and marketing process is carried out, with all bidders on a level playing field.</u> [underlining added][27]

19. In *Ontario Securities Commission v Bridging Finance Inc*, Chief Justice Morawetz of the Ontario Superior Court likewise characterized the interest at stake as being the "Receiver's efforts to maximize value for stakeholders".[28] In granting the requested sealing order, Chief Justice Morawetz found that there were "no reasonable alternatives to the sealing order in the circumstances and… [that] no stakeholders [would] be materially prejudiced by sealing the Confidential Supplement and the salutary effects of granting the relief outweigh any deleterious effects".[29]

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[25] *Sherman Estate v Donovan*, 2021 SCC 25 at para 38, [2021] 2 SCR 75 [**TAB 17**].

[26] *Yukon (Government of) v Yukon Zinc Corporation*, 2022 YKSC 2 at para 39, 343 ACWS (3d) 8 [***Yukon Zinc***] [**TAB 18**].

[27] *Yukon Zinc* at para 39 [**TAB 18**].

[28] *Ontario Securities Commission v Bridging Finance Inc*, 2022 ONSC 1857 at para 53, 2022 ACWS 646 [***Bridging Finance***] [**TAB 19**].

[29] *Bridging Finance* at para 53 [**TAB 19**].

20. For the reasons set out at paragraphs 56 and 57 of the Second Report, the Receiver submits that all three parts of the *Sherman Estate* test have been satisfied, and this Court should grant the sealing order sought.[30]

C. The Receiver's Actions and Activities Should Be Approved

21. As a final matter, this Honourable Court has jurisdiction to review and approve the activities of a court-appointed receiver.[31] A receiver's conduct is to be assessed objectively, and if reasonable, prudent, and not arbitrary, then the Court should approve the activities set out in a receiver's report.[32] Further, where a receiver has fulfilled the purpose of obtaining as high a value for the debtor's assets as it could, the court will find that the receiver has acted properly and within its mandate.[33]

22. As detailed in the Second Report, the Receiver has undertaken numerous and significant efforts to carry out its mandate since the First Report. Among other things, the Receiver has implemented the SISP, and negotiated and entered into the Agreement with a view of maximizing recovery for the stakeholders. The Receiver respectfully submits that its actions and activities are reasonable and prudent, consistent with its mandate, and should be approved together with the Receiver's interim statement of receipts and disbursements as provided for in the Second Report.

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[30] Second Report at paras 56-57.

[31] *Leslie & Irene Dube Foundation Inc v P218 Enterprises Ltd*, 2014 BCSC 1855 at para 54, [2014] BCWLD 7241 [***P218 Enterprises***] [**TAB 20**].

[32] *P218 Enterprises* at para 54 [**TAB 20**].

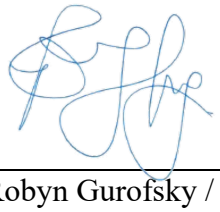
[33] *Re Regal Constellation Hotel Ltd*, [2004] OJ No 365 at para 11, 128 ACWS (3d) 646 (ONCJ) [**TAB 21**], aff'd 2004 CanLII 206 (ONCA), 242 DLR (4th) 689.

V. CONCLUSION

23. In light of the foregoing, the Receiver respectfully submits that this Honourable Court should grant the relief sought in the Application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 23rd DAY OF JUNE, 2025.

FASKEN MARTINEAU DuMOULIN LLP

Per: 

Robyn Gurofsky / Tiffany Bennett,
Counsel for FTI Consulting Canada Inc., in its capacity as Court-appointed receiver and manager of Beta Energy Corp. and Kaden Energy Ltd., and not in its personal capacity

LIST OF AUTHORITIES

TAB	AUTHORITY
1.	*Bankruptcy and Insolvency Act*, RSC 1985, c B-3
2.	*British Columbia v Peakhill Capital Inc*, 2024 BCCA 246, [2025] 3 WWR 420
3.	*Sydco Energy Inc (Re)*, 2018 ABQB 75, 64 Alta LR (6th) 156
4.	*Royal Bank v Soundair Corp*, 1991 CanLII 2727 (ONCA), [1991] OJ No 1137
5.	*Sanjel Corp, Re*, 2016 ABQB 257, [2016] AWLD 2474
6.	*PricewaterhouseCoopers Inc v 1905393 Alberta Ltd*, 2019 ABCA 433, 98 Alta LR (6th) 1
7.	*Jaycap Financial Ltd v Snowdon Block Inc*, 2019 ABCA 47, [2019] AWLD 951
8.	*1705221 Alberta Ltd v Three M Mortgages Inc*, 2021 ABCA 144, [2021] AWLD 4108
9.	*B&M Handelman Investments Limited v Drotos*, 2018 ONCA 581, 293 ACWS (3d) 758.
10.	*Harte Gold Corp (Re)*, 2022 ONSC 653, 343 ACWS (3d) 284.
11.	*Acerus Pharmaceuticals Corporation (Re), 2023 ONSC 3314, 2023 ACWS 3438*
12.	*Just Energy Group Inc et al v Morgan Stanley Capital Group Inc et al*, 2022 ONSC 6354, 2022 ACWS 5355.
13.	*Re Vert Infrastructure Ltd*, ONSC Court File No. CV-20-00642256-00CL, Endorsement of Conway J, dated June 8, 2021
14.	*Long Run Exploration Ltd (Re)*, 2024 ABKB 710, [2025] AWLD 395
15.	*Lydian International Limited (Re)*, 2020 ONSC 4006, 321 ACWS (3d) 618
16.	*Peakhill Capital Inc v Southview Gardens Limited Partnership*, 2023 BCSC 1476, 2023 ACWS 4242
17.	*Sherman Estate v Donovan*, 2021 SCC 25, [2021] 2 SCR 75
18.	*Yukon (Government of) v Yukon Zinc Corporation*, 2022 YKSC 2, 343 ACWS (3d) 8

TAB	AUTHORITY
19.	*Ontario Securities Commission v Bridging Finance Inc*, 2022 ONSC 1857, 2022 ACWS 646
20.	*Leslie & Irene Dube Foundation Inc v P218 Enterprises Ltd*, 2014 BCSC 1855, [2014] BCWLD 7241
21.	*Re Regal Constellation Hotel Ltd*, [2004] OJ No 365 at para 11, 128 ACWS (3d) 646 (ONCJ)

TAB 1

Canada Federal Statutes
Bankruptcy and Insolvency Act
Part XI — Secured Creditors and Receivers (ss. 243-252)

KeyCite treatment
Most Recently Cited in: Mayfield Investments Ltd (Re) , 2025 ABKB 326, 2025 CarswellAlta 1216 | (Alta. K.B., May 28, 2025)

R.S.C. 1985, c. B-3, s. 243

s 243.

Currency

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

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

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

(c) take any other action that the court considers advisable.

243(1.1)Restriction on appointment of receiver
In the case of an insolvent person in respect of whose property a notice is to be sent under subsection 244(1), the court may not appoint a receiver under subsection (1) before the expiry of 10 days after the day on which the secured creditor sends the notice unless

(a) the insolvent person consents to an earlier enforcement under subsection 244(2); or

(b) the court considers it appropriate to appoint a receiver before then.

243(2)Definition of "receiver"
Subject to subsections (3) and (4), in this Part, **"receiver"** means a person who

(a) is appointed under subsection (1); or

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

(i) an agreement under which property becomes subject to a security (in this Part referred to as a "security agreement"), or

(ii) a court order made under another Act of Parliament, or an Act of a legislature of a province, that provides for or authorizes the appointment of a receiver or receiver-manager.

243(3)Definition of "receiver" — subsection 248(2)
For the purposes of subsection 248(2), the definition "receiver" in subsection (2) is to be read without reference to paragraph (a) or subparagraph (b)(ii).

243(4)Trustee to be appointed
Only a trustee may be appointed under subsection (1) or under an agreement or order referred to in paragraph (2)(b).

243(5)Place of filing
The application is to be filed in a court having jurisdiction in the judicial district of the locality of the debtor.

243(6)Orders respecting fees and disbursements
If a receiver is appointed under subsection (1), the court may make any order respecting the payment of fees and disbursements of the receiver that it considers proper, including one that gives the receiver a charge, ranking ahead of any or all of the secured creditors, over all or part of the property of the insolvent person or bankrupt in respect of the receiver's claim for fees or disbursements, but the court may not make the order unless it is satisfied that the secured creditors who would be materially affected by the order were given reasonable notice and an opportunity to make representations.

243(7)Meaning of "disbursements"
In subsection (6), **"disbursements"** does not include payments made in the operation of a business of the insolvent person or bankrupt.

Amendment History
1992, c. 27, s. 89(1); 2005, c. 47, s. 115; 2007, c. 36, s. 58

Judicial Consideration (9)

Currency
Federal English Statutes reflect amendments current to September 25, 2024
Federal English Regulations Current to Gazette EXTRA Vol. 158:3 (December 6, 2024)

End of Document

TAB 2

KeyCite treatment
Most Negative Treatment: Application/Notice of Appeal
Most Recent Application/Notice of Appeal: His Majesty the King in Right of the Province of British Columbia v. Peakhill Capital Inc., et al. | 2024 CarswellBC 3713 | (S.C.C., Oct 3, 2024)

2024 BCCA 246
British Columbia Court of Appeal

British Columbia v. Peakhill Capital Inc.

2024 CarswellBC 1870, 2024 BCCA 246, [2025] 3 W.W.R. 420,
13 C.B.R. (7th) 218, 2024 A.C.W.S. 3437, 499 D.L.R. (4th) 344

His Majesty the King in Right of the Province of British Columbia (Appellant / Respondent) And Peakhill Capital Inc. (Respondent / Petitioner) And KSV Restructuring Inc., Cenyard Pacific Developments Inc., and Cenyard Southview Gardens Ltd. (Respondents / Respondents)

Harris, Voith, Winteringham JJ.A.

Heard: June 3, 2024
Judgment: July 2, 2024
Docket: Vancouver CA49320

Proceedings: affirming *Peakhill Capital Inc. v. Southview Gardens Limited Partnership* (2023), 9 C.B.R. (7th) 119, 2023 CarswellBC 25062023 BCSC 1476, K. Loo J. (B.C. S.C.)

Counsel: O.J. James, R. L. Power, B.A. Gulka-Tiechko, for Appellant
J.D. Schultz, E.T.T.Y. Newbery, for Respondent, Cenyard Pacific Developments Inc.
W.L. Roberts, S.B. Hannigan, B. Hunt, for Respondent, Cenyard Southview Gardens Ltd.

Subject: Insolvency; Property; Provincial Tax; Public
Table of Authorities
Cases considered by *Harris J.A.*:

Hamilton Wentworth Credit Union Ltd. (Liquidator of) v. Courtcliffe Parks Ltd. (1995), 28 M.P.L.R. (2d) 59, 32 C.B.R. (3d) 303, (sub nom. *Hamilton Wentworth Credit Union Ltd. v. Courtcliffe Parks Ltd.)* 23 O.R. (3d) 781, 1995 CarswellOnt 374 (Ont. Gen. Div. [Commercial List]) — referred to

Harte Gold Corp. (Re) (2022), 2022 ONSC 653, 2022 CarswellOnt 1698, 97 C.B.R. (6th) 202 (Ont. S.C.J. [Commercial List]) — referred to

National Trust Co. v. 1117387 Ontario Inc. (2010), 2010 ONCA 340, 2010 CarswellOnt 2869, 262 O.A.C. 118, 67 C.B.R. (5th) 204, 52 C.E.L.R. (3d) 163 (Ont. C.A.) — referred to

PaySlate Inc. (Re) (2023), 2023 BCSC 608, 2023 CarswellBC 1025, 7 C.B.R. (7th) 61 (B.C. S.C.) — referred to

Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc. (2019), 2019 ONCA 508, 2019 CarswellOnt 9683, 70 C.B.R. (6th) 181, 3 R.P.R. (6th) 175, 435 D.L.R. (4th) 416, 11 P.P.S.A.C. (4th) 11 (Ont. C.A.) — referred to

Yukon (Government of) v. Yukon Zinc Corporation (2021), 2021 YKCA 2, 2021 CarswellYukon 18, 91 C.B.R. (6th) 209 (Yukon C.A.) — referred to

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

Generally — referred to

s. 72(1) — considered

s. 183 — referred to

s. 183(1)(c) — referred to

s. 243 — referred to

s. 243(1)(c) — considered

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

Generally — referred to

s. 11 — referred to

Law and Equity Act, R.S.B.C. 1996, c. 253

s. 39 — referred to

Property Transfer Tax Act, R.S.B.C. 1996, c. 378

Generally — referred to

s. 2.001(1) "avoidance transaction" [en. 2016, c. 27, s. 3] — referred to

s. 2.001(3) [en. 2016, c. 27, s. 3] — referred to

APPEAL by Province from judgment allowing rectification of agreement to allow reverse vesting, reported at *Peakhill Capital Inc. v. Southview Gardens Limited Partnership* (2023), 2023 BCSC 1476, 2023 CarswellBC 2506, 9 C.B.R. (7th) 119 (B.C. S.C.).

***Harris J.A.*:**

Reasons for Judgment

Introduction

1 The appellant, the Province, appeals from an order pronounced in a receivership under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 [*BIA*], approving what is referred to as a reverse vesting order ("RVO").

2 Reduced to its essentials, this RVO approved a transaction whereby the shares of the insolvent debtor were sold to a purchaser. As part of the transaction, the unwanted assets and liabilities of the debtor were stripped out of the company and transferred to another corporate entity (the residual company), leaving only the valuable real property as an asset of the company. The sale of the shares therefore transferred the beneficial interest in the property to the purchaser of the company without transferring title to the underlying real estate asset. By avoiding the transfer of title, the transaction did not attract property transfer tax ("PTT") under the *Property Transfer Tax Act*, R.S.B.C. 1996, c. 378 [*PTTA*], thereby enhancing, for the benefit of creditors, the value of the estate for distribution to them. If tax were payable, the amount available for distribution to the creditors would have been reduced by the tax owing.

3 The use of RVOs appears to be a relatively recent innovation in insolvency proceedings. They have been used principally, it seems, in restructuring the affairs of insolvent companies under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 [*CCAA*], (see, e.g., *Harte Gold Corp. (Re)*, 2022 ONSC 653) or the proposal provisions of the *BIA* (see, e.g., *PaySlate Inc. (Re)*2023 BCSC 608 [*PaySlate #1*]). We are told that this case is the first opportunity for an appellate court to consider whether a court in a receivership proceeding has the jurisdiction to authorize an RVO rather than an approval and vesting order ("AVO") involving the transfer of title from the insolvent debtor to a purchaser. It seems that, if such a jurisdiction exists, the parties invite the Court to identify the criteria governing the exercise of discretion to make such an order.

4 For completeness, the order under appeal also approved an AVO, as an alternative transaction in the event the RVO was improperly approved, for the sale and transfer of the underlying asset, at a reduced price to account for PTT that would then be owing.

Reasons for Judgment

5 The judge began by outlining the transaction and the rationale for it. He noted, at para. 14, that "(i)t is uncontested that the purpose for structuring the Transaction in this way, as opposed to through a conventional AVO, was to avoid paying PTT of approximately $3.5 million."

6 The judge first considered whether he had jurisdiction to make the order sought. The application grounded jurisdiction in s. 243 of the *BIA* and s. 39 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253 [*LEA*]. The judge followed a decision of Justice Walker in *PaySlate #1* that had found jurisdiction to grant an RVO in the courts' general jurisdiction under s. 183(1)(c) of the *BIA*. That section grants the Supreme Court of British Columbia "such jurisdiction at law and in equity as will enable [it] to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act . . . ".

7 The judge considered that Justice Walker's decision was a complete answer to the challenge to jurisdiction mounted by the Province. In passing, I comment that I am not persuaded that that was necessarily so, if only because Justice Walker's decision did not deal with an RVO in the context of a receivership, but dealt rather with a proposal under the *BIA*. The judge in the present case did not go on to decide whether s. 243 also provided the necessary jurisdiction.

8 The judge then turned to a second argument, rooted in the implications of s. 72(1) of the *BIA*, which limits the jurisdiction of the court such that the *BIA* cannot "be deemed to abrogate or supersede" provincial laws of general application that relate to property and civil rights.

9 The judge concluded that this argument did not properly relate to jurisdiction, but went to whether an RVO was appropriate on the particular facts of the case. On that question, the judge identified the issue as being whether an RVO may be granted solely for the purpose of achieving a tax benefit.

10 The judge turned to examine cases in which RVOs had been authorized for the tax benefits they provide. I do not think it necessary to summarize the judge's analysis of those cases. It is sufficient to observe that the judge recognized that typically RVOs had been used to preserve going concerns or to deal with situations where, for example, licences were not readily transferrable. Moreover, these cases typically involved restructuring, not liquidation. Furthermore, he identified a common theme in the cases: that RVOs should be sanctioned only where they furthered the remedial objects of the legislation under which authorization was sought, and that they were not regarded as routine, the norm, but rather were "exceptional" or "extraordinary". The judge commented:

> [45] There is no doubt that careful consideration is required when an RVO is sought. It is important to observe, however, that much of the reluctance expressed by courts about granting RVOs has arisen because RVOs may be used to circumvent processes in insolvency proceedings which entitle creditors to vote on plans, or may otherwise prejudice creditors.

11 The judge then turned his mind to the details of the proposed transaction. He considered that the proposed RVO provided approximately $3.5 million more to the secured creditors than an AVO; that the three secured creditors were owed more than the recovery available under either an RVO or an AVO; and, that the unsecured creditors or residual claimants were "out of the money". He reasoned:

> [51] There is no suggestion in this case that the rights of creditors are being compromised or that their interests would be prejudiced by the granting of an RVO. There is no suggestion that any significant liabilities or obligations other than the PTT will be avoided. It appears that the only party by whom any prejudice will be allegedly suffered is the taxing authority. In the particular circumstances of this case, the reasons for caution typically considered when an RVO is contemplated do not weigh heavily.

In his view, the analysis needed to be viewed in the context of the purpose and objectives of insolvency law, including maximizing recovery for creditors.

12 The judge then considered the interplay between the granting of an RVO and the application of the *PTTA*. First, he reiterated that courts have granted RVOs which have conferred tax benefits on the parties in an insolvency proceeding, blessing the objective of avoiding a tax liability, albeit in circumstances where that was not the only objective. Second, the judge said that "the Province's arguments on this issue appear to be based on the premise that the transfer of property by means of the sale of the corporate property owner's shares constitutes unlawful tax avoidance": at para. 62. The judge rejected that proposition, noting that outside of the insolvency context, share transactions premised on PTT avoidance are not captured by the *PTTA*. On this point, the judge concluded:

> [66] . . . This is not a case in which the title will be transferred but the parties will be permitted nonetheless to evade or avoid the tax. The entire point of the RVO is to create an alternative arrangement in which there is no transfer of the property, as can readily be done without attracting tax when property is owned by a solvent company.

13 The judge did not accept the Province's argument that statutory jurisdiction to grant an RVO is negated by mechanisms in the *PTTA* by which the Administrator can assess PTT and penalties when a transaction is designed to avoid the tax. He accepted that the Province already has, by means of regulation (albeit not exercised), the authority to impose PTT on the transfer of property through the purchase of the shares of a nominee company.

14 Finally, the judge summarized his conclusion:

> [77] In my view, these factors lead to the conclusion that an RVO ought to be granted in this matter:
>
> a) While an RVO is not necessary to avoid foreclosure or bankruptcy, it is necessary to allow the parties to structure their affairs so as to preserve $3.5 million in value for the creditors and to maximize the return for creditors.
>
> b) In my view, the RVO structure produces an economic result at least as favourable as any other viable alternative. It clearly creates more value for the creditors. To the extent that the Province is a stakeholder in the analysis, the overall economic result is at least as favourable overall, in the sense that the Province "loses" exactly the amount that the creditors gain.
>
> c) As to whether any stakeholder is worse off under the RVO structure, the Province is undoubtedly worse off. However, for the reasons set out above, it is my view that the Province's argument that it is entitled to the PTT because would be unlawful for the creditors to avoid the tax in these circumstances is belied by the regime currently in place in the non-insolvency context. As stated above, it has not been suggested that any creditor or any other stakeholder is worse off.
>
> d) Finally, the question of whether the consideration paid for the assets reflect the importance and value of the assets being preserved under the RVO structure may be answered in the affirmative. In the event that an RVO is granted, the saved funds go to the creditors.

15 In authorizing the RVO, the judge decided that the order should include releases of third-party claims, even though the releases would potentially prevent the Province from collecting PTT. In his view: "As the purpose of the RVO is to maximize the creditors' recovery by avoiding [PTT], it would be inconsistent with that purpose to permit the Province to collect the tax from the proposed releasees": at para. 81.

The Province's Position on Appeal

16 The Province contends that a court supervising a receivership intended to liquidate an insolvent debtor's assets for the benefit of its creditors lacks the jurisdiction to approve an RVO. It says that neither s. 183 nor s. 243 of the *BIA* confer that authority on the court. The Province says that s. 183 provides a more limited jurisdiction to approve a transaction such as an

RVO than is found in, for example, s. 11 of the *CCAA*. Had Parliament intended to confer on a court such a broad authority to approve such a transaction, it would have amended s. 183 of the *BIA* at the same time as the broad scope of a court's authority was clarified by the amendments to s. 11 of the *CCAA*.

17 According to the Province, the broad scope of authority conferred by s. 11 of the *CCAA* is consistent with the purposes and objects of restructuring and plans of arrangement under that Act, which focus on attempting to continue insolvent companies as going concerns. By contrast, the receivership provisions in the *BIA* are concerned with the liquidation of assets in accordance with the priorities of creditors and interested third parties. The court's authority in receiverships under the *BIA*, it argues, is rule bound and does not engage a broad discretionary grant of authority outside what is necessary to sell assets as part of an orderly liquidation of them.

18 In the Province's submission, if the jurisdiction to authorize an RVO in a receivership exists at all, it must be found in the part of the *BIA* that concerns receiverships. More specifically, it says the jurisdiction must be found in s. 243 which gives a court power to appoint a receiver to take possession and control of the insolvent company's assets. Section 243 further allows the court to "take any other action that the court considers advisable" — language that has been held to authorize the court to direct a sale of the assets, and to take actions incidental or ancillary to that sale. The Province, however, says that s. 243 should not be read broadly to confer the jurisdiction required to authorize an RVO. It says that an RVO goes beyond anything that can properly be seen as incidental or ancillary to a sale.

19 If this Court is inclined to find the jurisdiction for an RVO in the *BIA*, the Province offers an alternative argument against transactions designed specifically to limit tax exposure. It says that an order authorizing such an RVO, if accompanied by releases of any third-party claims arising from the transaction, immunizes the transaction from a possible review or reassessment by the Administrator designated by the *PTTA*. In short, it usurps the authority of the Administrator to potentially inquire into and determine whether the transaction is a tax avoidance transaction for the purposes of the *PTTA*. By so doing, it violates the limitation on jurisdiction found in s. 72(1) of the *BIA*, which prevents a court abrogating any other law or statute governing property and civil rights.

Analysis

20 It is convenient to set out the relevant statutory provisions that provide the framework in which the RVO was granted. Section 183(1)(c) of the *BIA* provides:

> 183 (1) The following courts are invested with such jurisdiction at law and in equity as will enable them to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act during their respective terms, as they are now, or may be hereafter, held, and in vacation and in chambers:
>
> . . .
>
> (c) in the Provinces of Nova Scotia and British Columbia, the Supreme Court; . . .

Section 243 of the *BIA* provides:

> 243 (1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:
>
> (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
>
> (b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or
>
> (c) take any other action that the court considers advisable. [Emphasis added.]

And finally, s. 72(1) of the *BIA* states:

> 72 (1) The provisions of this Act shall not be deemed to abrogate or supersede the substantive provisions of any other law or statute relating to property and civil rights that are not in conflict with this Act, and the trustee is entitled to avail himself of all rights and remedies provided by that law or statute as supplementary to and in addition to the rights and remedies provided by this Act.

Did the court err in finding jurisdiction to grant the RVO?

21 It is important to begin by recognizing that the purpose and object of a receivership authorized by the *BIA* is to facilitate and enhance the preservation and realization of the assets of an insolvent debtor for the benefit of the creditors in accordance with their priority rankings: *Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.* 2019 ONCA 508 at para. 73 [*Third Eye*], quoting *Hamilton Wentworth Credit Union Ltd. v. Courtcliffe Parks Ltd.*, (1995), 23 O.R. (3d) 781 (S.C.), 1995 CanLII 7059. This necessarily involves the receiver being endowed with the power to liquidate assets, and being charged with a principal responsibility to ensure the liquidation of the assets results in a maximum return to the creditors: *Third Eye* at para. 73, quoting *1117387 Ontario Inc. v. National Trust Company* 2010 ONCA 340 at para. 77. It is, perhaps, surprising that there is no *express* power in the *BIA* authorizing a receiver to liquidate and sell assets. Although, those powers are incontrovertibly conferred on a court-appointed receiver, inherent in their role and standardly contained in the order appointing them, in order to give effect to the purpose and object of the insolvency regime contained in the *BIA*: *Third Eye* at para. 74.

22 There is, it appears to me, no question that the general jurisdiction found in s. 243(1)(c) to "take any other action that the court considers advisable" encompasses the jurisdiction to authorize the sale of a debtor's assets confirmed by the mechanism of a vesting order. If authority is needed to confirm that proposition, it can be found in cases such as *Third Eye* (at para. 87) and *Yukon (Government of) v. Yukon Zinc Corporation*, 2021 YKCA 2. In that case, the Yukon Court of Appeal, *per* Justice Tysoe, observed:

> [132] . . . The Ontario Court of Appeal held that s. 243(1) does give jurisdiction to grant such orders on the bases that vesting orders are incidental and ancillary to a receiver's power to sell and that the interests of efficiency dictate the ability for vesting orders to be granted in national receiverships rather than requiring them in each province in which assets are being sold. The Court did, however, note that the exercise of the jurisdiction is not unbounded: *Third Eye* at para. 82. [Emphasis added.]

23 The Province relies heavily on the observation that the jurisdiction to grant vesting orders is not unbounded. That is hardly a surprising proposition. Orders granted pursuant to a statutory regime will only be legitimate to the extent that they are consistent with, and further the purposes and objects of, the statute. The question here is simply whether an RVO furthers the purpose and objects of the insolvency regime insofar as a receiver is liquidating assets to maximize the recovery of the creditors, subject to the priorities among them and the rights of third parties.

24 It follows, in my view, that there is a clear jurisdiction to authorize an RVO found in s. 243, provided that the vesting order in question is incidental and ancillary to the receiver's power to liquidate the assets by sale. The shares of the insolvent company are assets within the receivership. The receiver has taken possession and control of them. They are capable of being sold or liquidated just as underlying assets held by the company can be sold or liquidated. Just as the company's underlying assets can be prepared for the sale in a manner intended to maximize their fair market value (as in an AVO), so too can arrangements be made to enhance the value of the shares by transferring the liabilities that serve to depress the value of those shares to another entity. I can see no reason to conclude that an RVO is not incidental or ancillary to a receiver's power to sell. An RVO advances the same goals as an AVO — albeit by employing a different transaction structure. The Province was not able to explain why the RVO at issue here was not incidental or ancillary to powers of the court and receiver under s. 243. This Court was provided only with a bald assertion, without any underlying rationale, as to why the RVO was not an exercise of incidental or ancillary powers.

25 Accordingly, given that the jurisdiction to authorize an RVO is found in s. 243, it is not necessary to opine on whether that jurisdiction is also found in s. 183 (which appears in the part of the *BIA* concerned with the general jurisdiction of courts

pursuant to the statute). As noted above, s. 243 deals with the powers of a receiver, and in that sense is a more specific source of the jurisdiction. I appreciate that the judge concluded the jurisdiction was found in s. 183. That may very well be correct. But, as I understand it, the application was brought pursuant to s. 243 of the *BIA* and s. 39 of the *LEA*. It suffices to say that s. 243 of the *BIA* provides a jurisdictional foundation for the order. It is also unnecessary to decide whether the jurisdiction to authorize an RVO is also found in the *LEA*, although I am aware of cases which have found jurisdiction under the equivalent of the *LEA*.

Did the court err in granting an order inconsistent with s. 72(1) of the BIA?

26 I turn now to the question whether the judge erred in granting an RVO for what is said to be the sole purpose of avoiding the payment of PTT that would be incurred under the *PTTA* if title to the real estate asset were transferred. Here, the Province does not suggest that the transaction as structured attracts PTT. It also accepts that the form of the transaction approved by the RVO is one commonly used outside the insolvency context to ensure that PTT is not payable. The Province does not explicitly contend that structuring a transaction in this way is illegitimate, abusive, or in any other way an improper means of avoiding the payment of taxes otherwise owing. These circumstances figured prominently in the judge's consideration of how to exercise his discretion. It is convenient to reproduce what the judge had to say:

> [62] Second, the Province's arguments on this issue appear to be based on the premise that the transfer of property by means of the sale of the corporate property owner's shares constitutes unlawful tax avoidance. However, it seems clear that, at least outside of the insolvency context, this proposition is not correct.
>
> [63] . . . [I]t is common for purchasers to acquire land in British Columbia by acquiring the shares of a nominee to avoid paying PTT.
>
> [64] In a non-insolvency context, the parties would have been permitted to carry out the transfer of the property by means of the transfer of shares of the nominee company. Indeed, it seems evident that similarly situated parties in a non-insolvency context would have done so.
>
> [65] Therefore, this is a tax liability which is readily avoided in a non-insolvency context. The Province has not been able to satisfactorily explain why, given that premise, the proposed RVO transaction is unlawful or would attract the *PTTA*'s general anti-avoidance tax rules.
>
> [66] In the Province's submission quoted above, it refers to "specific provisions of the *PTTA* . . . which provide for . . . the payment of PTT *when title is transferred*". It is important to emphasize that if an RVO is granted in this case, title to the Real Property will not be transferred. This is not a case in which the title will be transferred but the parties will be permitted nonetheless to evade or avoid the tax. The entire point of the RVO is to create an alternative arrangement in which there is no transfer of the property, as can readily be done without attracting tax when property is owned by a solvent company. [Italics emphasis in original; underline emphasis added.]

27 As noted, the Province does not challenge these conclusions. Indeed, in resisting an application to introduce new evidence, the Province explicitly accepts the fact that transactions of this kind are routine outside the insolvency context, and went so far as to submit that the factual findings in paras. 63-65 were not contested. The Province has not provided any evidentiary basis that would permit the Court to conclude that the Province regards such transactions as improper tax avoidance, or a form of tax evasion, or that the powers of the Administrator have been used to invoke the *PTTA*'s general anti-avoidance tax rules.

28 Before us, the Province's argument devolved to an academic and theoretical argument about a potential conflict between the authority of the Administrator to review transactions in order to decide whether they should be assessed under the so-called Recapture Provisions of the *PTTA*. Section 2.001(3) of the *PTTA* enables the Administrator to deny any resultant tax benefit where the transaction is not undertaken for a *bona fide* purpose other than obtaining tax avoidance. For the purposes of s. 2.001, an "avoidance transaction" is comprised of:

- a transaction (which notably is defined so as to include an arrangement);

• resulting directly or indirectly in a tax benefit (which is defined broadly as a reduction, avoidance or deferral of tax payable under the *PTTA*); and,

• where that transaction is not one that may reasonably be considered to have been undertaken or arranged primarily for a *bona fide* purpose other than for the purpose of obtaining the tax benefit.

29 The Province contends that the Recapture Provisions demonstrate a statutory intention that the *PTTA*'s Administrator has the exclusive jurisdiction to review the RVO at first instance and decide whether to assess under the Recapture Provisions. It says the effect of the RVO was to insulate the parties from the potential application of the Recapture Provisions and usurp the role of the Administrator. Any jurisdiction afforded by the *BIA* was necessarily circumscribed in this case by the Recapture Provisions by operation of s. 72(1) of the *BIA*. The Province maintains that by granting the RVO in the face of the Recapture Provisions, the chambers judge exceeded his jurisdiction by trenching provincial jurisdiction.

30 Respectfully, I think there is no force in these submissions. I can see no error in the judge's conclusion that structuring a transaction to avoid the transfer of title and thereby PTT is a legitimate commercial practice outside the insolvency context. It is a perfectly proper form of transaction structured so as to avoid attracting PTT. In other words, there is no basis for the suggestion that the Recapture Provisions might apply to them. I can see no reason why that which is legitimate and proper outside the insolvency context should be viewed differently within it.

31 In any event, I can find no air of reality to the suggestion that the Recapture Provisions could apply to this transaction. The Province fastens on to the suggestion that the sole purpose of the transaction is to avoid PTT, but that is not entirely accurate. As the judge found, the purpose of the transaction was to maximize recovery for the creditors and it did so by avoiding PTT. The goal of maximizing recovery for creditors is a *bona fide* purpose intended to further the objectives of the *BIA*. Avoiding PTT was simply the means by which that benefit was conferred. To use the language of the provisions, the RVO is a transaction that may reasonably be considered to have been undertaken or arranged primarily for a *bona fide* purpose other than for the purpose of obtaining the tax benefit. Accordingly, I see no conflict, on these facts, between the RVO and the jurisdiction of the Administrator.

Did the judge err in exercising his discretion?

32 Finally, I can discern no other errors in the way the judge exercised his discretion. The judge noted the various reasons why it is important to give very careful consideration to whether to pronounce an RVO. He identified the importance of respecting third-party rights, concerns about avoiding creditors' rights to vote on plans, and other factors. In my view, the comment that RVOs are exceptional or extraordinary orders simply reflects the fact that, in any given situation, the rights of all persons engaged in an insolvency must be carefully weighed to decide whether an RVO best fulfills the purposes and objects of the statutory scheme. The judge turned his mind to those considerations and determined that, in all of the circumstances of this case, an RVO should be pronounced. There is no basis to interfere with his decision.

Disposition

33 I would dismiss the appeal.

***Voith J.A.*:**

I agree.

***Winteringham J.A.*:**

I agree.

Appeal dismissed.

End of Document

TAB 3

2018 ABQB 75
Alberta Court of Queen's Bench

Sydco Energy Inc (Re)

2018 CarswellAlta 157, 2018 ABQB 75, [2018] A.W.L.D. 1029,
289 A.C.W.S. (3d) 13, 57 C.B.R. (6th) 73, 64 Alta. L.R. (6th) 156

In the Matter of the Receivership of Sydco Energy Inc.

MNP Ltd, in its capacity as the Court-appointed Receiver and Manager of Sydco Energy Inc (Applicant)

B.E. Romaine J.

Judgment: January 31, 2018
Docket: Calgary 1701-02520

Counsel: Tom Cumming, Anthony Mersich, for Receiver MNP Ltd.
Patrick Fitzpatrick, for Rothwell Development Corporation
Jeffrey Oliver, for Wormwood Resources
Patricia M. Johnston, Q.C., Keely R. Cameron, for Alberta Energy Regulator
Ryan Algar, for Trican Partnership & Trican Well Service Ltd.
Gregory Plester, for Clear Hills County

Subject: Estates and Trusts; Insolvency; Natural Resources

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APPLICATION by receiver of insolvent company for order approving sale of insolvent's assets.

***B.E. Romaine J.*:**

I. Introduction

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

II. Facts

2 The history of this receivership is relevant to the issues that were before me.

costs of public obligations. It submitted that "(p)arties should not be permitted to place themselves into insolvency proceedings voluntarily and shed their obligations and then reacquire their assets at the expense of the environment, the public and the orphan fund."

47 The AER also submitted that, by asking the Court to find that the AER does not have the jurisdiction to consider whether the proposed purchaser is arm's length, the Receiver and 203 were attempting to collaterally attack the AER's license eligibility decision regarding 203. It asserted that, if 203 wished to contest the conditions on its approval, its remedy was to avail itself of the appeal mechanisms under the *Responsible Energy Development Act*, SA 2012, c R-17.3.

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

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

IV. Analysis

A. Approval of the Wormword Transaction

50 The four factors a court should consider in approving a proposed sale of assets by a Receiver, as set out in *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (Ont. C.A.) at 6, and endorsed in *Bank of Montreal v. River Rentals Group Ltd.*, 2010 ABCA 16 (Alta. C.A.) at para 12, are as follows:

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

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

B. Precedential Value of the Redwater Order

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

TAB 4

KeyCite treatment
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
Table of Authorities
Cases considered:

Beauty Counsellors of Canada Ltd., Re (1986), 58 C.B.R. (N.S.) 237 (Ont. S.C.) — *referred to*
British Columbia Development Corp. v. Spun Cast Industries Ltd. (1977), 26 C.B.R. (N.S.) 28, 5 B.C.L.R. 94 (S.C.) — *referred to*
Cameron v. Bank of Nova Scotia (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303, 86 A.P.R. 303 (C.A.) — *referred to*
Crown Trust Co. v. Rosenburg (1986), 67 C.B.R. (N.S.) 320n, 60 O.R. (2d) 87, 22 C.P.C. (2d) 131, 39 D.L.R. (4th) 526 (H.C.) — *applied*
Salima Investments Ltd. v. Bank of Montreal (1985), 59 C.B.R. (N.S.) 242, 41 Alta. L.R. (2d) 58, 65 A.R. 372 , 21 D.L.R. (4th) (C.A.) — *referred to*
Selkirk, Re (1986), 58 C.B.R. (N.S.) 245 (Ont. S.C.) — *referred to*
Selkirk, Re (1987), 64 C.B.R. (N.S.) 140 (Ont. S.C.) — *referred to*

Statutes considered:

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

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

Appeal from order approving sale of assets by receiver.

Galligan J.A. **:**

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

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

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

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

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

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

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

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

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

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

8 It was well known in the air transport industry that Air Toronto was for sale. During the months following the collapse of the negotiations with Air Canada, the receiver tried unsuccessfully to find viable purchasers. In late 1990, the receiver turned

to Canadian Airlines International, the only realistic alternative. Negotiations began between them. Those negotiations led to a letter of intent dated February 11, 1990. On March 6, 1991, the receiver received an offer from Ontario Express Limited and Frontier Airlines Limited, who are subsidiaries of Canadian Airlines International. This offer is called the OEL offer.

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

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

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

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

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

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

13 I will deal with the two issues separately.

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

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

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

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

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

2. It should consider the interests of all parties.

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

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

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

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

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

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

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

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

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

[Emphasis added.]

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

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

[Emphasis added.]

> 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.

TAB 5

2016 ABQB 257
Alberta Court of Queen's Bench

Sanjel Corp., Re

2016 CarswellAlta 900, 2016 ABQB 257, [2016] A.W.L.D. 2474, 266 A.C.W.S. (3d) 542, 36 C.B.R. (6th) 239

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

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

B.E. Romaine J.

Heard: April 28, 2016
Judgment: May 16, 2016
Docket: Calgary 1601-03143

Counsel: Chris Simard, Alexis Teasdale, for Sanjel Group

Subject: Insolvency

Table of Authorities

Cases considered by *B.E. Romaine J.*:

AbitibiBowater inc., Re (2010), 2010 QCCS 1742, 2010 CarswellQue 4082, 71 C.B.R. (5th) 220 (C.S. Que.) — considered

Algoma Steel Inc., Re (2001), 2001 CarswellOnt 1742, 25 C.B.R. (4th) 194, 147 O.A.C. 291 (Ont. C.A.) — referred to

Bloom Lake, g.p.l., Re (2015), 2015 QCCS 1920, 2015 CarswellQue 4072, 27 C.B.R. (6th) 1 (C.S. Que.) — considered

Nelson Education Ltd., Re (2015), 2015 ONSC 5557, 2015 CarswellOnt 13576, 29 C.B.R. (6th) 140 (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]) — followed

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

SemCanada Crude Co., Re (2009), 2009 ABQB 490, 2009 CarswellAlta 1269, 57 C.B.R. (5th) 205, 479 A.R. 318 (Alta. Q.B.) — referred to

Target Canada Co., Re (2015), 2015 ONSC 303, 2015 CarswellOnt 620, 22 C.B.R. (6th) 323 (Ont. S.C.J.) — considered

Windsor Machine & Stamping Ltd., Re (2009), 2009 CarswellOnt 4471, 55 C.B.R. (5th) 241 (Ont. S.C.J. [Commercial List]) — referred to

Statutes considered:

Bankruptcy Code, 11 U.S.C.

Chapter 11 — referred to

Chapter 15 — referred to

Business Corporations Act, R.S.A. 2000, c. B-9

Generally — referred to

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

Generally — referred to

s. 6 — considered

s. 36 — considered

s. 36(3) — considered

s. 36(4) — referred to

s. 36(5) — considered

Proceeding

Motion/Application to Dismiss.

APPLICATION by debtor companies for orders approving sales of assets generated through Sales and Investment Solicitation Process; APPLICATION by trustee of the bonds for order dismissing debtors' application, allowing bondholders to propose plan of arrangement, and other relief.

***B.E. Romaine J.*:**

I. Introduction

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

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

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

II. Facts

4 On April 4, 2016, the Sanjel Corporation and its affiliates were granted an Initial Order under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c.C-36, as amended. PricewaterhouseCoopers Inc., ("PWC") was appointed as Monitor of the applicants.

5 Sanjel and its affiliates (the "Sanjel Group" or "Sanjel") provide fracturing, cementing, coiled tubing and reservoir services to the oil and gas industry in Canada, the United States and Saudi Arabia. Sanjel Corporation, the parent company, is a private corporation, the shares of which are owned by the MacDonald Group Ltd. It was incorporated under the *Alberta Business Corporations Act* in 1980, and its principal executive and registered office is located in Calgary. Four of the other members of the group were incorporated in Alberta, seven in various American states and three in offshore jurisdictions.

6 The sole director of all Canadian and US Sanjel companies resides in Calgary, as do all of the officers of these companies. The affidavit in support of the Initial Order sets out a number of factors relevant to the Sanjel Group's ability to file under the CCAA and that would be relevant to a determination of a Centre of Main Interest ("COMI") of the Sanjel Group. In subsequent Chapter 15 proceedings in the United States, the US Court declared COMI to be located in Canada and the CCAA proceedings to be a "foreign main proceeding." It is clear that the Sanjel Group is a fully integrated business centralized in Calgary.

7 Sanjel Corporation and Sanjel (USA) Inc. are borrowers under a credit agreement (the "Bank Credit Facility") dated April 21, 2015 with a banking syndicate (the "Syndicate") led by Alberta Treasury Branches as agent. The total amount outstanding under the Bank Credit Facility at the time of the CCAA filing was approximately $415.5 million. The Syndicate has perfected

110 The Bond Forbearance Agreement also recognized that, while Sanjel would negotiate in good faith with the Ad Hoc Bondholders, nothing restricted its ability to enter into or conduct negotiations with respect to potential sales or other transactions. It was only on March 14, 2016 that the Ad Hoc Bondholders requested third party bid information.

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

V. Conclusion

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

> (a) the process, while not conducted under the CCAA, was nevertheless reasonable in the circumstances, as established by the evidence. It was brief, but not unreasonably brief, given the previous BAML process, current economic climate and the deteriorating financial position of the Sanjel Group;
>
> (b) while the Monitor was not directly involved and did not actively participate in the SISP process prior to February 24, 2016, the Monitor has reviewed the process and is of the opinion that the SISP was a robust process run fairly and reasonably, and that sufficient efforts were made to obtain the best price possible for the Sanjel Group's assets in that process. I agree with the Monitor's assessment from my review of the evidence.
>
> It is the Monitor's view, based on (i) the advice of CS and PJT, (ii) the nature of the Sanjel Group's operations and assets, (iii) the market conditions over the past year, (iv) the proposals received in the context of the SISP and from the Ad Hoc Bondholders, (v) the current ongoing depressed condition of the market and (vi) the underlying value of the Sanjel Group's assets, it is highly improbably that another post-filing sales process would yield offers for the Canadian and U.S. operations materially in excess of the values contained in the STEP and Liberty APAs.
>
> I accept the Monitor's opinion in that regard, and nothing in my review of the evidence and the submissions of interested parties causes me to doubt that opinion.
>
> (c) The Monitor has provided an opinion that the proposed sales are more beneficial to creditors than a sale or disposition under bankruptcy.
>
> (d) Creditors, other than trade creditors, were consulted and involved in the process.
>
> (e) While the sales provide no return to any creditor other than the Syndicate, I am satisfied that all other viable or reasonable options were considered. While there is no guarantee of further employment arising from the sale, there is the prospect that since the business will continue to operate until the sale, there will be an opportunity for employment for Sanjel employees with the new enterprises, and an opportunity for suppliers to continue to supply them.
>
> (f) I am satisfied from the evidence that the consideration to be received for the assets is reasonable and fair.

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

VI. Postscript

113 On May 9, 2016, before these reasons were released, I received a copy of a letter dated May 5, 2016 from Fried Frank on behalf of the Ad Hoc Bondholders addressed to Canadian and US counsel for the Sanjel Group, the Monitor, the Syndicate and the prospective purchasers. In extravagant language, the Ad Hoc Bondholders state that they have become aware of information that the addressees are "duty bound" to bring to the attention of the Courts as officers of the Courts. That information is that Shane Hooker has been designated to lead the Canadian cementing operations when the STEP sale closes, according to a STEP

TAB 6

2019 ABCA 433
Alberta Court of Appeal

Pricewaterhousecoopers Inc v. 1905393 Alberta Ltd

2019 CarswellAlta 2418, 2019 ABCA 433, [2019] A.W.L.D. 4519,
312 A.C.W.S. (3d) 237, 74 C.B.R. (6th) 14, 98 Alta. L.R. (6th) 1

Pricewaterhousecoopers Inc. in its capacity as Receiver of 1905393 Alberta Ltd. (Respondent / Cross-Appellants / Applicant) and 1905393 Alberta Ltd., David Podollan and Steller One Holdings Ltd. (Appellants / Cross-Respondents / Respondents) and Servus Credit Union Ltd., Ducor Properties Ltd., Northern Electric Ltd. and Fancy Doors & Mouldings Ltd. (Respondents / Interested Parties)

Thomas W. Wakeling, Dawn Pentelechuk, Jolaine Antonio JJ.A.

Heard: September 3, 2019
Judgment: November 14, 2019
Docket: Edmonton Appeal 1903-0134-AC

Counsel: D.M. Nowak, J.M. Lee, Q.C., for Respondent, Pricewaterhousecoopers Inc. in its capacity as receiver of 1905393 Alberta Ltd.
D.R. Peskett, C.M. Young, for Appellants
C.P. Russell, Q.C., R.T. Trainer, for Respondent, Servus Credit Union Ltd.
S.A. Wanke, for Respondent, Ducor Properties Ltd.
S.T. Fitzgerald, for Respondent, Northern Electric Ltd.
H.S. Kandola, for Respondent, Fancy Doors & Mouldings Ltd.

Subject: Civil Practice and Procedure; Insolvency

Table of Authorities

Cases considered:

Bank of Montreal v. River Rentals Group Ltd. (2010), 2010 ABCA 16, 2010 CarswellAlta 57, 18 Alta. L.R. (5th) 201, 470 W.A.C. 333, 469 A.R. 333, 63 C.B.R. (5th) 26 (Alta. C.A.) — considered

Northstone Power Corp. v. R.J.K. Power Systems Ltd. (2002), 2002 ABCA 201, 2002 CarswellAlta 1111, 36 C.B.R. (4th) 272, 317 A.R. 192, 284 W.A.C. 192 (Alta. C.A.) — referred to

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

Salima Investments Ltd. v. Bank of Montreal (1985), 41 Alta. L.R. (2d) 58, 21 D.L.R. (4th) 473, 65 A.R. 372, 59 C.B.R. (N.S.) 242, 1985 CarswellAlta 332 (Alta. C.A.) — referred to

Skyepharma PLC v. Hyal Pharmaceutical Corp. (1999), 1999 CarswellOnt 3641, 12 C.B.R. (4th) 87, [2000] B.P.I.R. 531, 96 O.T.C. 172 (Ont. S.C.J. [Commercial List]) — referred to

Skyepharma PLC v. Hyal Pharmaceutical Corp. (2000), 2000 CarswellOnt 466, 47 O.R. (3d) 234, 130 O.A.C. 273, 15 C.B.R. (4th) 298 (Ont. C.A.) — referred to

1905393 Alberta Ltd v. Servus Credit Union Ltd (2019), 2019 ABCA 269, 2019 CarswellAlta 1342, 72 C.B.R. (6th) 20 (Alta. C.A.) — referred to

Statutes considered:

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

s. 193 — considered

s. 193(a) — considered

s. 193(a)-193(d) — referred to

s. 193(c) — considered

s. 193(e) — considered

APPEAL by appellants from Approval and Vesting Order which approved sale proposed in Asset Purchase Agreement between receiver, PWC, and respondent, D Ltd.

***Per curiam*:**

1 The appellants appeal an Approval and Vesting Order granted on May 21, 2019 which approved a sale proposed in the May 3, 2019 Asset Purchase Agreement between the Receiver, PriceWaterhouseCoopers, and the respondent, Ducor Properties Ltd ("Ducor"). The assets consist primarily of lands and buildings in Grande Prairie, Alberta described as a partially constructed 169 room full service hotel not currently open for business (the "Development Hotel") and a 63 room extended stay hotel ("Extended Stay Hotel") currently operating on the same parcel of land (collectively the "Hotels"). The Hotels are owned by the appellant, 1905393 Alberta Ltd. ("190") whose shareholder is the appellant, Stellar One Holdings Ltd, and whose president and sole director is the appellant, David Podollan.

2 The respondent, Servus Credit Union Ltd ("Servus"), is 190's largest secured creditor. Servus provided financing to 190 for construction of the Hotels. On May 16, 2018, Servus issued a demand for payment of its outstanding debt. As of June 29, 2018, 190 owed Servus approximately $23.9 million. That debt remains outstanding and, in fact, continues to increase because of interest, property taxes and ongoing carrying costs for the Hotels incurred by the Receiver.

3 On July 20, 2018, the Receiver was appointed over all of 190's current and future assets, undertakings and properties. The appellants opposed the Receiver's appointment primarily on the basis that 190 was seeking to re-finance the Hotels. That re-financing has never materialized.

4 As a result, the Receiver sought in October 2018 to liquidate the Hotels. In typical fashion, the Receiver obtained an appraisal of the Hotels, as did the respondents. After consulting with three national real estate brokers, the Receiver engaged the services of Colliers International ("Colliers"), which recommended a structured sales process with no listing price and a fixed bid submission date. While the sales process contemplated an exposure period of approximately six weeks between market launch and offer submission deadline, Colliers had contacted over 1,290 prospective purchasers and agents using a variety of mediums in the months prior to market launch, exposing the Hotels to national hotel groups and individuals in the industry, and conducted site visits and answered inquiries posed by prospective buyers. Prospective purchasers provided feedback to Colliers but that included concerns about the quality of construction on the Development Hotel.

5 The Receiver also engaged the services of an independent construction consultant, Entuitive Corporation, to provide an estimate of the cost to complete construction on the Development Hotel and to assist in decision-making on whether to complete the Development Hotel. In addition, the Receiver contacted a major international hotel franchise brand to obtain input on prospective franchisees' views of the design and fixturing of the Development Hotel. The ability to brand the Hotels is a significant factor affecting their marketability. Moreover, some of the feedback confirmed that energy exploration and development in Grande Prairie is down, resulting in downward pressure on hotel-room demand.

6 Parties that requested further information in response to the listing were asked to execute a confidentiality agreement whereupon they were granted access to a "data-room" containing information on the Hotels and offering related documents and photos. Colliers provided confidential information regarding 190's assets to 27 interested parties.

7 The deadline for offer submission yielded only four offers, each of which was far below the appraised valued of the Hotels. Three of the four offers were extremely close in respect of their stated price; the fourth offer was significantly lower than the

others. As a result, the Receiver went back to the three prospective purchasers that had similar offers and asked them to re-submit better offers. None, however, varied their respective purchase prices in a meaningful manner when invited to do so. The Receiver ultimately accepted and obtained approval for Ducor's offer to purchase which, as the appellants correctly point out, is substantially less than the appraised value of the Hotels.

8 The primary thrust of the appellants' argument is that an abbreviated sale process resulted in an offer which is unreasonably low having regard to the appraisals. They argue that the Receiver was improvident in accepting such an offer and the chambers judge erred by approving it. Approving the sale, they argue, would eliminate the substantial equity in the property evidenced by the appraised value and that the "massive prejudice" caused to them as a result materially outweighs any further time and cost associated with requiring the Receiver to re-market the Hotels with a longer exposure time. Mr. Podollan joins in this argument as he is potentially liable for any shortfall under personal guarantees to Servus for all amounts owed to Servus by 190. The other respondents, Fancy Doors & Mouldings Ltd and Northern Electric Ltd, similarly echo the appellants' arguments as the shortfall may deprive them both from collecting on their builders' liens which, collectively, total approximately $340,000.

9 The appellants obtained both a stay of the Approval and Vesting Order and leave to appeal pursuant to s 193 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3: *1905393 Alberta Ltd v. Servus Credit Union Ltd*, [2019] A.J. No. 895, 2019 ABCA 269 (Alta. C.A.). The issues around which leave was granted generally coalesce around two questions. First, whether the chambers judge applied the correct test in deciding whether to approve of the Receiver recommended sale; and second, whether the chambers judge erred in her application of the legal test to the facts in deciding whether to approve the sale and, in particular, erred in her exercise of discretion by failing to consider or provide sufficient weight to a relevant factor. The standard of review is correctness on the first question and palpable and overriding error on the second: *Northstone Power Corp. v. R.J.K. Power Systems Ltd.*, 2002 ABCA 201 (Alta. C.A.) at para 4, (2002), 317 A.R. 192 (Alta. C.A.).

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

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

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

13 At its core, then, the appellants challenge how the chambers judge applied and weighed the relevant factors in this case. The appellants suggest that the failure to obtain a price at or close to the appraised value of the Hotels is an overriding factor that trumps all the others in assessing whether the Receiver acted improvidently. That is not the test. A reviewing Court's function is not to consider whether a Receiver has failed to get the best price. Rather, a Receiver's duty is to act in a commercially

reasonable manner in the circumstances with a view to obtaining the best price having regard to the competing interests of the interested parties: *Skyepharma PLC v. Hyal Pharmaceutical Corp.* (1999), 12 C.B.R. (4th) 87 (Ont. S.C.J. [Commercial List]) at para 4, [1999] O.J. No. 4300 (Ont. S.C.J. [Commercial List]), aff'd on appeal (2000), 15 C.B.R. (4th) 298 (Ont. C.A.).

14 Nor is it the Court's function to substitute its view of how a marketing process should proceed. The appellants suggest that if the Hotels were re-marketed with an exposure period closer to that which the appraisals were based on, then a better offer might be obtained. Again, that is not the test. The Receiver's decision to enter into an agreement for sale must be assessed under the circumstances then existing. The chambers judge was aware that the Receiver considered the risk of not accepting the approved offer to be significant. There was no assurance that a longer marketing period would generate a better offer and, in the interim, the Receiver was incurring significant carrying costs. To ignore these circumstances would improperly call into question a receiver's expertise and authority in the receivership process and thereby compromise the integrity of a sales process and would undermine the commercial certainty upon which court-supervised insolvency sales are based: *Soundair* at para 43. In such a case, chaos in the commercial world would result and "receivers and purchasers would never be sure they had a binding agreement": *Soundair* at para 22.

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

16 Nor, as stated previously, have the appellants been able to re-finance the Hotels notwithstanding their assessment that there is still substantial equity in the Hotels based on the appraisals. At a certain point, however, it is the market that sets the value of property and appraisals simply become "relegated to not much more than well-meant but inaccurate predictions": *Romspen Mortgage Corp. v. Lantzville Foothills Estates Inc.*, 2013 BCSC 2222 (B.C. S.C.) at para 20.

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

18 We see no reviewable error. This ground of appeal is also dismissed.

19 Finally, leave to appeal was also granted on whether s 193 of the *Bankruptcy and Insolvency Act*, and specifically s 193(a) or (c) of the Act, creates a leave to appeal as of right in these circumstances or whether leave to appeal is required pursuant to s 193(e). As the appeal was also authorized under s 193(e), we find it unnecessary to address whether this case meets the criteria for leave as of right in s 193(a)-(d) of the Act.

Appeal dismissed.

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TAB 7

2019 ABCA 47
Alberta Court of Appeal

Jaycap Financial Ltd v. Snowdon Block Inc

2019 CarswellAlta 160, 2019 ABCA 47, [2019] A.W.L.D. 951, 301 A.C.W.S. (3d) 475, 68 C.B.R. (6th) 7

Jaycap Financial Ltd. (Respondent / Plaintiff) and Snowdon Block Inc., Neil John Richardson, Hugh Daryl Richardson and Heritage Property Corporation (Appellants / Defendants)

Brian O'Ferrall, Barbara Lea Veldhuis, Ritu Khullar JJ.A.

Heard: November 7, 2018
Judgment: February 4, 2019
Docket: Calgary Appeal 1701-0314-AC

Counsel: A. Henderson, for Respondent
K.W. Jesse, for Appellants

Subject: Corporate and Commercial; Insolvency

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Cases considered:

Beazer v. Tollestrup Estate (2017), 2017 ABCA 429, 2017 CarswellAlta 2689, 63 Alta. L.R. (6th) 25, [2018] 4 W.W.R. 513 (Alta. C.A.) — referred to

Housen v. Nikolaisen (2002), 2002 SCC 33, 2002 CarswellSask 178, 2002 CarswellSask 179, 286 N.R. 1, 10 C.C.L.T. (3d) 157, 211 D.L.R. (4th) 577, [2002] 7 W.W.R. 1, 219 Sask. R. 1, 272 W.A.C. 1, 30 M.P.L.R. (3d) 1, [2002] 2 S.C.R. 235, 2002 CSC 33 (S.C.C.) — referred to

Penner v. Niagara Regional Police Services Board (2013), 2013 SCC 19, 2013 CarswellOnt 3743, 2013 CarswellOnt 3744, 32 C.P.C. (7th) 223, 49 Admin. L.R. (5th) 1, 356 D.L.R. (4th) 595, 442 N.R. 140, 304 O.A.C. 106, [2013] 2 S.C.R. 125, (sub nom. *Penner v. Niagara (Police Services Board))* 118 O.R. (3d) 800 (note) (S.C.C.) — referred to

Ravelston Corp., Re (2007), 2007 CarswellOnt 661, 29 C.B.R. (5th) 1 (Ont. S.C.J. [Commercial List]) — considered

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

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

Toronto Dominion Bank v. Canadian Starter Drives Inc. (2011), 2011 ONSC 8004, 2011 CarswellOnt 15140, 90 C.B.R. (5th) 152 (Ont. S.C.J. [Commercial List]) — referred to

APPEAL by guarantors from chambers judge's decision vacating earlier order and approving agreement between receiver and nominee of main secured creditor for purchase of debtor's assets.

***Per curiam*:**

Introduction

1 This appeal arises in the context of insolvency proceedings. The guarantors appeal a chambers judge's decision vacating an earlier order and approving an agreement between the receiver and a nominee of the main secured creditor for the purchase of the debtor's assets. These parties had earlier entered into an agreement for the same assets and obtained a court order approving

that sale. However, they terminated this agreement after court approval on the basis of a mistake about the purchase price. The parties then entered into a second asset purchase agreement for a lower purchase price, which exposed the guarantors to a significant deficiency judgment. The guarantors (and as discussed below, the court) were provided very little information about what transpired between the execution of first and second agreements. The guarantors were unsuccessful before the chambers judge in arguing that the first asset purchase agreement should not be rectified because mutual mistake was not established on the record. The guarantors appeal to this Court alleging errors with the chambers judge's finding of mutual mistake and that the receiver's conduct challenged the integrity of the process.

2 We agree with the guarantors that there are some significant deficiencies with how the receiver proceeded and that the integrity of the process was seriously compromised. As a result, we allow the appeal.

Background

3 MNP Ltd. (the Receiver) was appointed receiver and manager of the debtor company, Snowdon Block Inc. (Snowdon) in February 2016. The only material asset of Snowdon was a parcel of land and a building in Calgary. In July 2016 the Receiver commenced a sales process to solicit offers for the assets. In October 2016 the Receiver finally received two offers for the assets and accepted a conditional offer from a third party. After months of extensions and negotiations, the would-be purchaser was unable to remove its conditions and the sale did not proceed.

4 Jaycap Financial Ltd. (Jaycap) was the primary creditor of Snowdon and was financing the Receiver's costs. Over time Jaycap became concerned with the increasing costs and protecting its investment. The Receiver advised Jaycap that a credit bid would be a viable option to obtain title to the assets and bring the receivership to an end. On July 5, 2017 Jaycap emailed the Receiver that it would credit bid its "current costs" noted to be a certain amount. Jaycap arranged for a numbered company it controlled to be the purchaser, but for simplicity, we will refer to Jaycap's nominee as Jaycap.

5 An asset purchase agreement was prepared and executed by Jaycap and the Receiver on August 2, 2017. The total debt was defined to be the amount contained in the July 5, 2017 email and that amount was also the purchase price.

6 On August 2, 2017 a representative of the Receiver and a representative of Jaycap also emailed about a request from one of the guarantors, the appellant Mr. Richardson, about the pending transaction. As part of this exchange, the two sides set out their understanding of the purchase price and the impact on the guarantors' liability. This was their exchange:

> Reid [*Jaycap's representative*]. Neil Richardson [*one of the appellants*] has contacted us asking for an adjournment of the application next week as he is out of town. His concern is that he does not have any idea of what #Co's offer is and is concerned about his personal guarantee. As #Co is offering Jaycap's total indebtedness, Neil would not be exposed to any shortfall payable under his guarantee. We can't be giving him any legal or other advice but should you wish you could let Neil know that you would not be going after him for any amount. Otherwise we will likely have to adjourn the application until such time as he is available.
>
> Please let us know what you wish to do.
>
> Best regards,
>
> Vic [*Receiver's representative*]
>
> . . . .
>
> Vic, [*Receiver's representative*]
>
> I believe that is incorrect actually.
>
> Neil Richardson[*one of the appellants*] has guaranteed the debt which has been accruing.

> Our Numbered Co is offering our full debt (carrying value) *NOT everything* we are legally entitled to.
>
> Please don't adjourn and please don't communicate anything to [N]eil, we will do that.
>
> Thanks,
>
> Reid [*Jaycap's representative*]

7 It appears from the record that the Receiver did not respond to this email nor did it obtain any clarification from Jaycap about what exactly was incorrect about its understanding of the purchase price and resulting impact on the guarantors.

8 On August 21, 2017 the Receiver obtained an approval and vesting order approving the first asset purchase agreement. The guarantors did not oppose this application as they were not facing a deficiency.

9 What happened next is a little unclear because of the lack of evidence and the Receiver's reliance on evidence from legal counsel about legal conclusions instead of the facts underlying those conclusions. The Receiver states in its third report that on August 28, 2017 counsel for Jaycap indicated that there was an error in the purchase price. The report then goes on to state that the Receiver was advised by its legal counsel that a common mistake occurred regarding the purchase price as set out in the first asset purchase agreement and that court approval was required to amend the mistake.

10 It appears from the evidence of Jaycap that the asset purchase agreement was incorrect when it equated the purchase price (the amount contained in the July 5, 2017 email) to the total debt. The total debt was $1.3 million higher than the purchase price, and continued to accrue with interest and costs.

11 The first asset purchase agreement did not close at the end of August 2017. On September 6, 2017 the Receiver and Jaycap entered into a second asset purchase agreement, which reduced the purchase price. On September 8, 2017 the Receiver filed an application to vacate the first approval and vesting order and sought approval of the second asset purchase agreement.

12 The guarantors were served with this application and the appellant, Mr. Richardson, sent a series of letters to the Receiver's counsel asking for information and documents to support that a mistake had occurred. The Receiver's legal counsel provided answers to some, but not all, of these requests.

13 The application was set for September 19, 2017 but adjourned and heard on October 26, 2017. The chambers judge reserved to consider the submissions and to review Mr. Richardson's materials which had not made it to the court file before the hearing. She issued her decision a week later and granted the second approval and vesting order. She found that she was not precluded from vacating the first order and issuing another. The first approval and vesting order did not direct the Receiver to close the transaction, but approved the terms of the asset purchase agreement and its execution by the Receiver. Pursuant to the termination clause, the agreement could be terminated by the parties if certain conditions were met.

14 The chambers judge also found that the Receiver and Jaycap terminated the first asset purchase agreement since they had, by error, failed to revise the purchase price in the agreement in accordance with earlier correspondence. The chambers judge found that the parties met the requirements for mutual mistake. She also found that they could rely on the termination provisions of the first asset purchase agreement.

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

16 The guarantors now appeal stating that the chambers judge erred in finding mutual mistake. Further, given the lack of information and Jaycap's instructions in the August 2, 2017 email to the Receiver to conceal from the guarantors their liability

under the guarantee, the guarantors argue that the Receiver's conduct casts doubt on the integrity of the process. They argue that the Receiver did not discharge its independent duty and was following instructions from Jaycap, who had a change of heart about the transaction and wanted a reduced price. As a result, the second approval and vesting order should be set aside, the first asset purchase agreement should be reinstated, and the guarantors should be relieved of their liability under the guarantee.

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

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

Standard of Review

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

20 The decision to approve the second asset purchase agreement was a matter of discretion. A discretionary decision will only be reversed where that court misdirected itself on the law, or came to a decision that is so clearly wrong it amounts to an injustice, or where the court gave no, or insufficient, weight to relevant considerations: *Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19 (S.C.C.) at para 27, [2013] 2 S.C.R. 125 (S.C.C.).

Analysis

There was no mutual mistake

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

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

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

Lack of fairness and integrity of the process

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

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

26 A number of the documents and information Mr. Richardson sought while the application was pending is exactly the information that ought to have been provided to the court in support of the Receiver's application. Certainly the different understandings of the parties about the purchase price was put forward as a reason why the first transaction did not close. However, because the Receiver was seeking to vacate an earlier court order, some information about why the order needed to be vacated was required.

27 Further, the Receiver provided little information about the critical August 2, 2017 email and why no further clarification was sought from Jaycap about what it meant before the court order approving the first transaction was obtained. There was enough information in that email to put the Receiver on notice that there was a misunderstanding. Had the Receiver been more diligent, this whole situation may well have been avoided.

28 While insolvency proceedings are subject to special procedural rules and are understandably time sensitive in nature, these considerations do not relieve the Receiver from its basic obligations to the parties and the court. Nor do these considerations relieve the Receiver from providing evidence to meet its burden of proof to the requisite standard for each application that it brings. As summarized by the court in *Ravelston Corp., Re*, 2007 CanLII 2663, (2007), 29 C.B.R. (5th) 1 (Ont. S.C.J. [Commercial List]):

> [60] A court-appointed receiver is an officer of the Court appointed to discharge certain duties prescribed by the appointment order. *Parsons et al. v. Sovereign Bank of Canada*, 1912 CanLII 365 (UK JCPC), [1913] A.C. 160 at 167 (J.C.P.C.).
>
> [61] When a court-appointed receiver is appointed in the normal course, "the receiver-manager is given exclusive control over the assets and affairs of the company and, in this respect, the board of directors is displaced." *TD Bank v. Fortin et al.* (1978), 1978 CanLII 1934 (BC SC), 85 D.L.R. (3d) 111 at 113 (B.C.S.C.). The essence of a receiver's power is to settle liabilities and liquidate assets.
>
> [62] It is well established that a court-appointed receiver owes duties not only to the Court, but also to all parties interested in the debtor's assets, property and undertakings. This includes competing secured claimants, guarantors, creditors or contingent creditors and shareholders. *Ostrander v. Niagra Helicopters Ltd.* (1974), 1973 CanLII 467 (ON SC), 1 O.R. (2d) 281 (Ont. H.C.J.) [*Ostrander*].
>
> [63] A receiver has the duty to exercise such reasonable care, supervision and control of the debtor's property as an ordinary person would give to his or her own. A receiver's duty is to discharge the receiver's powers honestly and in good faith. A receiver's duty is that of a fiduciary to all interested stakeholders involving the debtor's assets, property and undertaking. *Ostrander, supra* at 286.

29 The Receiver's materials on their own do not provide the evidentiary basis to support the relief it was seeking. It was only several weeks later, when faced with serious opposition from Mr. Richardson, that Jaycap filed an affidavit with more, although still incomplete, information about what transpired.

30 The lack of information about what happened and the way the Receiver and Jaycap skirted around the issue in its application materials certainly did not help the perception of the Receiver's independence. The optics of the situation likely contributed to

the guarantors' suspicion that what transpired merited further inquiries and that the Receiver was following Jaycap's instructions to conceal from the guarantors the true state of affairs. Jaycap and the Receiver were jointly represented before this Court, which was also unusual and unhelpful particularly when counsel for Jaycap could not answer questions the Receiver would be expected to know. During the hearing, the panel found that the guarantors' submissions were persuasive.

31 The termination of the first asset purchase agreement was also left unexplained by the Receiver. Jaycap's evidence is that the Receiver failed to deliver closing documents, which allowed Jaycap to terminate. Jaycap signed a unilateral termination notice and the parties executed a mutual termination notice several weeks after the second asset purchase agreement was signed, and after Mr. Richardson launched his opposition. The chambers judge found that the first asset purchase agreement was terminated, but she did not explain in her reasons which termination was valid or why. Termination in these circumstances is not merely a matter between the parties as suggested by Jaycap. The circumstances surrounding the termination of the first asset agreement ought to have been canvassed as this remained a court-supervised sales process where the Receiver owed fiduciary duties to the parties to act fairly.

32 The Receiver provided no evidence about termination nor did it explain why it failed to deliver the final closing documents, giving rise to termination, when the first asset purchase agreement reflected its understanding of the purchase price. Typically, sophisticated commercial parties who sign unambiguous agreements, drafted with the assistance of their legal counsel, will be held to their bargain. Had the Receiver sought to compel Jaycap to close the first asset purchase agreement, instead of abandoning it, its application may well have been successful.

33 What is missing here is transparency. The process should be transparent. It should enable the court and interested parties to make an informed decision as to whether the sale can be considered fair and reasonable in the circumstances: *Toronto Dominion Bank v. Canadian Starter Drives Inc.*, 2011 ONSC 8004 (Ont. S.C.J. [Commercial List]) at para 5, 2011 CarswellOnt 15140 (Ont. S.C.J. [Commercial List]). Given the significant questions left unanswered by the Receiver, we have serious concerns about the efficacy, fairness and integrity of the process the Receiver followed between August 2, 2017 and the hearing of the application to approve the second asset purchase agreement. As a result, we disagree with the chambers judge that the Receiver met the requirements of *Soundair*.

Conclusion

34 As an aside, and as a further indication of the parties' approach to procedure was the parties' approach to the sealing orders. The court record demonstrates that the parties failed to file a sealing order, failed to file an affidavit they undertook to file, and failed to ensure that the Receiver's certificate met the requirements to release the bans and restore public access to the proceedings if that was the Receiver's intention in filing it.

35 After the hearing concluded, and in preparation for filing this judgment, this Court was unable to discern the scope of the sealing orders, in part because of the missing information and the patchwork of numerous blanket orders that were taken over information that probably should not have been sealed. We asked for assistance from the parties and were provided with very little useful information.

36 A review of the transcripts suggests to this Court that the parties ought to be more thoughtful in drafting their materials, in seeking bans, and in drafting those ban orders carefully, limiting public access to what is truly sensitive confidential information that could prejudice the insolvency process. The test for a sealing ban is set out in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522 (S.C.C.) and is not merely the consent or non-objection of the parties. Sealing bans are the exception and not the rule because they engage *Charter* interests and materially impact the court's work. Better practices are required.

37 The appeal is allowed, the order is set aside and the matter returned to Queen's Bench for a rehearing before a different judge.

Appeal allowed.

End of Document

TAB 8

2021 ABCA 144
Alberta Court of Appeal

1705221 Alberta Ltd v. Three M Mortgages Inc

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

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

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

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

Heard: April 1, 2021
Judgment: April 21, 2021
Docket: Edmonton Appeal 2003-0076AC, 2003-0077AC

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

Counsel: D.R. Bieganek, Q.C., for Appellant, 1705221 Alberta Ltd
K.A. Rowan, Q.C., for Respondents, Three M Mortgages Inc and Avatex Land Corporation
K.G. Heintz, for Respondents, Todd Oeming, Todd Oeming as the Personal Representative of the Estate of Albert Oeming, and the Estate of Albert Oeming
M.J. McCabe, Q.C., for Interested Party, BDO Canada Limited
B.G. Doherty, for Interested Party, Shelby Fehr

Subject: Civil Practice and Procedure; Corporate and Commercial; Insolvency

Table of Authorities

Cases considered:

Crown Trust Co. v. Rosenberg (1986), 60 O.R. (2d) 87, 22 C.P.C. (2d) 131, 39 D.L.R. (4th) 526, 67 C.B.R. (N.S.) 320 (note), 1986 CarswellOnt 235 (Ont. H.C.) — followed

Jaycap Financial Ltd v. Snowdon Block Inc (2019), 2019 ABCA 47, 2019 CarswellAlta 160, 68 C.B.R. (6th) 7 (Alta. C.A.) — followed

Pricewaterhousecoopers Inc v. 1905393 Alberta Ltd (2019), 2019 ABCA 433, 2019 CarswellAlta 2418, 74 C.B.R. (6th) 14, 98 Alta. L.R. (6th) 1 (Alta. C.A.) — followed

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

Skyepharma PLC v. Hyal Pharmaceutical Corp. (2000), 2000 CarswellOnt 466, 47 O.R. (3d) 234, 130 O.A.C. 273, 15 C.B.R. (4th) 298 (Ont. C.A.) — followed

Statutes considered:

Business Corporations Act, R.S.A. 2000, c. B-9

Generally — referred to

Civil Enforcement Act, R.S.A. 2000, c. C-15

Generally — referred to

Judicature Act, R.S.A. 2000, c. J-2
Generally — referred to

APPEALS by guarantors and prospective purchaser seeking to set aside order approving sale of lands to SF.

Per curiam:

Overview

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

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

3 The chambers judge applied the correct test in deciding whether to approve the sale recommended by the Receiver; therefore, for either appeal to succeed, one or both appellants must demonstrate that the chambers judge erred in the exercise of his discretion in approving the sale. This attracts a high degree of deference. Since the chambers judge did not misdirect himself on the law, this Court will only interfere if his decision was so clearly wrong that it amounts to an injustice or where the chambers judge gave no or insufficient weight to relevant considerations: *Jaycap Financial Ltd v Snowdon Block Inc* 2019 ABCA 47 at para 20.

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

Background

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

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

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

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

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

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

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

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

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

Decision of the Chambers Judge

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

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

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

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

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

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

The Soundair Test

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

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

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

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

i. Sufficient Efforts to Sell

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

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

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

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

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

26 Further, the Receiver addressed the disparity in valuations in its First Report. Briefly, the Altus Group appraisal included two parcels of land that were not part of the sale process. Of the three lots to be sold, Altus had a higher value per acre on Lots 1

and 2 which the Receiver advised was intrinsically related to the purchase of Lot 3 for the purposes of commercial/recreational development, which was not the zoning then existing.

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

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

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

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

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

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

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

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

34 It must be remembered that the position of 170 as a bidder in this context is not analogous to the Contract A/Contract B reasoning in the law of tenders. Even if 170's disappointment stemming from its wishful optimism of being able to purchase the lands is understandable, this is not the same as 170 having an enforceable legal right arising from sales guidance of the listing

agent. In any event, it would appear that 170 was not even aware of the guidance from the listing agent, which is now suggested to be a condition precedent to the Receiver accepting the Fehr offer.

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

ii. Whether the Interests of All Parties Have Been Considered

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

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

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

39 Nonetheless, it is helpful to examine the policy reasons why a prospective purchaser's ability to challenge a sale approval application should be closely circumscribed. As noted by the Ontario Court of Appeal in *Skyepharma PLC*v *Hyal Pharmaceutical Corp* (2000), 47 OR (3d) 234, 130 OAC 273 at paras 25-28, the prospective purchaser has no legal or proprietary right in the lands being sold. Normally, an examination of the sale process and whether the Receiver has complied with the *Soundair* principles, is focussed on those with a direct interest in the sale process, primarily the creditors.

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

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

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

> I have decided this appeal in the way I have in order to assure business people who deal with court-appointed receivers that they can have confidence that an agreement which they make with a court-appointed receiver will be far more than a platform upon which others may bargain at the court approval stage. I think that persons who enter into agreements with

court-appointed receivers, following a disposition procedure that is appropriate given the nature of the assets involved, should expect that their bargain will be confirmed by the court.

iii. The Efficacy and Integrity of the Sale Process

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

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

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

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

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

47 While courts should avoid delving "into the minutia of the process or of the selling strategy adopted by the receiver", courts must still ensure the process was fair: *Soundair* at para 49. The chambers judge afforded both Oeming and 170 the opportunity to make full submissions and tender further evidence before deciding to approve the sale to Fehr. Having concluded that both the sale process and the Fehr offer were fair and reasonable, there was no reason for the chambers judge to compare 170's third offer to the offer accepted, nor to enter into a new bid process.

Conclusion

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

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

Appeals dismissed.

TAB 9

2018 ONCA 581
Ontario Court of Appeal

B&M Handelman Investments Limited v. Drotos

2018 CarswellOnt 10201, 2018 ONCA 581, 293 A.C.W.S. (3d) 758, 61 C.B.R. (6th) 208

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

B&M Handelman Investments Limited, Flordale Holdings Limited, M. Himel Holdings Inc., 1530468 Ontario Ltd., Maxoren Investments, and Sheilaco Investments Inc. (Applicants / Responding Party) and Christine Drotos (Respondent)

David M. Paciocco J.A.

Heard: June 13, 2018
Judgment: June 25, 2018
Docket: CA M49307, (C65474)

Counsel: Eric Golden, for Moving party, Rosen Goldberg Inc.
P. James Zibarras, Leslie Dizgun, Caitlin Fell, for Responding party, World Finance Corporation
David Preger, for Responding party, B&M Handelman Investments Limited
Adam J. Wygodny, for Responding party, Money Gate Investment Corp.
Miranda Spence, for Purchaser, Frederic P. Kielburger

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

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Regal Constellation Hotel Ltd., Re (2004), 2004 CarswellOnt 2653, 50 C.B.R. (4th) 258, 35 C.L.R. (3d) 31, (sub nom. *HSBC Bank of Canada v. Regal Constellation Hotel Ltd. (Receiver of))* 242 D.L.R. (4th) 689, 23 R.P.R. (4th) 64, (sub nom. *Regal Constellation Hotel Ltd. (Receivership), Re)* 188 O.A.C. 97, 71 O.R. (3d) 355 (Ont. C.A.) — followed

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

Ted Leroy Trucking Ltd., Re (2010), 2010 SCC 60, 2010 CarswellBC 3419, 2010 CarswellBC 3420, 12 B.C.L.R. (5th) 1, (sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 D.T.C. 5006 (Eng.), (sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, (sub nom. *Ted LeRoy Trucking Ltd., Re)* 326 D.L.R. (4th) 577, (sub nom. *Century Services Inc. v. Canada (A.G.))* [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, (sub nom. *Leroy (Ted) Trucking Ltd., Re)* 296 B.C.A.C. 1, (sub nom. *Leroy (Ted) Trucking Ltd., Re)* 503 W.A.C. 1 (S.C.C.) — considered

2403177 Ontario Inc. v. Bending Lake Iron Group Ltd. (2016), 2016 ONCA 225, 2016 CarswellOnt 4553, 35 C.B.R. (6th) 102, 396 D.L.R. (4th) 635, 347 O.A.C. 226 (Ont. C.A.) — considered

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

s. 193(b) — considered

s. 193(c) — referred to

s. 193(e) — considered

s. 195 — referred to

s. 243(1) — referred to

s. 193(a)-193(d) — referred to
Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

MOTION by receiver for directions regarding mortgagee's appeal, seeking order that mortgagee be denied leave to appeal, order that appealed order was not stayed by mortgagee's notice of appeal, and order approving sale.

***David M. Paciocco J.A.*:**

OVERVIEW

1 Rosen Goldberg Inc. is the receiver (the "Receiver") of property known municipally as 4 Birchmount Avenue, Toronto (the "Birchmount Property"). At all material times, the Birchmount Property was registered to Ms. Christine Drotos (the "Debtor").

2 On June 1, 2018, Dunphy J. made an Approval and Vesting Order approving the Receiver's sale of the Birchmount Property (the "Order"). The Order authorizes the transfer of the Birchmount Property to Mr. Frederic P. Kielburger (the "Purchaser") free and clear of all mortgages.

3 On June 7, 2018, World Finance Corporation ("World Finance"), a mortgagee of the Birchmount Property, filed a notice of appeal challenging the Order. In its notice of appeal, World Finance asserts that its appeal was as of right pursuant to s. 193(b) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"). In the alternative, it sought leave to appeal the Order pursuant to s. 193(e).

4 If World Finance was appealing as of right, the Order would have automatically been stayed pending World Finance's appeal pursuant to *BIA*, s. 195. This stay would have prevented the Receiver from completing the sale of the Birchmount Property, which was set to close on June 14, 2018.

5 On June 11, 2018, the Receiver brought the instant motion on an urgent basis seeking directions regarding World Finance's appeal. The Receiver took the position that s. 193(b) did not apply and that no leave to appeal should be granted under s. 193(e). The Receiver sought an order declaring that the Order was not stayed by World Finance's notice of appeal and approving the closing of the sale on June 14, 2018.

6 After denying an adjournment motion brought by World Finance, I abridged the time for service and heard the Receiver's motion on June 13, 2018. At the conclusion of the hearing, I held that World Finance does not have an appeal as of right pursuant to s. 193(b). I denied leave to appeal pursuant to s. 193(e). And I also approved the sale pursuant to the Order. I indicated that reasons for my decision would follow in writing. These are my reasons.

THE RECEIVERSHIP AND THE APPLICATION FOR THE APPROVAL AND VESTING ORDER

7 The Birchmount Property is a partially constructed 12,900 square-foot home located in the Scarborough Bluffs neighborhood. At all material times, the Birchmount Property was vacant, in need of repairs, and unfit for occupancy. There were three mortgages on title

8 The first mortgagee, Pillar Capital Corporation ("Pillar"), claims that as of May 29, 2018 it was owed $2,534,582.27 under its mortgage.

9 The second mortgage is held by a group of corporations comprising the applicants in the proceedings below. B&M Handelman Investments Limited ("B&M") is one of the second mortgagees. It claims that as of June 11, 2018, $1,164,755.78 was owing under the second mortgage, excluding legal fees.

10 The third mortgage is held 69.9% and 30.1% by World Finance and Money Gate Mortgage Investment Corporation ("Money Gate"), respectively. World Finance alleges that the total amount owing under this third mortgage was approximately $6.7 million as of May 14, 2018.

11 On April 10, 2018, B & M applied, pursuant to BIA s. 243(1), for the appointment of a receiver. On April 13, 2018, the requested Appointment Order was made, appointing the Rosen Goldberg Inc. as receiver over the Debtor's lands and premises, including the Birchmount Property.

12 The Appointment Order contains the usual Model Order clauses granting the Receiver the power to engage consultants and appraisers, market the property, and negotiate the terms and conditions of sale. The Appointment Order also permits the Receiver to report to, meet with, and discuss with affected Persons (as defined in the Appointment Order) "as the Receiver deems appropriate" and to share information subject to confidentiality terms. It permits the Receiver to sell the Birchmount Property with court approval and to apply for a vesting order to convey the property to a purchaser free and clear of encumbrances.

13 After obtaining the Appointment Order, the Receiver secured an appraisal of the Birchmount Property which set the value at $3.2 million. The Receiver considered different sale options and determined that an MLS listing process was the optimal method. After reviewing various listing proposals, it entered into a 90-day listing agreement with Chris Kelos of Re/Max Corbo & Kelos Realty Ltd. ("Kelos"). Kelos listed the Birchmount Property on the MLS on April 30, 2018 at a sale price of $3.8 million.

14 On May 3, 2018, an unconditional offer to purchase for $2.5 million was submitted. The Receiver did not accept this offer.

15 On May 8, 2018, the Receiver received an unconditional offer to purchase from the Purchaser. Following negotiations, the Purchaser increased his offer to $3.45 million, an amount higher than the appraised value. Nonetheless, it was evident that insufficient proceeds of sale would be generated by this offer to fully retire the encumbrances. In fact, B&M would suffer a shortfall and World Finance would recover nothing. The Receiver accepted this offer subject to court approval.

16 The Receiver then brought an application before Dunphy J. in the instant Debtor's bankruptcy proceedings, seeking approval of the sale of the Birchmount Property. At the same time, the Receiver also applied for approval of the sale of four other properties from the separate bankruptcy proceeding of Comfort Capital. The sale approvals raised similar issues, but the two bankruptcies involve different debtors and different subsequent mortgagees. World Finance claims to be interested in both of the bankruptcies. Although the Receiver brought both applications at the same time, no formal consolidation order was made linking or joining the two applications. The form of receivership order in both cases is effectively identical.

17 With respect to the instant Debtor's bankruptcy proceedings, the parties disputed who had the authority to speak in respect of the third mortgage on the Birchmount Property. World Finance appeared and opposed the Receiver's application. Money Gate appeared and supported the Receiver's position.

18 World Finance's key complaint before Dunphy J. was that the Receiver failed to consult World Finance about the sale and marketing process and the listing price. In its view, had the Receiver discharged its duty, a higher purchase price would have

resulted. In support of its assertion that the property was undervalued, World Finance relied on the opinion of a realtor who states that he would have listed the Birchmount Property at between $4 million to $4.5 million, and would not have accepted an offer of $3.4 million.

THE DECISION OF DUNPHY J.

19 Dunphy J. granted the Order respecting the Birchmount Property. He considered the criteria in *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1, [1991] O.J. No. 1137 (Ont. C.A.) and the procedure adopted by the Receiver in selling the property:

> . . . In each case, the first step the Receiver took was to seek appraisals. These are a necessary pre-condition to a Receiver having a sense of what the property being marketed is worth. The Receiver obtained two appraisals in respect of the High Point property, one appraisal in respect of the Bridge property, one appraisal for the Loyalist property, two for the Caldwell property, and one for the Birchmount property.
>
> The Receiver also consider [*sic*] how best to market these properties. In considering that question, the Receiver had to have regard to the state of these properties. At least two of them were in a very challenging state [. . .] The Birchmount property is a partially constructed shell with a roof that has a hole in it and has become a home for wild animals.
>
> Among other things, the Receiver also had to consider the carrying costs of these properties in terms of accrued reality [*sic*] taxes, which are in arrears on many of the properties, and the state of the market and other relevant considerations.
>
> After considering the matter, the Receiver determined that proceeding to market through the MLS process was the optimal process to follow in relation to the five properties that are the subject matter of these motions.
>
> The Receiver also considered possible listing agents and in considering that question looked at the experience of the brokers considered, looked at their experience in the areas, considered their recommendations as to listing price and considered that in relation to appraisals . . .
>
> [. . .]
>
> In the case of the B&M receivership, which is to say the Birchmount property, an information package was prepared, there were online and advertising and email blasts, open houses, newspaper coverage was arranged . . .

20 Justice Dunphy concluded that fair market value had been obtained. He referred to the realtor's opinion of value that World Finance relied upon to support its position that a higher value could be obtained, stating that while this report had some helpful comments, it did "not have any solid valuation evidence that I can attach weight to in it." Justice Dunphy concluded that the Receiver's business judgment had been applied and informed by the appraisals responsibly sought.

21 He applied the *Soundair* principles to the argument that the Receiver failed to consult World Finance. He was not prepared to accept the criticism that the Receiver acted too quickly. In his view, the MLS marketing process was designed to obtain offers as soon as reasonably practicable and in each case multiple offers were received. Nor was Dunphy J. persuaded that the Receiver failed to consider the interests of all parties. He stated:

> There has been some confusion about who those other parties are and how much their claims are. Who is entitled to speak for them has also been an issue in this case. Ultimately, however, the interests of all of the parties is the same. Their interest is in obtaining the highest and best price reasonably available.

22 Justice Dunphy dismissed the specific complaint that World Finance ought to have been consulted on the marketing process and given a greater degree of input, concluding as follows:

> This objection runs into a number of factual walls. Firstly, the appraisals were obtained in this case and they were available to the creditors if they chose. The receivership order allowed the Receiver to share information with creditors subject to appropriate NDAs. At least some of the stakeholders did obtain the appraisals and signed NDAs. I cannot say that this

was not available to others. Nobody in this case contacted the Receiver until the time came to begin the process of seeking court approval, which does not speak well for the level of interest they had in seeking to shape the process.

THE ISSUES

23 The issues on this motion are: (1) whether the proposed appeal of the Order is as of right pursuant to s. 193(b);[1] and (2) alternatively, whether leave to appeal should be granted pursuant to s. 193(e). If the appeal is not as of right, and leave is not appropriate, the Receiver asks this court to approve the sale to the Purchaser, as provided for in the agreement of purchase and sale.

24 Section 193 of the *BIA* provides, in relevant part:

> Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:
>
> [. . .]
>
> (b) if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings;
>
> [. . .]
>
> (e) in any other case by leave of a judge of the Court of Appeal.

ANALYSIS

(1) Subsection 193(b) does not apply

25 World Finance contends that it has the right to appeal the Order under s. 193(b). It claims that any order made in connection with its appeal of the Approval and Vesting Order related to the Birchmount Property will likely affect other cases of a similar nature relating to Approval and Vesting Orders made in the Comfort Capital bankruptcy.

26 World Finance contends that although there are two separate bankruptcies involved, in substance the application to approve the sale of the five properties was only one bankruptcy proceeding within the meaning of s. 193(b). It notes that the Receiver brought the applications together before the same judge. Each application raised the same course of conduct by the Receiver. And one set of reasons was provided. World Finance argues that it would be met with an issue estoppel argument if it raises the same issues in subsequent proceedings to approve vesting orders on other properties. It contends that s. 193(b) should be interpreted purposively, giving World Finance an appeal as of right so that it is not left, unfairly, without an avenue to challenge the Order.

27 First, I do not agree that s. 193(b) should be interpreted in the expansive manner that World Finance submits. In *Downing Street Financial Inc. v. Harmony Village-Sheppard Inc.*, 2017 ONCA 611, 49 C.B.R. (6th) 173 (Ont. C.A.), at para. 20, Tulloch J.A. described the "clear direction in recent case law in favour of a narrow construal of the rights to appeal in ss. 193(a) to (d) of the *BIA*", citing *Enroute Imports Inc., Re*, 2016 ONCA 247, 35 C.B.R. (6th) 1 (Ont. C.A.), at para. 5. This "narrow construal" is incompatible with World Finance's position, and there are good reasons for it.

28 In *2403177 Ontario Inc. v. Bending Lake Iron Group Ltd.*, 2016 ONCA 225, 396 D.L.R. (4th) 635 (Ont. C.A.), at para. 49, Brown J.A. explained that initially the *BIA* provided only for appeals as of right. The inclusion in 1949 of a leave to appeal provision removed the need for a broad interpretive approach to ss. 193(a) to (d). More importantly, the appeal as of right provisions should be read harmoniously with the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, which requires leave for all appeals from orders made under the statute.[2] Reading s. 193's appeal as of right subsections narrowly avoids disharmony between the two insolvency regimes.

29 In *Bending Lake*, Brown J.A. explained at para. 32 that s. 193(b) applies where there is a real dispute that is likely to affect another case in the *same* bankruptcy proceedings. The Order that World Finance proposes to appeal was made in the instant Debtor's bankruptcy and pertains only to this bankruptcy proceeding. The fact that the outcome of the proposed appeal could affect cases arising out of the Comfort Capital bankruptcy is insufficient to give rise to an appeal as of right. There is no appeal as of right in this case under s. 193(b).

30 Second, this outcome does not operate to unfairly deny World Finance an opportunity to challenge the Order that it says will likely affect other cases it will be involved in. This is because a party whose interest are likely to be affected in other case of a similar nature arising in other bankruptcy proceedings can move to protect those interests by seeking leave to appeal, where an appeal as of right is not available. Where leave is warranted in the circumstances, it will be granted.

31 I turn, then, to World Finance's alternative position that leave to appeal should be granted under s. 193(e) in this case.

(2) Leave to appeal should not be granted

32 The granting of leave to appeal under s. 193(e) is discretionary and contextual. The test for leave described by Blair J.A. in *Business Development Bank of Canada v. Pine Tree Resorts Inc.*, 2013 ONCA 282, 115 O.R. (3d) 617 (Ont. C.A.), at para. 29, was adopted by a panel of this court in *Impact Tool & Mould Inc. (Receiver of) v. Impact Tool & Mould Inc. (Trustee of)*, 2013 ONCA 697 (Ont. C.A.), at para. 3. The proposed appeal must:

> a) raise an issue that is of general importance to the practice in bankruptcy/insolvency matters or to the administration of justice as a whole, and is one that this [c]ourt should therefore consider and address;
>
> b) be *prima facie* meritorious; and
>
> c) [not] unduly hinder the progress of the bankruptcy/insolvency proceedings.

33 As Doherty J.A. noted in *Ravelston Corp., Re*, [2005] O.J. No. 5351, 24 C.B.R. (5th) 256 (Ont. C.A.), at para. 28, the leave inquiry should begin with some consideration of the merits of the proposed appeal, for if the appeal cannot possibly succeed, "there is no point in granting leave to appeal regardless of how many other factors might support the granting of leave to appeal."

34 World Finance argues that its proposed appeal is *prima facie* meritorious. It contends that the Receiver failed to consider World Finance's interests, and that the process used was unfair because the Receiver did not consult with World Finance on the marketing process, or the price at which the Birchmount Property would be listed. It urges that Dunphy J. misapplied the *Soundair* principles in finding otherwise.

35 Specifically, World Finance claims that Dunphy J. erred in law when finding that the Receiver had considered World Finance's interests by assuming that all parties had the same interest, namely, obtaining a higher sale price. It further submits that he erred in law in finding the process to have been fair by considering irrelevant or improper explanations for the Receiver's failure to consult with World Finance about the marketing process and listing price.

36 In my view, World Finance's grounds of appeal are not legitimately arguable points. They do not present a realistic possibility of success and therefore lack *prima facie* merit.

37 First, there is no reasonable prospect that fault could be found in Dunphy J.'s conclusion that, in seeking the highest and best price reasonably available, the Receiver was considering the shared interest of all of the parties. World Finance's argument that, as a fulcrum creditor, it had unique interests in the marketing strategy and list price that were not considered has no traction. Marketing strategy and list price are means to an end, namely, achieving the highest and best price reasonably available, the very thing that Dunphy J. considered.

38 World Finance's claim that Dunphy J. considered irrelevant and improper explanations for the Receiver's failure to consult directly with World Finance about the marketing and listing price for the Birchmount Property is also without merit.

39 World Finance has not presented any authority for the proposition that a receiver has a positive obligation to consult with subsequent mortgagees as to a particular sales process and the listing price.

40 Indeed, the Appointment Order in this case expressly permits the Receiver to report to, meet with, and discuss with affected Persons "as the Receiver deems appropriate" and to share information subject to confidentiality terms. The Receiver had discretion under the order to proceed as it did.

41 Moreover, even if a general duty to consult applied in this case, Dunphy J. was clearly entitled to come to the decision he did, for the reasons he expressed.

42 As he pointed out, in this case there was confusion as to the secured creditors' true identities and who represented their interests. There were also fraud allegations at play, which explained why the Receiver was not more proactive in its dealings with certain creditors. Moreover, those creditors previously showed a low level of interest in seeking to shape the process. In these circumstances, Dunphy J. found that making the appraisals available to those creditors who chose to consult them was sufficient.

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

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

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

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

47 In my view, granting leave to appeal would also unduly hinder the bankruptcy proceeding. If the sale was delayed, additional interest and costs payable on the first mortgage would have continued to accrue, serving only to further denude the second mortgagee's position.

48 Moreover, the agreement of purchase and sale provided specific timelines for the obtaining of court approval and for the closing of the sale. It permitted postponement of the closing date for only 60 days after the original closing date. The sale transaction was originally scheduled to close on June 11, 2018 and was postponed until June 14, 2018. If leave to appeal had been granted, the additional delay required for the disposition of the appeal could have resulted in the loss of this transaction.

49 Accordingly, I denied leave to appeal pursuant to s. 193(e).

50 I granted the Receiver's request to approve the sale under the agreement of purchase and sale because Dunphy J. found that the Receiver made efforts to obtain the best price and achieved the offer to purchase after considering the interests of all parties in a fair process that had integrity. Moreover, postponement of the sale would have created the prejudice described above.

DISPOSITION

51 For these reasons, I granted the Receiver's motion. I declare that World Finance does not have an appeal as of right pursuant to s. 193(b) and hold that leave to appeal pursuant to s. 193(e) of the *BIA* should not be granted. The Order approving the closing of the sale to the Purchaser on June 14, 2018 is also approved.

52 Costs are assessed by a judge of the Superior Court of Justice, Commercial List in insolvency proceedings. I will not interfere with that judge's discretion to do so, and therefore will make no costs order relating to the costs claimed by the Receiver and B&M.

53 Money Gate was not served with the motion but appeared and exercised its right of standing, as its interests were at stake. World Finance will pay costs, on a partial indemnity basis, to Money Gate in the amount of $2,000, inclusive of HST and disbursements.

54 The Purchaser also requested nominal costs. It did not play an active role in the proceedings. In my view, a costs award in favour of the purchaser is not warranted so I decline to make one.

Motion granted.

Footnotes

1 While World Finance raised the potential application of s. 193(c) in its factum, it did not seek to rely on that subsection in oral argument. In any event, reliance on that subsection would not have been tenable given World Finance's emphasis on process-related errors: *2403177 Ontario Inc. v. Bending Lake Iron Group Ltd.*, 2016 ONCA 225, 396 D.L.R. (4th) 635 (Ont. C.A.), at para. 54.

2 See also *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60, [2010] 3 S.C.R. 379 (S.C.C.), at para. 24, where a majority of the Supreme Court held that the *BIA* and the *CCAA* should be read harmoniously to the extent possible.

End of Document

TAB 10

2022 ONSC 653
Ontario Superior Court of Justice [Commercial List]

Harte Gold Corp. (Re)

2022 CarswellOnt 1698, 2022 ONSC 653, 343 A.C.W.S. (3d) 284, 97 C.B.R. (6th) 202

THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED (Applicant) and A PLAN OF COMPROMISE OR ARRANGEMENT OF HARTE GOLD CORP. (Applicant)

Penny J.

Heard: January 28, 2022
Judgment: February 4, 2022
Docket: CV-21-00673304-00CL

Counsel: Guy P. Martel, Danny Duy Vu, Lee Nicholson, William Rodler Dumais, for Applicant
Joseph Pasquariello, Chris Armstrong, Andrew Harmes, for Court appointed Monitor
Leanne M. Williams, for Board of Directors of the Applicant
Marc Wasserman, Kathryn Esaw, Dave Rosenblat, Justin Kanji, for 1000025833 Ontario Inc.
Stuart Brotman, Daniel Richer, for BNP Paribas
Sean Collins, Walker W. MacLeod, Natasha Rambaran, for Appian Capital Advisory LLP, 2729992 Ontario Corp., ANR Investments B.V. and AHG (Jersey) Limited
David Bish, for OMF Fund II SO Ltd., Orion Resource Partners (USA) LP and their affiliates
Orlando M. Rosa, Gordon P. Acton, for Netmizaaggamig Nishnaabeg First Nation (Pic Mobert First Nation)
Timothy Jones, for Attorney General of Ontario

Subject: Civil Practice and Procedure; Corporate and Commercial; Insolvency

Table of Authorities

Cases considered by *Penny J.*:

Arrangement relatif à Nemaska Lithium inc. (2020), 2020 CarswellQue 10601, 2020 QCCS 3218 (Que. Bktcy.) — considered

Arrangement relatif à Nemaska Lithium inc. (2020), 2020 QCCA 1488, 2020 CarswellQue 11925 (C.A. Que.) — referred to

Lydian International Limited (Re) (2020), 2020 ONSC 4006, 2020 CarswellOnt 9768, 81 C.B.R. (6th) 218 (Ont. S.C.J. [Commercial List]) — followed

Plasco Energy, Re (July 17, 2015), Doc. Toronto CV-15-10869-00C (Ont. S.C.J. [Commercial List]) — considered

Quest University Canada (Re) (2020), 2020 BCSC 1883, 2020 CarswellBC 3091, 85 C.B.R. (6th) 41 (B.C. S.C.) — considered

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

Sino-Forest Corp., Re (2012), 2012 ONSC 4377, 2012 CarswellOnt 9430, 92 C.B.R. (5th) 99 (Ont. S.C.J. [Commercial List]) — referred to

Southern Star Developments Ltd. v. Quest University Canada (2020), 2020 BCCA 364, 2020 CarswellBC 3252, 85 C.B.R. (6th) 96 (B.C. C.A.) — referred to

Stelco Inc., Re (2006), 2006 CarswellOnt 863, 18 C.B.R. (5th) 173 (Ont. S.C.J. [Commercial List]) — referred to

Target Canada Co., Re (2015), 2015 ONSC 1487, 2015 CarswellOnt 3261, 23 C.B.R. (6th) 314 (Ont. S.C.J.) — referred to

Victor Cantore v. Nemaska Lithium Inc. (Formerly Nemaska Lithium Inc., Nemaska Lithium Whabouchi Mine Inc., Nemaska Lithium Shawinigan Transformation Inc., Nemaska Lithium P1p Inc. and Nemaska Lithium Innovation Inc.), et al. (2021), 2021 CarswellQue 4589, 2021 CarswellQue 4590 (S.C.C.) — referred to

9354-9186 Québec inc. v. Callidus Capital Corp. (2020), 2020 SCC 10, 2020 CSC 10, 2020 CarswellQue 3772, 2020 CarswellQue 3773, 78 C.B.R. (6th) 1, 444 D.L.R. (4th) 373, 1 B.L.R. (6th) 1 (S.C.C.) — followed

Statutes considered:

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

Generally — referred to

Business Corporations Act, R.S.O. 1990, c. B.16

Generally — referred to

s. 168 — referred to

s. 168(1)(g) — referred to

s. 186(1) "reorganization" — referred to

s. 186(2) — referred to

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

Generally — referred to

s. 5.1(2) [en. 1997, c. 12, s. 122] — referred to

s. 6(2) — referred to

s. 6(8) — referred to

s. 11 — pursuant to

s. 11.02 [en. 2005, c. 47, s. 128] — referred to

s. 11.3 [en. 1997, c. 12, s. 124] — referred to

s. 11.3(4) [en. 2005, c. 47, s. 128] — referred to

s. 22(1) — referred to

s. 23(1)(k) — referred to

s. 36 — referred to

s. 36(1) — referred to

s. 36(3) — referred to

MOTION by company for approval of sale of company's mining enterprise to strategic purchaser, including reverse vesting order structure of transaction, and for order extending stay and expanding monitor's powers.

***Penny J.*:**

1 This is a motion by Harte Gold for an approval and reverse vesting order involving the sale of Harte Gold's mining enterprise to a strategic purchaser (that is, an entity in the gold mining business) and for an order extending the stay and expanding the Monitor's powers to include new entities to be created for the purposes of implementing Harte Gold's proposed restructuring. There was no opposition to the relief sought. All those who appeared at the hearing supported approval of the transaction.

2 Following the conclusion of oral submissions on Friday, January 28, 2022, I issued the orders sought with written reasons to follow. These are the reasons.

outside the ordinary course of business', as provided in s. 36(1). This is because the RVO structure is really a purchase of shares of the debtor and "vesting out" from the debtor to a new company, of unwanted assets, obligations and liabilities.

37 I am, therefore, not sure I agree with the analysis which founds jurisdiction to issue an RVO in s. 36(1). But that can be left for another day because I am wholeheartedly in agreement that s. 11, as broadly interpreted in the jurisprudence including, most recently, *Callidus*, clearly provides the court with jurisdiction to issue such an order, provided the discretion available under s. 11 is exercised in accordance with the objects and purposes of the CCAA. And it is for this reason that I also wholeheartedly agree that the analytical framework of s. 36(3) for considering an asset sale transaction, even though s. 36 may not support a standalone basis for jurisdiction in an RVO situation, should be applied, with necessary modifications, to an RVO transaction.

38 Given this context, however, I think it would be wrong to regard employment of the RVO structure in an insolvency situation as the "norm" or something that is routine or ordinary course. Neither the BIA nor the CCAA deal specifically with the use or application of an RVO structure. The judicial authorities approving this approach, while there are now quite a few, do not generally provide much guidance on the positive and negative implications of this restructuring technique or what to look out for. Broader-based commentary and discussion is only now just now starting to emerge. This suggests to me that the RVO should continue to be regarded as an unusual or extraordinary measure; not an approach appropriate in any case merely because it may be more convenient or beneficial for the purchaser. Approval of the use of an RVO structure should, therefore, involve close scrutiny. The Monitor and the court must be diligent in ensuring that the restructuring is fair and reasonable to all parties having regard to the objectives and statutory constraints of the CCAA. This is particularly the case where there is no party with a significant stake in the outcome opposing the use of an RVO structure. The debtor, the purchaser and especially the Monitor, as the court appointed officer overseeing the process and answerable to the court (and in addition to all the usual enquiries and reporting obligations), must be prepared to answer questions such as:

(a) Why is the RVO necessary in this case?

(b) Does the RVO structure produce an economic result at least as favourable as any other viable alternative?

(c) Is any stakeholder worse off under the RVO structure than they would have been under any other viable alternative? and

(d) Does the consideration being paid for the debtor's business reflect the importance and value of the licences and permits (or other intangible assets) being preserved under the RVO structure?

39 With this in mind, I will turn to the enumerated s. 36(3) factors. To the extent there are RVO specific issues of concern apart from those enumerated in s. 36(3), I will also address those in the following section of my analysis.

The Section 36 Factors in the RVO Context

Reasonableness of the Process Leading to the Proposed Sale

40 Between the pre-filing strategic review process and the court approved SISP, the business and assets of Harte Gold have been extensively marketed on a global basis. While the SISP was subject to variation from the format contemplated in my earlier order, the ability of the applicant, in conjunction with the Monitor, to vary the process was already established in that order. I find, in any event, that the adjustments made were appropriate in the circumstances, given there were no new bidders and the only offers came from the two competing secured creditors who had already been extensively involved in the process and whose status, interests and objectives were well known to the applicant and the Monitor.

41 Prior to its appointment as Monitor, FTI was intimately involved at all stages of the strategic review process, including the implementation of the pre-filing marketing process and the negotiation of the original proposed subscription agreement that was executed prior to the commencement of the CCAA proceedings and subsequently replaced by the stalking horse bid and the SARSA.

42 Following the commencement of the CCAA proceedings, the Monitor was involved in the negotiations that resulted in the execution of the stalking horse bid and the SARSA. In addition, the Monitor has overseen the implementation of the SISP and

TAB 11

KeyCite treatment
Most Negative Treatment: Recently added (treatment not yet designated)
Most Recent Recently added (treatment not yet designated): Hudson's Bay Company, Re | 2025 ONSC 3328, 2025 CarswellOnt 9289 | (Ont. S.C.J. [Commercial List], Jun 3, 2025)

2023 ONSC 3314
Ontario Superior Court of Justice

Acerus Pharmaceuticals Corporation (Re)

2023 CarswellOnt 8791, 2023 ONSC 3314, 2023 A.C.W.S. 3438

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF ACERUS PHARMACEUTICALS CORPORATION, ACERUS BIOPHARMA INC., ACERUS LABS INC., AND ACERUS PHARMACEUTICALS USA, LLC

Penny J.

Heard: May 30, 2023
Judgment: June 2, 2023
Docket: CV-23-00693595-00CL

Counsel: Elizabeth Pillon, Lee Nicholson, Philip Yang, for Applicants
Stuart Brotman, Mitch Stephenson, for Monitor
Mervyn D. Abramowitz, for United States of America
Alex MacFarlane, Xiaodi Jin, for First Generation Capital Inc.
D.J. Miller, Alexander Soutter, for Jones Day
Kristina Bezprozvannykh, for Canada Life Assurance Company
Troels Keldmann — as principal of Keldmann Healthcare and Keldmann Innovation
Brian Gilderman — as principal of Precision Clinical Research, Inc.

Subject: Civil Practice and Procedure; Corporate and Commercial; Insolvency
Table of Authorities
Cases considered by *Penny J.*:

Harte Gold Corp. (Re) (2022), 2022 ONSC 653, 2022 CarswellOnt 1698, 97 C.B.R. (6th) 202 (Ont. S.C.J. [Commercial List]) — referred to

Just Energy Group Inc. et. al. v. Morgan Stanley Capital Group Inc. et. al. (2022), 2022 ONSC 6354, 2022 CarswellOnt 16700, 6 C.B.R. (7th) 386 (Ont. S.C.J.) — referred to

Lydian International Limited (Re) (2020), 2020 ONSC 4006, 2020 CarswellOnt 9768, 81 C.B.R. (6th) 218 (Ont. S.C.J. [Commercial List]) — referred to

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

Target Canada Co., Re (2015), 2015 ONSC 1487, 2015 CarswellOnt 3261, 23 C.B.R. (6th) 314 (Ont. S.C.J.) — referred to

Statutes considered:

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

Generally — referred to

s. 5.1(2) [en. 1997, c. 12, s. 122] — referred to

s. 11 — referred to

s. 36 — referred to

s. 36(3) — referred to

MOTION for approval of Subscription Agreement and proposed transactions, and granting of release, ancillary releases and sealing order.

***Penny J.*:**

Overview

1 On May 30, 2023 I granted a sale approval and reverse vesting order, extended the stay and granted other ancillary relief, with reasons to follow. These are my reasons. The capitalized terms used in these reasons reflect the meanings attributed to those terms in the relevant documents submitted to the court on this motion.

Background

2 APC is an Ontario public company listed on the TSX and the OTCQB Exchange. APC operates out of its registered head office in Mississauga, Ontario. ABI and ALI are also OBCA corporations. APL was formed under the laws of the State of Delaware. There is a cross border component to these proceedings.

3 Each of the subsidiaries (ABI, ALI, and APL) are wholly owned by APC. The applicants comprise one corporate group which is operated and controlled by the management of APC at its head office in Mississauga, Ontario.

4 The applicants are in a specialized pharmaceutical business, focused on the commercialization and development of prescription men's health products. Their primary products are (a) Natesto, which is currently the sole source of revenue; and (b) Noctiva, which is currently not in distribution. There are also a number of secondary products.

5 The procedural history is uncontroversial. It is well laid out in the supporting material, the Monitor's Third Report and the applicants' factum. I will not repeat any of that here, other than to note that the proposed transactions are the result of both a prefiling strategic process and SISP, initialed by the applicants and overseen by E&Y, and a subsequent court approved SISP, also overseen by E&Y, which had been appointed Monitor by the initial order in these proceedings.

6 The proposed transactions which are before the Court are structured in the form of a Subscription Agreement, with the consideration or purchase price in the form of a credit bid of all secured debt obligations owing to First Generation Capital (FGC). FGC is the majority shareholder of APC. It is also the first in priority secured creditor of the applicants and the court approved DIP Lender. It is owed over $60 million in secured debt.

7 The proposed transaction structure provides for available funding to remain with the applicants and court officers, as necessary, to implement the transactions, address ancillary post-closing steps, and emerge from the CCAA proceedings. The transactions contemplated in the Subscription Agreement have been structured as a "reverse vesting" (or RVO) transaction. The transactions provide for a share transaction under which:

(a) FGC will subscribe for and purchase new shares of APC, who will, in turn, cancel and terminate all of its existing shares so that FGC may become the sole shareholder of APC and ultimately, each of the subsidiaries of APC (including APL); and

(b) all excluded contracts, excluded assets, and excluded liabilities with respect to the Companies (including APL) will be transferred and "vested out" to corporations (Residual Cos.) to be incorporated by APC in advance of the closing date, so as to allow FGC to indirectly acquire APC's business and assets on a "free and clear" basis.

Issues

8 The issues to be determined on this motion are whether this Court should:

(a) approve the Subscription Agreement and proposed transactions in the form of an Approval and Reverse Vesting Order;

(b) grant the requested releases in favour of the applicants' directors, officers, employees and advisors, FAAN as CRO, the Monitor and its advisors and FGC and its directors, officers and advisors;

(c) grant ancillary relief in respect of the shares being cancelled and the articles of reorganization;

(d) grant the sealing order over the bid comparison chart in the Monitor's Third Report; and

(e) extend the stay period.

Analysis

Jurisdiction and Factors

9 Section 11 of the CCAA confers jurisdiction on the court in the broadest of terms: "the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances".

10 Section 36(3) of the CCAA provides a non-exhaustive list of factors to be considered on a motion to approve a sale. While this motion is not for approval of a traditional asset sale, the s. 36(3) factors have been applied in an ARVO context. The factors include:

(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.

11 The s. 36(3) criteria largely correspond to the principles articulated in *Royal Bank v. Soundair Corp*1991 CanLII 2727ONCA for the approval of the sale of assets in an insolvency scenario:

(a) whether sufficient effort has been made to obtain the best price and that the debtor has not acted improvidently;

(b) the interests of all parties;

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

(d) whether there has been unfairness in the working out of the process: see *Target Canada Co. (Re)*, 2015 ONSC 1487, at paras. 14-17.

12 Use of the ARVO structure is an unusual or extraordinary measure; not an approach appropriate in any case merely because it may be more convenient or beneficial for the purchaser. Approval of the use of an ARVO structure must be preceded by close scrutiny. The Monitor and the court must be diligent in ensuring that the restructuring is fair and reasonable to all

parties having regard to the objectives and statutory constraints of the CCAA. This is particularly the case where there is no party with a significant stake in the outcome opposing the use of the ARVO structure. The debtor, the purchaser and especially the Monitor, as the court appointed officer overseeing the process and answerable to the court (and in addition to all the usual enquiries and reporting obligations), must address questions such as:

(a) Why is the ARVO necessary in this case?

(b) Does the ARVO structure produce an economic result at least as favourable as any other viable alternative?

(c) Is any stakeholder worse off under the ARVO structure than they would have been under any other viable alternative? and

(d) Does the consideration being paid for the debtor's business reflect the importance and value of the licences and permits (or other intangible assets) being preserved under the ARVO structure?

The ARVO Structure is Necessary

13 The applicants operate in the pharmaceutical industry which is heavily regulated. In order for the applicants to carry on business, therefore, they are required to maintain various licenses. These licences are essential to the viability of the business. The insolvent circumstances of the applicants rules out a simple share purchase. In a traditional asset transaction, the purchaser would have to apply to transfer existing licences or apply for new ones. The purchaser in this case is not prepared to take the risk or invest the time and money to go through that process which is, by its very nature uncertain at best. There is no other comparable or viable transaction on offer.

14 The Subscription Agreement was structured as an ARVO transaction which is necessary to provide the following benefits:

(a) the applicants will maintain the multiple licenses that are required to maintain operations;

(b) the applicants have several in-progress trials and testing programs that are proceeding under and in the name of the applicants;

(c) the applicants hold various contracts with government entities; and

(d) the applicants have net operating losses in the approximate amount of $215 million.

15 The evidence is that it was not possible to structure the transaction in a different manner. The Monitor canvassed the possibility of structuring the transaction with FGC by way of a plan of arrangement. However, FGC was not willing to consider that approach.

More Favourable Economic Result

16 The benefits of the transactions include:

(a) based on the price payable under the Subscription Agreement, all of the applicants' secured liabilities will be satisfied by way of the credit bid (which, including advances under the DIP Facility, totals over $65 million), which would not otherwise be satisfied by any other potential alternative;

(b) various unsecured and contingent liabilities will be assumed, in comparison to the other potential alternatives which do not; and

(c) sufficient liquidity to provide for post-filing obligations incurred to date and those necessary to exit the CCAA proceedings, in comparison to the other potential alternatives which do not provide comparable funding.

17 The only other bid options available to the applicants were what is referred to in the material as Unsuccessful Bid 1 and Unsuccessful Bid 2. Neither of the unsuccessful bids was a better or even viable option because:

Unsuccessful Bid 1 offered nominal consideration for a minor asset owned by the applicants, where the consideration being offered was insufficient to cover even the expected professional fees related to closing that bid; and,

in respect of Unsuccessful Bid 2:

(i) the cash payment provided by Unsuccessful Bidder 2 was insufficient to repay the DIP Facility and amounts secured by charges in order to permit the applicants to exit the CCAA proceedings and the applicants are unable to generate liquidity from the excluded assets;

(ii) the vast majority of the offer value was driven by future sales, which are subject to a high degree of uncertainty and risk;

(iii) the Bid was only for a single product of the applicants and did not provide for a going-concern solution related to the remaining business of the applicants; and

(iv) the Bid does not assume any liabilities of the applicants nor provide for the potential employment of any existing employees.

The Transactions Do Not Disadvantage Any Stakeholder Relative to Any Other Viable Transaction

18 Under the proposed transactions, the applicants, some of the unsecured creditors and all of the existing shareholders will have no recovery. However, the evidence makes it clear that these stakeholders would not realize any recovery in any other available restructuring alternative either (i.e., under either of the unsuccessful bids or in a bankruptcy/liquidation).

19 The proposed transactions, by contrast, assure a going concern result. This will result in:

(a) an opportunity for each of the pharmaceutical products previously held by the applicants to be pursued and determine if they can be successfully brought to market at a future date;

(b) potential for several of the applicants' employees preserving their employment; and

(c) suppliers of goods and services having the opportunity to maintain their business relationship with the applicants on an ongoing basis in the future.

Is the Consideration Fair and Reasonable?

20 The consideration payable for the purchased shares under the Subscription Agreement is fair, reasonable, and reflects the importance of the assets being preserved under the RVO structure. The purchase price for the purchased shares will be satisfied through FGC's credit bid and the financing of post-filing obligations, which, as noted, together total in excess of $65 million. The fairness and reasonableness of the consideration is confirmed by the results of the pre-filing strategic process, the pre-filing SISP, and the court approved SISP (discussed in more detail below). The consideration allows for the satisfaction of all the applicants' secured liabilities and assumption of some unsecured liabilities. Further, the consideration provides the applicants with the ability to implement the transactions and exit the CCAA proceedings as a going-concern.

21 As noted earlier, the applicants' licenses and contracts with government entities may be difficult to transfer. Further, the applicants' tax attributes are also an important asset being preserved under the ARVO structure. The evidence is that the tax attributes were an important consideration for FGC in making its credit bid for all of the applicants' secured debt.

22 The market (and the evidence) has shown that there is no other bidder out there who is willing to pay more for these assets.

Section 36 CCAA Factors

The Process Leading Up to the Subscription Agreement and the Transactions

23 The execution of the Subscription Agreement represents the culmination of extensive solicitation efforts for investments beginning from March 2022 and a robust sales process conducted by the applicants and E&Y beginning from September 2022. These efforts include:

(a) the applicants seeking refinancing or investment options;

(b) the pre-filing SISP which commenced in September 2022 and concluded in November 2022, with E&Y having canvassed its global network for prospective bidders;

(c) during the course of the CCAA the Monitor broadly canvassed the market under the SISP by approaching known potential bidders from prior processes and contacting 20 additional parties;

(d) the careful consideration of all the bids by the Special Committee, the applicants, the Monitor, the CRO, and their respective advisors and counsel of all available options; and

(e) negotiations between the Monitor, APC, and FGC in respect of the Subscription Agreement and the proposed transactions.

24 The SISP appears to have been well structured and, when combined with the pre-filing strategic processes, resulted in a broad canvassing of the market for potential purchasers of the applicants' business.

The Monitor Approved the Process Leading up to the Subscription Agreement and the Transactions

25 E&Y assisted with the pre-filing strategic initiative and the pre-filing SISP. The court approved SISP was developed in consultation with and supported by E&Y as Monitor. Further, the Monitor administered the SISP in accordance with its terms and the SISP order of this court. The Subscription Agreement is the product of the applicants' and the Monitor's continued efforts to solicit interest in the applicants' business and/or assets and is supported by the Monitor. It is the best alternative available.

More Beneficial to Creditors Than a Sale or Disposition Under a Bankruptcy

26 The Monitor has conducted an analysis of whether the completion of the proposed transactions contemplated by the Subscription Agreement would be more beneficial to the applicants' creditors and other stakeholders as compared to a sale or disposition of the business and assets of the applicants under a bankruptcy. The Monitor determined that:

(a) a potential bankruptcy could cause significant disruption in operations and delay the market launch of Noctiva, thus adversely impacting the value of the business. The uncertainty surrounding the timeline for transferring the patents and license to a purchaser during bankruptcy proceedings adds to the uncertainty and complexity. This, coupled with the bankruptcy procedure itself, could result in a substantial delay in closing any transaction;

(b) the RVO structure is a condition of closing the Subscription Agreement. The reverse vesting structure is unlikely to be available in a potential bankruptcy given the vesting of the assets in the trustee. Furthermore, even if FGC was willing to proceed based on an asset sale structure, instead of the RVO, the Monitor believes it is unlikely that the recovery could be enhanced by pursuing a sale transaction in a bankruptcy;

(c) accordingly, it is the Monitor's view that a sale or disposition of the business and assets of the applicants in a bankruptcy would most likely result in a lower recovery. In the Monitor's view, the market has been sufficiently canvassed and the FGC bid is the only viable bid in the circumstances. It is unlikely that there is any material value to the assets of the applicants in any transaction other than the FGC bid.

Stakeholders Were Consulted During the Sale Process

27 The applicants consulted with their largest secured creditor, FGC, throughout the pre-filing strategic process. FGC, and FGC in its capacity as the DIP Lender, was given the opportunity to submit a bid in respect of the applicants' business and assets, which FGC did. This was through a court approved process on notice to all stakeholders. In addition, notice of this motion was given to a broad spectrum of the applicants' stakeholders as well.

28 In this context, I will address three specific situations which arose before and/or during the hearing of the motion.

Jones Day has an existing action against APL in the U.S. for outstanding professional fees owed by an APL predecessor. One of the issues raised by Jones Day in this CCAA proceeding involved a potential challenge to FGC's security beyond the amount advanced in December 2022 and pursuant to the DIP, in respect of the Applicants other than APC. The applicants, FGC and Jones Day were able to negotiate a specific carve-out of the Jones Day claim from the proposed releases and agreed that the following language would be approved by the court in this endorsement:

> For greater certainty, in providing the releases as outlined in paragraph 31 of the proposed Approval and Reverse Vesting Order, such relief shall not be used or raised by APL or any individual defendants in the course of the Jones Day Litigation, to limit or adversely affect the Jones Day Litigation as against APL or any individuals that have been named as defendants.
>
> This language is so approved.

29 Dr. Troels Keldmann attended the hearing. He is a principal of Keldmann Healthcare and Keldmann Innovation which sold certain product rights to a predecessor of APL in 2009. Part of the payment to Keldmann Innovation A/S was to be in the form of royalties under the Amended Product Development Agreement between Trimel Biopharma SRL, Keldmann Healthcare A/S and Keldmann Innovation A/S dated December 30, 2009. This agreement, however, is one of the Excluded Contracts being transferred to a ResidualCo under the terms of the Subscription Agreement. Dr. Keldmann was concerned that, although the Keldmann counterparties would lose the right to any future payments, should the product sold to APL be successfully developed at some future point, they would remain subject to a non-compete provision embedded in that agreement. The applicants immediately made it clear that they had no intention of relying on enforcement rights under this excluded contract and proposed that they would issue a formal disclaimer of rights under that contract. This appeared to satisfactorily address Dr. Keldmann's concern.

30 Mr. Brian Gilderman also attended the hearing. Mr. Gilderman is a principal of Precision Clinical Research, Inc., which is conducting clinical trials on an APL product. Mr. Gilderman expressed concern about a potential mis-match between his obligation to continue to perform contractual services under the court's CCAA order while being at risk of not being paid for those services. This situation was complicated by the existence of "hold back" provisions in the service agreement. There was insufficient evidence before the court to address this issue properly. The applicants and the Monitor undertook to pursue the matter with Mr. Gilderman. If a satisfactory understanding cannot be reached, the parties may return to court for further direction.

The Subscription Agreement and the Proposed Transactions Allow Various Stakeholders to Maintain their Rights

31 As noted earlier, the analysis of the applicants and the Monitor is that none of the applicants' creditors will be materially disadvantaged by the Subscription Agreement and the proposed transactions relative to any other viable alternative. In addition, the Subscription Agreement maintains many of the rights that creditors would otherwise have in an asset sale transaction. In the case of parties with existing contracts with the applicants, though no assignment of contracts (consensual or through an assignment order) is contemplated as part of the proposed transactions, the Subscription Agreement provides for all contracts, other than the Excluded Contracts, to remain with the applicants. The contracting parties, therefore, have the opportunity to continue supplying goods and services to the applicants post-CCAA proceedings if they choose to do so. While the Subscription Agreement does not require FGC to cure pre-filing arrears under the Retained Contracts, all contract counterparties have also

been served with the applicants' motion record to provide them with notice that their contracts are either being retained or excluded as part of the proposed transactions.

32 While the Excluded Contracts, Assets and Liabilities will be vested out into Residual Cos in this structure, this outcome is no different from the result that would obtain if the proposed transactions had been carried out using a typical asset purchase structure. Nor will there be any inter-company transfer of assets and liabilities among the existing applicants prior to closing. Therefore, the proposed transactions will not result in any material prejudice or impairment of any creditors' rights which might have been avoided in an asset purchase transaction.

Sufficient Effort has been Made to Obtain the Best Price and the Applicants have not Acted Improvidently

33 The execution of the Subscription Agreement represents the culmination of extensive solicitation efforts for investment or sale opportunities beginning in March 2022 and a robust sales process conducted by the applicants and E&Y from September 2022, both privately and under a court approved SISP post-filing. There is no evidence, or suggestion, that the process was less than fair and robust. Nor is there any prospect that a "better deal" was somehow available but not pursued.

The Share Transactions

34 Consistent with ARVOs previously granted by this court, the proposed order in this case will terminate and cancel all options, securities and other rights held by any person that are convertible or exchangeable for any securities of APC. APC, previously publicly traded on the TSX, will be taken private as a result of the proposed transaction. The purchaser, FGC, currently holds approximately 89% of the issued and outstanding shares of APC. The other shareholders have been notified of the CCAA proceedings and the proposed transactions by way of various press releases and notices issued by the applicants and/or the Monitor.

35 The jurisdictional and legal basis for these orders has been canvassed extensively in prior decisions of this court so I will not repeat that analysis here: *Harte Gold (Re)* 2022 ONSC 653; *Just Energy Group Inc. v. Morgan Stanley Capital Group Inc.* 2022 ONSC 6354. In essence, equity claims must be subordinate to the claims of creditors. In no possible scenario, on the record before me, would there be any recovery for the shareholders of APC. The OBCA provides the relevant authority to order the restructuring of the shares and the articles as contemplated in the proposed Approval and Reverse Vesting Order.

The Releases

36 The Release covers any and all present and future claims against the Released Parties based upon any fact or matter of occurrence in respect of the transactions or the applicants, its assets, business or affairs or administration of the applicants, except any claim that is not permitted to be released under s. 5.1(2) of the CCAA. For avoidance of doubt, as noted above, the Releases will not release APL or the individuals named as defendants in the Jones Day litigation from liability in respect of that action.

37 A non-exhaustive list of relevant factors to consider in determining court approval of proposed releases was laid out by Chief Justice Morawetz in *Lydian International Limited (Re),*2020 ONSC 4006 at para. 54.

38 Considering those factors, I conclude the Release is reasonable and appropriate in the circumstances and that they should be granted for the following reasons:

(a) The claims released are rationally connected to the applicants' restructuring. The Release will have the effect of diminishing claims against the Released Parties, which in turn will diminish indemnification claims by the Released Parties against the Administration Charge and the Directors' Charge. Given that a purpose of a CCAA proceeding is to maximize creditor recovery, a release that helps achieve this goal is rationally connected to the purpose of the applicants' restructuring.

(b) The Released Parties made significant contributions to the applicants' restructuring, both prior to and throughout the CCAA proceedings. Among other things, the extensive efforts of the directors and management of the applicants were instrumental to the conduct of the pre-filing strategic process, the pre-filing SISP, the court-approved SISP and the continued operations of the applicants during the CCAA proceedings. The proposed transactions will maintain the

applicants as a going concern; in this sense at least, the CCAA proceedings have had a successful outcome for the benefit of at least some of the applicants' stakeholders. This is an outcome which is, as discussed above, better than any other reasonably available alternative. The Released Parties have contributed time, energy and resources to achieve this outcome; they are deserving of the Release.

(c) The Release is fair and reasonable. The applicants, for example, are unaware of any statutory liabilities in respect of the Released Parties (particularly, the directors and officers of the applicants) and to date, no stakeholder of the applicants have made the applicants or the Monitor aware that they intend to assert a claim against any of the Released Parties in respect of any claims covered by the Release. Further, the Release is sufficiently narrow in circumstances as the Release carves out and preserve claims that are not permitted to be released pursuant to s. 5.1(2) of the CCAA, claims arising from fraud or wilful misconduct. The scope of the Release is sufficiently balanced to allow the applicants and the Released Parties to move forward with the Subscription Agreement and the transactions and work to conclude the CCAA proceedings.

(d) The Release will bring certainty and finality for the Released Parties. Additionally, the applicants, the Monitor, and FGC all believe that the Release is an essential component to the transactions.

(e) The Release benefits the applicants' creditors and other stakeholders by reducing the potential for the Released Parties to seek indemnification from the applicants, thus minimizing further claims against the applicants.

(f) Creditors had knowledge of the nature and effect of the Release. All creditors on the Service List were served with materials relating to this motion. The applicants also made additional efforts to serve all parties with excluded claims under the transactions. To date, no creditor has objected to the Release. At this point, and in these circumstances, requiring a specific claims process for claims against the Released Parties would only result in additional costs and delay without any apparent corresponding benefit.

Sealing Order

39 The applicants seek a limited sealing order regarding the results of the bids under the SISP. Preservation of the confidentiality of bid information is recognized as meeting the requirements of the test for sealing court documents in *Sherman Estate*. It is in the public interest that the ability of the applicants and the Monitor to maximize value be preserved until the transactions contemplated by the Subscription Agreement have closed. The request for a sealing order of the bid information is granted.

Extension of the Stay

40 The applicants need further time to close the proposed transactions and implement the remaining steps to bring these proceedings to their conclusion. As detailed in Updated Cash Flow Forecast at Appendix B to the Third Report of the Monitor, the applicants are expected to maintain liquidity to fund operations up to July 2, 2023. The stay is extended to June 30, 2023.

Monitor Support

41 I will say, in summary fashion to the extent not specifically mentioned in connection with the issues addressed above, that the Monitor has deep familiarity and experience with the applicants and their circumstances, dating back to March 2022. The Monitor has worked closely with the stakeholders, the CRO and other players. The Monitor, appointed by the court and answerable to the court, fully supports all the relief being sought by the applicants and has explained the basis for its support in detail in its Third Report.

Conclusion

42 For the forgoing reasons, the motion is granted. The Subscription Agreement and proposed transactions, including the ARVO, are approved. The sealing order regarding the bid summary is granted. The stay of proceedings is extended to June 30, 2023.

Motion granted.

2023 ONSC 3314, 2023 CarswellOnt 8791, 2023 A.C.W.S. 3438

End of Document

TAB 12

2022 ONSC 6354
Ontario Superior Court of Justice

Just Energy Group Inc. et. al. v. Morgan Stanley Capital Group Inc. et. al.

2022 CarswellOnt 16700, 2022 ONSC 6354, 2022 A.C.W.S. 5355, 6 C.B.R. (7th) 386

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF JUST ENERGY GROUP INC., JUST ENERGY CORP., ONTARIO ENERGY COMMODITIES INC., UNIVERSALE ENERGY CORPORATION, JUST ENERGY FINANCE CANDA ULC, HUDSON ENERGY CANADA CORP., JUST MANAGEMENT CORP., JUST ENERGY FINANCE HOLDING INC., 11929747 CANADA INC., 12175592 CANADA INC., JE SERVICES HOLDCO I INC., JE SERVICES HOLDCO II INC., 8704104 CANADA INC., JUST ENERGY ADVANCED SOLUTIONS CORP., JUST ENERGY (U.S.) CORP., JUST ENERGY ILLINOIS CORP., JUST ENERGY INDIANA CORP., JUST ENERGY MASSACHUSETTS CORP., JUST ENERGY NEW YORK CORP., JUST ENERGY TEXAS I CORP., JUST ENERGY, LLC, JUST ENERGY PENNSYLVANIA CORP., JUST ENERGY MICHIGAN CORP., JUST ENERGY SOLUTIONS INC., HUDSON ENERGY SERVICES LLC, HUDSON ENERGY CORP., INTERACTIVE ENERGY GROUP LLC , HUDSON PARENT HOLDINGS LLC, DRAG MARKETING LLC JUST ENERGY ADVANCED SOLUTIONS LLC, FULCRUM RETAIL ENERGY LLC, FULCRUM RETAIL HOLDINGS LLC, TARA ENERGY, LLC, JUST ENERGY MARKETING CORP., JUST ENERGY CONNECTICUT CORP., JUST ENERGY LIMITED, JUST SOLAR HOLDINGS CORP. and JUST ENERGY (FINANCE) HUNGARY ZRT. (Applicants) and MORGAN STANLEY CAPITAL GROUP INC. (Respondents)

McEwen J.

Heard: November 2, 2022
Judgment: November 14, 2022
Docket: CV-21-00658423-00CL

Counsel: Jeremy Dacks, Marc Wasserman, for Just Energy Group
Tim Pinos, Ryan Jacobs, Alan Merskey, for LVS III SPE XV LP, TOCU XVII LLC, HVS XVI LLC, OC II LVS XIV LP, OC III LFE I LP and CBHT Energy I LLC
David H. Botter, Sarah Link Schultz, for LVS III SPE XV LP, TOCU XVII LLC, HVS XVI LLC, OC II LVS XIV LP, OC III LFE I LP and CBHT Energy I LLC
Heather L. Meredith, James D. Gage, for Agent and the Credit Facility Lenders
Howard A. Gorman, Ryan E. Manns, for Shell Energy North American (Canada) Inc. and Shell Energy North America (U.S.)
Danielle Glatt, for U.S. Counsel for Fira Donin and Inna Golovan, in their capacity as proposed class representatives in Donin et al. v. Just Energy Group Inc. et al. and Counsel to U.S. Counsel for Trevor Jordet, in his capacity as proposed class representative in Jordet v. Just Energy Solutions Inc.
David Rosenfeld, James Harnum, for Haidar Omarali in his capacity as Representative Plaintiff in Omarali v. Just Energy
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Jessica MacKinnon, for Macquarie Energy LLC and Macquarie Energy Canada Ltd.
Bevan Brooksbank, for Chubb Insurance Co. of Canada
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Robert I. Thornton, Rebecca Kennedy, Rachel B. Nicholson, Puya Fesharaki, for FTI Consulting Canada Inc., as Monitor
John F. Higgins, for FTI Consulting Canada Inc., as Monitor
Ganesh Yadav, for himself
Mohammad Jaafari, for himself

Subject: Corporate and Commercial; Insolvency

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Canwest Global Communications Corp., Re (2010), 2010 ONSC 4209, 2010 CarswellOnt 5510, 70 C.B.R. (5th) 1 (Ont. S.C.J. [Commercial List]) — referred to

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Quest University Canada (Re) (2020), 2020 BCSC 1883, 2020 CarswellBC 3091, 85 C.B.R. (6th) 41 (B.C. S.C.) — referred to

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

Statutes considered:

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Generally — referred to

Canada Business Corporations Act, R.S.C. 1985, c. C-44

Generally — referred to

s. 173 — referred to

s. 176(1)(b) — referred to

s. 191(1) "reorganization" — referred to

s. 191(1) "reorganization" (c) — referred to

s. 191(2) — referred to

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

Generally — considered

s. 11 — referred to

s. 36 — referred to

s. 36(3) — referred to

s. 36(4) — referred to

32 In *Harte Gold Corp. (Re)*, 2022 ONSC 653, Penny J. held that the s. 36(3) criteria largely correspond to the principles articulated in *Royal Bank of Canada v. Soundair Corp*, (1991), 4 O.R. (3d) 1 (C.A) for the approval of the sale of assets in an insolvency. They are as follows:

- whether sufficient effort has been made to obtain the best price and that the debtor has not acted improvidently;
- the interests of all parties;
- the efficacy and integrity of the process by which offers have been obtained; and
- whether there has been unfairness in the working out of the process.

33 Reverse vesting orders are relatively new structures. I agree that reverse vesting orders should not be the "norm" and that a court should carefully consider whether a reverse vesting order is warranted in the circumstances: see *Harte Gold Corp. (Re)* , at para. 38; *Black Rock Metals Inc.*, at para. 99. That said, reverse vesting orders have been deemed appropriate in a number of cases: see *Quest University (Re)* , at para. 168, *Harte Gold Corp. (Re)* , at para. 77 and *Black Rock Metals Inc.*, at para. 114.

34 The aforementioned cases approved reverse vesting orders in circumstances where:

- The debtor operated in a highly-regulated environment in which its existing permits, licenses or other rights were difficult or impossible to reassign to a purchaser.
- The debtor is a party to certain key agreements that would be similarly difficult or impossible to assign to a purchaser.
- Where maintaining the existing legal entities would preserve certain tax attributes that would otherwise be lost in a traditional vesting order transaction.

35 Given the supporting jurisprudence, I will now discuss why the RVO should be granted and why the Transaction should be approved.

The RVO should be granted

36 The Just Energy Entities' business, as noted, is highly regulated and depends almost entirely on a substantial number of licenses, authorizations and permits in multiple jurisdictions in Canada and the U.S.

37 As set out in the affidavit of Mr. Michael Carter, the Chief Financial Officer to the Just Energy Entities (at para. 57), the value of the Just Energy Entities' business arises predominantly from the gross margin in their customer contracts. The business is wholly dependent on the Just Energy Entities holding several non-transferable licenses and authorizations that permit their operation in Canada and the U.S. and in their agreements with over 100 public utilities, which allow the Just Energy Entities to provide natural gas and electricity in certain markets to their customers.

38 Currently the Just Energy Entities hold at least:

- Seventeen separate licenses and authorizations in five provinces in Canada which allows them to market natural gas and electricity in the applicable provincial markets, eight of which are non-transferrable and non-assignable, with the remaining nine only assignable with leave of the regulator.
- Five separate import and export orders issued by the Canadian Energy Regulator ("CER"), all of which are non-transferrable and non-assignable.
- Three separate registrations with the Alberta Electricity System Operator (the "AESO") in Alberta and with the Independent Electricity System Operator ("IESO") in Ontario, all of which are either non-transferrable or only assignable with leave.

• Six licenses in Nevada and New Jersey to allow them to market natural gas and/or electricity in the applicable states, all of which are non-transferrable.

• Twenty-five licenses in Connecticut, Delaware, Maine, Maryland, Ohio, Pennsylvania and Virginia to allow them to market natural gas and/or electricity in the applicable states, all of which may only be transferred with the prior authorization of the applicable regulator in each jurisdiction.

• Eighteen electricity and/or natural gas provider licenses or authorizations in California, Illinois, Massachusetts, Michigan, and New York, where no process for transferring the licenses or authorizations is prescribed in the applicable statutes.

• Five retail electricity provider certifications in Texas which may only be transferred with the authorization of the Public Utility Commission of Texas ("PUCT").

• Three separate export authorizations issued by the Department of Energy ("DOE") in the U.S., all of which may only be transferred with the prior authorization of the DOE's assistant secretary.

• Seven separate market-based authorizations issued by the Federal Energy Regulatory Commission ("FERC") in the U.S. which may only be transferred with the prior authorization of FERC.

39 As further deposed by Mr. Carter, all the provincial, state, market participation, export and import orders, licenses and authorizations held by the Just Energy Entities are either non-transferrable, capable of transfer only with the approval of the applicable regulator, or provide for no clear regulatory process for the transfer of such authorizations.

40 On Mr. Carter's analysis, the RVO would not hamper the existing licenses, authorizations, orders and agreements. As such, he deposes that the RVO structure is the only feasible structure for the Transaction (at para. 59). Any other structure would risk exposing most of the 89 licenses upon which the Just Energy Entities' business is founded. Mr. Carter also deposes (at para. 75) that if a traditional vesting order was granted, the Purchaser would be required to participate in a separate regulatory process in five Canadian provinces, 15 U.S. states and with federal agencies in both Canada and the U.S. to try and obtain transfers of the 89 licenses, authorizations and certifications or the issuance of new licenses, authorizations and certifications. This risk and uncertainty would affect the value of a sale to any other purchaser. For this reason, the benefit of the RVO is clear: it preserves the necessary approvals to conduct business.

41 Additionally, Mr. Carter (at para. 60) deposes that the Just Energy Entities are party to a myriad of hedging transactions. This includes hedge transactions with commodity suppliers to minimize commodity and volume risk, foreign exchange hedge transactions and hedges for renewal energy credits, many of which are fundamental to the Just Energy Entities' ability to effectively operate their business and non-transferrable. Moreover, any U.S. tax attributes resident in the Just Energy Entities would generally be unable to be utilized in the go-forward business where the Transaction structure has a traditional asset sale vesting order.

42 No stakeholder disputes Mr. Carter's evidence. More specifically, no stakeholder disputes the importance of maintaining the 89 current licenses, authorizations and certifications listed above. And, no stakeholder disputes the fact that under a traditional asset sale and approval and vesting order structure, a purchaser would have to apply to the various agencies and regulators for transfers of the aforementioned licenses, etc.

43 I agree with the Just Energy Entities, who are supported by the Monitor. Given the above, the RVO sought is the only way to achieve the preservation of the licenses, authorizations and certifications necessary for the ongoing business operations of the Just Energy Entities. This includes transferring the excluded assets into the two Residual Cos., one in Canada and one in the U.S. as is typically the case in reverse vesting orders.

44 The fact that the Just Energy Entities has been operating for approximately 19 months since the *CCAA* filing is critical. As noted by Penny J. in *Harte Gold Corp. (Re)* , at para. 72, time is not on the side of a debtor company facing financial challenges. I agree.

45 For all the reasons above, I am satisfied that the RVO is appropriate.

46 I now turn to the s. 36(3) factors.

The Transaction is fair and reasonable

The process leading to the proposed sale was reasonable

47 The Transaction was developed by the Just Energy Entities in consultation with the Monitor and its financial advisor, Mr. Mark Caiger, the Managing Director, Mergers & Acquisitions at BMO Nesbitt Burns Inc., as well as the Purchaser and other secured lenders. As noted, the SISP was approved by this court and thereafter conducted as per the provisions of the SISP Approval Order. As set out in Mr. Carter's affidavit, the SISP was undertaken in accordance with the SISP Approval Order in two stages.

48 The overview of the SISP structure is well described in Mr. Caiger's October 19, 2022 affidavit. Amongst other things, in the first stage, the Just Energy Entities and Mr. Caiger prepared a list of potential bidders, established a data room and published a press release announcing the SISP. Mr. Caiger contacted 41 potential bidders, non-disclosure agreements were negotiated and four NOIs were received.

49 The process then moved into the second stage. The Just Energy Entities prepared a form of transaction agreement that included a form of approval and RVO for completion by bidders as part of receiving submissions of a qualified bid. Three of the four second stage participants eventually indicated that they were not going to proceed. The remaining party did not submit a bid. It advised the Monitor that it saw no value beyond the stalking-horse bid.

50 The Transaction before this court is therefore the only going-concern Transaction available to the Just Energy Entities. I am satisfied in the circumstances that the market was thoroughly canvassed and, as noted, in addition to the SISP, the business of the Just Energy Entities has been marketed broadly and extensively for approximately three years. The U.S. Class Actions previously indicated that they may advance their own restructuring plan for consideration and voting by the Just Energy Entities creditors. During this process, they were allowed full participation but ultimately did not file a NOI or further engage in the SISP process.

The Monitor has approved the process

51 As noted, the Monitor approved the process that lead to the Transaction. The Monitor concluded that the RVO is the only efficient means to ensure that all the licenses, authorizations and agreements remain in place. The Monitor is also of the view that any potential prejudice to the individual creditors is far outweighed by the overall benefit of the Transaction. Importantly, the Monitor also believes that the RVO represents the only viable alternative to implement the Transaction for the benefit of the Just Energy Entities' stakeholders.

The Transaction is more beneficial to the creditors than a sale or disposition in bankruptcy

52 The Monitor assisted the Just Energy Entities in preparing a liquidation analysis when the Just Energy Entities were pursuing approval of the Plan of Compromise and Arrangement. The analysis has been updated. The Monitor and the Just Energy Entities concluded, on the basis of the updated liquidation analysis, that not only would a liquidation produce no recovery for unsecured creditors, but it would result in a shortfall to secured creditors. This, of course, would be less beneficial than closing the Transaction.

The creditors were consulted

53 As noted in this endorsement, extensive consultation was undertaken both with the secured creditors, the U.S. Class Actions, the Omarali Class Action and the Mass Tort Claims. There is no suggestion in the record that any creditors were ignored or overlooked.

TAB 13

Endorsement of Madam Justice Conway dated June 8, 2021

From: Conway, Madam Justice Barbara
Sent: June 8, 2021 2:51 PM
To: Nicholls, Robert

Subject: RE: RECEIVERSHIP OF VERT INFRASTRUCTURE LTD., Court File No. CV-20-00642256-00CL
Importance: High

The Receiver of Vert Infrastructure Ltd. (KSV) bring this motion to approve a transaction with Emprise Capital Corp. as well as for a vesting order and related relief. It also seeks approval of its activities in its Second Report. The motion is on consent/unopposed.

The transaction is designed to monetize the shell status of Vert for the benefit of Vert's creditors. Essentially, the creditors will receive $200,000 that Emprise will be paying to acquire Vert as a shell company. Emprise will be funding the cost of the transaction up to $100,000 so the creditors will receive the $200,000 without any associated expense. This will constitute some recovery for the senior secured creditors who are significantly under water.

The transaction has been designed in a practical manner that uses judicial tools available to this court – a vesting order, channelling claims, and creation of a common law trust. I am satisfied that I can grant the order. Ultimately, KSV, who is the Receiver of Vert, will be holding these assets in trust for the very same creditors of Vert – it mirrors the structure and rights/obligations that are in place under the receivership. It is all for the benefit of those creditors. There is no reason to have a formal trust agreement in place here since KSV would be signing it both as Receiver and Trustee.

Order to go as signed by me and attached to this email. This order is effective from today's date and is enforceable without the need for entry and filing.

Superior Court of Justice (Toronto)

TAB 14

2024 ABKB 710
Alberta Court of King's Bench

Long Run Exploration Ltd (Re)

2024 CarswellAlta 3148, 2024 ABKB 710, [2025] A.W.L.D. 395, 18 C.B.R. (7th) 13, 2024 A.C.W.S. 6248

In the Matter of the Companies' Creditors Arrangement Act, RSC 1985, c C-36, as amended

And In the Matter of a Plan of Compromise or Arrangement of
Long Run Exploration Ltd and Calgary Sinoenergy Investment Corp

Douglas R. Mah J.

Heard: November 14, 2024
Judgment: November 29, 2024
Docket: Calgary 2401-09247

Counsel: Kelsey Meyer, Michael Selnes, Kaamil Khalfan, Kyle Kashuba, Bilal Qureshi, for Monitor, FTI Consulting Canada Inc
Kelly Bourassa, Warren Nishimura, Farrukh Ahmad, for China Construction Bank, Toronto Branch
John Regush, for Long Run Exploration Ltd and Calgary Sinoenergy Investment Corp.
Wendy Barber, for Long Run Exploration Ltd
Trevor Batty, for Henenghaixin Corp.
Ryan Zahara, for Orphan Well Association
Kristian Toivonen, for Abe Neufeld and unnamed surface lessors
Michael E. Swanberg, for Birch Hills County, Big Lakes County and Lac Ste Anne County
Jessica Cameron, for TC Energy and Nova Gas Transmission Ltd.
Alexander W. Yiu, for Paddle Prairie Metis Settlement
Curtis Auch, for Mackenzie County, Flagstaff County, Lamont County, Municipal District of Smoky River, and Sturgeon County
Randal Van de Mosselaer, for Canadian Natural Resources Limited
Colin LaRoche, for Indian Oil and Gas Canada
Chase Van Sant, for Obsidian Energy
Danielle Marechal, Danica Jorgenson, for Hiking Group Shandong Jinyue Int't Trading Corporation and Purchaser
Peng Zuo, for Bank of China (Qingdao Branch)
Kristopher Lensink, for Alberta Energy and Minerals Energy Team
George Wong, for Alberta Energy Regulator

Subject: Contracts; Estates and Trusts; Insolvency; Restitution; Torts

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Sanjel Corp., Re (2016), 2016 ABQB 257, 2016 CarswellAlta 900, 36 C.B.R. (6th) 239 (Alta. Q.B.) — referred to

Sherman Estate v. Donovan (2021), 2021 SCC 25, 2021 CSC 25, 2021 CarswellOnt 8339, 2021 CarswellOnt 8340, 66 C.P.C. (8th) 1, 67 E.T.R. (4th) 163, 458 D.L.R. (4th) 361, 72 C.R. (7th) 223, [2021] 2 S.C.R. 75, [2021] 2 R.C.S. 75 (S.C.C.) — referred to

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

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Tacora Resources Inc. (Re) (2024), 2024 ONSC 4436, 2024 CarswellOnt 12364 (Ont. S.C.J. [Commercial List]) — referred to

Ted Leroy Trucking Ltd., Re (2010), 2010 SCC 60, 2010 CarswellBC 3419, 2010 CarswellBC 3420, 12 B.C.L.R. (5th) 1, (sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 D.T.C. 5006 (Eng.), (sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, (sub nom. *Ted LeRoy Trucking Ltd., Re)* 326 D.L.R. (4th) 577, (sub nom. *Century Services Inc. v. Canada (A.G.))* [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, (sub nom. *Leroy (Ted) Trucking Ltd., Re)* 296 B.C.A.C. 1, (sub nom. *Leroy (Ted) Trucking Ltd., Re)* 503 W.A.C. 1, 2010 CSC 60 (S.C.C.) — referred to

Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc. (2019), 2019 ONCA 508, 2019 CarswellOnt 9683, 70 C.B.R. (6th) 181, 3 R.P.R. (6th) 175, 435 D.L.R. (4th) 416, 11 P.P.S.A.C. (4th) 11 (Ont. C.A.) — referred to

Windsor Machine & Stamping Ltd., Re (2009), 2009 CarswellOnt 4471, 55 C.B.R. (5th) 241 (Ont. S.C.J. [Commercial List]) — referred to

Zerbin v. Vrbanek (2020), 2020 ABQB 797, 2020 CarswellAlta 2514, 13 B.L.R. (6th) 50, 7 C.L.R. (5th) 191 (Alta. Q.B.) — referred to

Zerbin v. Vrbanek (2021), 2021 ABCA 317, 2021 CarswellAlta 2308, 31 C.L.R. (5th) 76 (Alta. C.A.) — referred to

9354-9186 Québec inc. v. Callidus Capital Corp. (2020), 2020 SCC 10, 2020 CSC 10, 2020 CarswellQue 3772, 2020 CarswellQue 3773, 78 C.B.R. (6th) 1, 444 D.L.R. (4th) 373, 1 B.L.R. (6th) 1, [2020] 1 S.C.R. 521 (S.C.C.) — referred to

Statutes considered:

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

Generally — referred to

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

Generally — referred to

Pt. I — referred to

s. 5.1 [en. 1997, c. 12, s. 122] — referred to

s. 5.1(2) [en. 1997, c. 12, s. 122] — referred to

s. 11 — referred to

s. 19(2) — referred to

s. 36(3) — referred to

Criminal Code, R.S.C. 1985, c. C-46

s. 354 — referred to

Surface Rights Act, R.S.A. 2000, c. S-24

Generally — referred to

s. 36 — referred to

APPLICATION by monitor to approve sale in insolvency proceedings.

Corrected judgment: *A corrigendum was issued on December 6, 2024; the corrections have been made to the text and the corrigendum is appended to this judgment.*

Corrected judgment: *A corrigendum was issued on November 29, 2024; the corrections have been made to the text and the corrigendum is appended to this judgment.*

***Douglas R. Mah J.*:**

Reasons for Decision

A. Background

1 The applicant is the Court-Appointed Monitor of Long Run Exploration Ltd and Calgary Sinoenergy Investment Corp acting under the ***CCAA***.[1] The Monitor seeks transaction approval and a Reverse Vesting Order (RVO) in order to give effect to a stalking horse bid in the form of a Subscription Agreement for the shares of Long Run.

2 The stalking horse bid is advanced by Hiking Group Shandong Jinyue Int't Trading Corp as part of a Court-approved sale and investment solicitation process (SISP). It was the only qualified offer that emerged from the SISP. Hiking also provided debtor-in-possession or DIP financing in the ***CCAA*** proceeding to the extent of $7 million under previous Court Order.

3 The stalking horse Subscription Agreement was subsequently slightly amended for tax planning purposes. Subsequent mention of the Subscription Agreement in these Reasons refers to the amended Subscription Agreement (identified as the A & R Subscription Agreement in the application materials).

4 Reduced to its basics for the purposes of this decision, the Subscription Agreement contemplates:

• Cancellation of the existing common shares of Long Run and issuance of new shares to Hiking's nominee (a new wholly owned subsidiary created for that purpose), which shares would be free and clear of any existing liabilities of Long Run other than those expressly retained.

• Long Run would continue as a going concern with its retained assets, retained liabilities and retained contracts.

• The retained liabilities include the indebtedness owing by Long Run to senior secured creditors, as represented by China Construction Bank Toronto Branch (CCBT) as collateral agent, in the approximate amount of $350 million, as well as environmental liabilities of about $453 million.

• Apart from assumption of the senior secured debt, the cash component of the purchase price consists of an approximate $17.5 million to deal with priority payables, another much smaller amount ($100,000) to fund the Trustee's expenses for the Creditor Trust to be created and set-off of the $7 million DIP financing already advanced.

• Assets, liabilities and contracts not retained would be transferred to a Creditor Trust to be administered by the Monitor, and all of Long Run's liabilities except those expressly retained would be discharged so far as Long Run is concerned.

• Court approval of the Subscription Agreement and granting of an RVO are necessary to create the Creditor Trust. Creditors whose claims are transferred to the Creditor Trust would have further recourse only to the Creditor Trust, which is expected to be negligible. It is not anticipated that unsecured creditors would receive any payment.

5 The transaction, if approved, enables Long Run to continue operations with a new owner "cleansed" of unwanted liabilities while retaining desired assets, contracts and liabilities.

Appendix contains confidential information regarding the bids received in the SISP, the Monitor submits that the disclosure of the information contained in the Confidential Appendix could prejudice any further efforts to market and sell the business and assets of the Debtors should the transaction fail to close. Such an outcome would be prejudicial to the Debtors and the public interest inherent in the sale of distressed companies and their assets via an insolvency process.

114 The request for a Restricted Access Order, Sealing Order or any compromise of the open Courts principle is governed by ***Sierra Club of Canada v Canada (Minister of Finance*,), [2002] 2 SCR 522, 2002** SCC 41as refined by ***Sherman Estate v Donovan*, , 2021 SCC 25**.

115 The applicant must show on a balance of probabilities that:

- normal Court openness presents a serious risk to an important interest;
- the order is necessary to prevent the risk because alternative measures are inadequate; and
- as a matter of proportionality, the benefits outweigh the negative effects.

116 It is recognized in Alberta and elsewhere that commercial interests, particularly in the context of Court supervised insolvency proceedings, are an important interest deserving of protection: for example, see ***Alberta Treasury Branches v Elaborate Homes Ltd*, 2014 ABQB 350** at para 54.

117 The risk here is that if the sale falls through or the information in the confidential appendix is disclosed, disclosure will adversely affect the value of the assets to the detriment of the stakeholders.

118 The form of Order appears to be the least intrusive means of managing the risk, being specific in scope and limited in time (3 months after the date of hearing). The Court's process for giving notice to the media has been complied with and no contrary representations have been presented.

119 Accordingly, I find the legal test is met and I grant the order.

M. Summary of Rulings

120 In the result, and to summarize:

- I accept the Monitor's submissions (Sections B & C above) that the Subscription Agreement/RVO as presented by the Monitor represents the optimal outcome for Long Run and its stakeholders, best advances the remedial objectives of the ***CCAA*** and meets the test and expectations set out in ***Harte Gold***. I therefore grant approval of the Subscription Agreement and RVO in accordance with the form of Order presented to the Court on November 14, 2024.
- In so doing, I approve the Releases as requested by the Monitor as part of the transaction, for the reasons set out in Section D above.
- Necessarily implicit in my approval of the transaction, I deny the relief sought by H Corp and Mr. Neufeld to vary the transaction as they respectively requested, for the reasons set out in Sections E to J (H Corp) and Section K (Neufeld) above.
- I also deny Mr. Neufeld's request to rescind the Monitor's letter to landowners of October 22, 2024 as set out in Section K above.
- The Restricted Access Order (or Sealing Order) as requested is granted.

121 Should the parties or some of them wish to address costs of this application, they may do so by January 3, 2025 by each submitting a letter no more than 3 single-spaced pages in length, excluding exhibits and authorities, and supported by a draft Bill of Costs.

Application granted.

Footnotes

1 ***Companies' Creditors Arrangement Act***, RSC, 1985, c C-36 as am.

2 ***Invico Diversified Incom Limited Partnership v NewGrange Energy Inc*, 2024 ABKB 214** at para 19.

3 ***Bison Properties Ltd (Re)*, , 2016 BCSC 793** and ***American Iron v 1340923 Ontario*, , 2018 ONSC 2810**.

4 Note this is a leave decision. Justice Yamauchi had countenanced the credit bidder's selective assumption approach. Justice de Wit denied leave.

5 ***Bankruptcy and Insolvency Act***, RSC 1985, c B-3 as am.

End of Document

TAB 15

2020 ONSC 4006
Ontario Superior Court of Justice [Commercial List]

Lydian International Limited (Re)

2020 CarswellOnt 9768, 2020 ONSC 4006, 321 A.C.W.S. (3d) 618, 81 C.B.R. (6th) 218

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF LYDIAN INTERNATIONAL LIMITED, LYDIAN CANADA VENTURES CORPORATION AND LYDIAN U.K. CORPORATION LIMITED

Geoffrey B. Morawetz C.J. Ont. S.C.J.

Heard: June 29, 2020
Judgment: July 10, 2020
Docket: CV-19-00633392-00CL

Counsel: Elizabeth Pillon, Maria Konyukhova, Sanja Sopic, Nicholas Avis, for Applicants
D.J. Miller, Rachel Bergino, for Alvarez & Marsal Inc.
Robert Mason, Virginie Gauthier, for Osisko Bermuda Limited
Pamela Huff, Chris Burr, for Resource Capital Fund VI L.P.
David Bish, Michael Pickersgill, for Orion Capital Management
Alexander Steele, for Caterpillar Financial Services (UK) Limited
Bruce Darlington, for ING Bank N.V./Abs Svensk Exportkredit (publ)
John LeRoux, Hasan Ciftehan, Mehmet Ali Ekingen, Atilla Bozkay, for themselves

Subject: Corporate and Commercial; Insolvency

Table of Authorities

Cases considered by *Geoffrey B. Morawetz C.J. Ont. S.C.J.*:

ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp. (2008), 2008 ONCA 587, 2008 CarswellOnt 4811, 45 C.B.R. (5th) 163, 47 B.L.R. (4th) 123, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re)* 296 D.L.R. (4th) 135, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re)* 240 O.A.C. 245, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re)* 92 O.R. (3d) 513 (Ont. C.A.) — referred to

Anvil Range Mining Corp., Re (2002), 2002 CarswellOnt 2254, 34 C.B.R. (4th) 157 (Ont. C.A.) — referred to

Canadian Airlines Corp., Re (2000), 2000 ABQB 442, 2000 CarswellAlta 662, [2000] 10 W.W.R. 269, 20 C.B.R. (4th) 1, 84 Alta. L.R. (3d) 9, 9 B.L.R. (3d) 41, 265 A.R. 201 (Alta. Q.B.) — referred to

Canwest Global Communications Corp., Re (2010), 2010 ONSC 4209, 2010 CarswellOnt 5510, 70 C.B.R. (5th) 1 (Ont. S.C.J. [Commercial List]) — referred to

Kitchener Frame Ltd., Re (2012), 2012 ONSC 234, 2012 CarswellOnt 1347, 86 C.B.R. (5th) 274 (Ont. S.C.J. [Commercial List]) — referred to

Philip Services Corp., Re (1999), 1999 CarswellOnt 4673, 13 C.B.R. (4th) 159 (Ont. S.C.J. [Commercial List]) — referred to

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

1078385 Ontario Ltd., Re (2004), 2004 CarswellOnt 8041, 16 C.B.R. (5th) 144 (Ont. S.C.J.) — referred to

1078385 Ontario Ltd., Re (2004), 2004 CarswellOnt 8034, 16 C.B.R. (5th) 152, (sub nom. *1078385 Ontario Ltd. (Receivership), Re)* 206 O.A.C. 17 (Ont. C.A.) — referred to

Statutes considered:

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

Generally — referred to

s. 2(1) "debtor company" — considered

s. 2(1) "equity claim" — considered

s. 5.1 [en. 1997, c. 12, s. 122] — unconstitutional

s. 5.1(2) [en. 1997, c. 12, s. 122] — considered

s. 6(3) — considered

s. 6(5) — considered

s. 6(6) — considered

s. 6(8) — considered

s. 11.2(1) [en. 2005, c. 47, s. 128] — considered

s. 11.2(2) [en. 2005, c. 47, s. 128] — considered

s. 11.2(4) [en. 2005, c. 47, s. 128] — considered

MOTION by applicants for relief, including order and sanctioning and approving applicants' plan of arrangement.

***Geoffrey B. Morawetz C.J. Ont. S.C.J.*:**

1 Lydian International Limited, Lydian Canada Ventures Corporation and Lydian U.K. Corporation Limited (the "Applicants") bring this motion for an order (the "Sanction and Implementation Order"), among other things:

a) declaring that the Meeting of Affected Creditors held on June 19, 2020 was duly convened and held, all in accordance with the Meeting Order;

b) sanctioning and approving the Applicants' Plan of Arrangement (the "Plan") as approved by a requisite majority of Affected Creditors at the Meeting, in accordance with the Plan Meeting Order (each as defined below), a copy of which is attached as Schedule "A" to the draft Sanction and Implementation Order; and

c) granting various other related relief (as more particularly outlined below).

2 The Applicants submit that the Plan represents the culmination of the Applicants' restructuring efforts and allows for the resolution of these CCAA Proceedings. The Monitor and the majority of the Affected Creditors are supportive of the Plan and if sanctioned and implemented, the Plan will provide a path forward for Lydian Canada and Lydian UK as part of a privatized Restructured Lydian Group (as defined in the Plan) and ultimately lead to the termination of these CCAA Proceedings.

3 Shortly after the conclusion of the hearing on June 29, 2020, which was conducted by Zoom, I granted the motion with reasons to follow.

4 The facts with respect to this motion are more fully set out in the Affidavit of Edward A. Sellers sworn June 24, 2020 (the "Sellers Sanction Affidavit"), the Affidavit of Edward A. Sellers sworn June 15, 2020 (the "Sellers Meeting Affidavit") and the Affidavit of Mark Caiger sworn June 11, 2020 (the "BMO Affidavit"). Mr. Sellers and Mr. Caiger were not cross-examined.

b) obligations of any Existing Lydian Group member other than Lydian International under the Credit Agreement and Stream Agreement, and any agreements entered into relating to the foregoing, from and after the Plan Implementation Date;

c) any claims arising from the willful misconduct or gross negligence of any applicable Released Party; and

d) any Director from any Director Claim that is not permitted to be released pursuant to section 5.1(2) of the CCAA.

52 Unsecured creditors' claims, other than the Ancillary Releases in favour of the Directors, are not compromised or released and remain in the Restructured Lydian Group.

53 The Applicants submit that it is accepted that there is jurisdiction to sanction plans containing releases if the release was negotiated in favour of a third party as part of the "compromise" or "arrangement" where the release reasonably relates to the proposed restructuring and is not overly broad. There must be a reasonable connection between the third-party claim being compromised in the plan and the restructuring achieved by the plan to warrant inclusion of the third-party release in the plan (see: *Canadian Airlines Corp., Re*, 2000 ABQB 442 (Alta. Q.B.) at para 92 (*CanLII*) CCAA at s. 5(1); *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587 (Ont. C.A.) at paras 61 and 70 (*CanLII*); *Canwest Global Communications Corp., Re*, 2010 ONSC 4209 (Ont. S.C.J. [Commercial List]) at para 28-30 (*CanLII*); and *Kitchener Frame Ltd., Re*, 2012 ONSC 234 (Ont. S.C.J. [Commercial List]) at paras 85-88 (*CanLII*).

54 The Applicants submit that in considering whether to approve releases in favour of third parties, courts will consider the particular circumstances of the case and the objectives of the CCAA. While no single factor will be determinative, the courts have considered the following factors:

a) Whether the parties to be released from claims were necessary and essential to the restructuring of the debtor;

b) Whether the claims to be released were rationally connected to the purpose of the plan and necessary for it;

c) Whether the plan could succeed without the releases;

d) Whether the parties being released were contributing to the plan; and

e) Whether the release benefitted the debtors as well as the creditors generally.

55 The Applicants submit that the releases were critical components of the decision-making process for the Applicants' directors and officers and Senior Lenders' participation in these CCAA Proceedings in proposing the Plan and the Applicants submit that they would not have brought forward the Plan absent the inclusion of the releases.

56 The Applicants also submit that the support of the Senior Lenders is essential to the Plan's viability. Without such support, which is conditional on the releases, the Plan would not succeed.

57 The Applicants submit that the Released Parties made significant contributions to the Applicants' restructuring, both prior to and throughout these CCAA Proceedings. The extensive efforts of the Applicants' directors and officers and the Senior Lenders and Monitor resulted in the negotiation of the Plan, which forms the foundation for the completion of these CCAA Proceedings. The Senior Lenders financial contributions through forbearances, additional advances and DIP and Exit Financing were instrumental.

58 The Applicants also submit that the releases are an integral part of the CCAA Plan which provides an orderly and effective alternative to uncoordinated and disruptive secured lender enforcement proceedings. The Plan permits unsecured creditors future potential recovery in the Restructured Lydian Group, which may not exist in bankruptcy (*ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587 (Ont. C.A.) at paras 71 (*CanLII*); and *Kitchener Frame Ltd., Re*, 2012 ONSC 234 (Ont. S.C.J. [Commercial List]) at paras 80-82 (*CanLII*).

TAB 16

KeyCite treatment
Most Negative Treatment: Check subsequent history and related treatments.

2023 BCSC 1476
British Columbia Supreme Court

Peakhill Capital Inc. v. Southview Gardens Limited Partnership

2023 CarswellBC 2506, 2023 BCSC 1476, 2023 A.C.W.S. 4242, 9 C.B.R. (7th) 119

Peakhill Capital Inc. (Petitioner) And Southview Gardens Limited Partnership, Southview Gardens BT Ltd., Southview Gardens Properties Ltd., Zhen Yu Zhong, Junchao Mo, Coromandel Properties (2016) Ltd., Baystone Properties (2016) Ltd., and Coromandel Holdings Ltd. (Respondents)

K. Loo J.

Heard: August 4, 2023
Judgment: August 25, 2023
Docket: Vancouver S-231065

Counsel: E. Laskin, for Petitioner
V. Tickle, for Receiver, KSV Restructuring Inc.
J. Schultz, E. Newbery, for Cenyard Pacific Developments Inc.
O. James, R. Power, for His Majesty the King in right of the Province of British Columbia
A. Teasdale, for Cenyard Southview Gardens Ltd.

Subject: Insolvency; Property; Provincial Tax; Public

Table of Authorities

Cases considered by *K. Loo J.*:

Arrangement relatif à Blackrock Metals Inc. (2022), 2022 QCCS 2828, 2022 CarswellQue 10503, 2 C.B.R. (7th) 214 (C.S. Que.) — considered

Arrangement relatif à Blackrock Metals Inc. (2022), 2022 QCCA 1073, 2022 CarswellQue 11443 (C.A. Que.) — referred to

Comark Holdings Inc., Re (July 13, 2020), Doc. Toronto CV-20-00642013-00CL (Ont. Gen. Div. [Commercial List]) — referred to

Harte Gold Corp. (Re) (2022), 2022 ONSC 653, 2022 CarswellOnt 1698, 97 C.B.R. (6th) 202 (Ont. S.C.J. [Commercial List]) — considered

Just Energy Group Inc. et. al. v. Morgan Stanley Capital Group Inc. et. al. (2022), 2022 ONSC 6354, 2022 CarswellOnt 16700, 6 C.B.R. (7th) 386 (Ont. S.C.J.) — referred to

Lydian International Limited (Re) (2020), 2020 ONSC 4006, 2020 CarswellOnt 9768, 81 C.B.R. (6th) 218 (Ont. S.C.J. [Commercial List]) — considered

PaySlate Inc. (Re) (2023), 2023 BCSC 608, 2023 CarswellBC 1025, 7 C.B.R. (7th) 61 (B.C. S.C.) — considered

PaySlate Inc. (Re) (2023), 2023 BCSC 977, 2023 CarswellBC 1613 (B.C. S.C.) — considered

Plasco Energy, Re (July 17, 2015), Doc. Toronto CV-15-10869-00C (Ont. S.C.J. [Commercial List]) — referred to

Port Capital Development (EV) Inc. (Re) (2022), 2022 BCSC 1464, 2022 CarswellBC 2307, 1 C.B.R. (7th) 270 (B.C. S.C.) — considered

Quest University Canada (Re) (2020), 2020 BCSC 1883, 2020 CarswellBC 3091, 85 C.B.R. (6th) 41 (B.C. S.C.) — considered

Southern Star Developments Ltd. v. Quest University Canada (2020), 2020 BCCA 364, 2020 CarswellBC 3252, 85 C.B.R. (6th) 96 (B.C. C.A.) — referred to

Winner World Holdings Limited, et al. v. Blackrock Metals Inc., et al. (2023), 2023 CarswellQue 4204, 2023 CarswellQue 4205 (S.C.C.) — referred to

Statutes considered:

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

Generally — referred to

s. 72(1) — referred to

s. 183 — referred to

s. 183(1)(c) — referred to

s. 243 — referred to

Law and Equity Act, R.S.B.C. 1996, c. 253

Generally — referred to

s. 39 — referred to

Property Transfer Tax Act, R.S.B.C. 1996, c. 378

Generally — referred to

s. 2(3) — referred to

s. 2(4) — referred to

APPLICATION by creditor and purchaser for approval of sale utilizing reverse vesting order.

***K. Loo J.*:**

Overview

1 On this application in an ongoing receivership proceeding, this Court has been asked to approve a sale transaction (the "Transaction") in respect of lands legally described as Lot 14, District Lot 334, Plan 13993, PID 007-982-160, municipally known as 3240 East 58th Avenue, Vancouver, British Columbia, and the buildings thereon (the "Real Property") to Cenyard Southview Gardens Ltd. (the "Purchaser").

2 The sole issue before the Court is whether the Transaction may be carried out by means of a Reverse Vesting Order ("RVO") or whether it must proceed by way of a standard Approval and Vesting Order ("AVO").

3 An RVO is a type of transaction which is typically used as an alternative to transferring assets from an insolvent company to a creditor. Instead of having assets conveyed from the debtor to the creditor, the debtor company's shares are transferred to the creditor after unwanted assets and liabilities are removed from the debtor company and vended to a new "residual" company.

4 RVOs were described by Justice Walker as follows in *PaySlate Inc. (Re)*2023 BCSC 608 [*PaySlate #1*]:

> [1] Reverse vesting orders ("RVOs") are a relatively new method used in insolvency cases to avoid the purchaser assuming the insolvent debtor's unwanted assets and liabilities. Typically, an RVO contemplates the sale of the debtor company's shares through a transaction structured so that "unwanted" assets and liabilities (including in this case, certain unsecured creditor claims) are removed and vended to a residual company while the "good assets" remain with the debtor.

5 In this case, an AVO would transfer legal title to the Real Property directly to the Purchaser from the company under receivership. That conveyance would trigger an obligation to pay property transfer tax ("PTT") pursuant to the *Property Transfer Tax Act*, R.S.B.C. 1996, c. 378 [*PTTA*] estimated to be approximately $3.5 million.

6 By contrast, if an RVO is employed, the shares of the debtor company which owns legal title to the Real Property, Southview Gardens BT Ltd., would be conveyed to the Purchaser. In those circumstances, the Real Property would not be directly transferred and no PTT would be payable.

7 Cenyard Pacific Developments Inc. ("Cenyard") is a major secured creditor of the respondents, which holds a second priority mortgage on the Real Property.

8 The Transaction provides that if the PTT is payable, the purchase price will be reduced by the amount of the PTT. If PTT is payable, it is Cenyard who will suffer the shortfall, subject to any other security rights that it may have.

9 Both Cenyard and the Purchaser (the "Applicants") seek to have the Transaction completed by way of an RVO, thus avoiding the PTT obligation.

10 The Province of British Columbia (the "Province") opposes the Transaction by way of RVO, but does not oppose the Transaction by way of an AVO.

Background

11 Pursuant to an application made by Peakhill Capital Inc., this Court made an order on February 16, 2023 appointing KSV Restructuring Inc. (the "Receiver") as the receiver of all of the assets, undertakings and business of various companies related to the Real Property, together with the Real Property itself.

12 On March 23, 2023, this Court made an Order approving a sales process for the Real Property.

13 The sales process was overseen by CBRE Limited who was retained and authorized by the Receiver to market the Real Property. Five offers were received, and the Purchaser submitted the highest offer.

14 The Purchaser's offer contemplated completion of the Transaction in part by way of an RVO. It is uncontested that the purpose for structuring the Transaction in this way, as opposed to through a conventional AVO, was to avoid paying PTT of approximately $3.5 million.

15 On June 29, 2023, in its second report, the Receiver expressed some reservations about the Transaction proceeding by way of RVO on the basis that the Transaction did not include attributes that have been relied upon in the past by the courts in granting RVOs. In early July 2023, the Province expressed its opposition to the RVO.

16 Consequently, the hearing of this application was set, and pending the contested hearing, the parties decided to seek approval of the AVO. I am advised by counsel for the Purchaser that this was done to achieve some commercial certainty.

17 On July 13, 2023, this Court approved the Transaction by way of AVO, subject to: (i) the Court granting the RVO; and (ii) the closing of the Transaction being on or before September 12, 2023.

Issues

18 In determining this application, there are two issues. In the circumstances of this case:

(a) does the Court have jurisdiction to grant an RVO; and

(b) if so, is it appropriate for the Court to grant an RVO?

Jurisdiction

19 The receivership order in this case was sought pursuant to s. 243 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 [*BIA*] and s. 39 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253 [*LEA*].

20 In *PaySlate #1*, Justice Walker found that an RVO may be granted under this Court's general jurisdiction under s. 183(1)(c) of the *BIA* which provides:

> 183 (1) The following courts are invested with such jurisdiction at law and in equity as will enable them to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act during their respective terms, as they are now, or may be hereafter, held, and in vacation and in chambers . . .
>
> (c) in the Provinces of Nova Scotia and British Columbia, the Supreme Court;

21 In *PaySlate #1*, Justice Walker held:

> [84] Although many of the case authorities discussing the circumstances in which RVOs may be issued are in the context of the *CCAA*, RVOs are available tools in other insolvency cases as well. Similar considerations apply in the context of the *BIA*.
>
> [85] In the *BIA*, s. 183 confers jurisdiction in accordance with legal and equitable principles to give effect to its purpose: *Re Olympia & York Developments Ltd.*, [1997] O.J. No. 591 at paras. 7, 10 (Gen. Div., in Bankruptcy); *Re Residential Warranty Company of Canada Inc. (Bankrupt)*, 2006 ABQB 236 at para. 26. Those purposes include those applying to proposals such as s. 65.13(4).
>
> [86] In addition to *Blackrock Metals*, *Harte Gold*, and *Quest*, there are other case authorities finding jurisdiction to order RVOs, including a notice of intention to make a proposal under the *BIA* (case name is underlined), and receivership proceedings, such as: *Plasco Energy* (July 17, 2015), Toronto CV-15-10869-00 (Ont. S.C.J. [Comm. List]); *Stornoway Diamond Corporation* (October 7, 2019), Montreal 500-11-057094-191 (Q.C.S.C. [Comm. Div.]); *Wayland Group Corp.* (April 21, 2020), Toronto CV-19-00632079-00CL (Ont. S.C.J. [Comm. List]); *Comark Holdings Inc.* (July 13, 2020), Toronto CV-20-00642013-00CL (Ont. S.C.J. [Comm. List]); *Beleave Inc.* (September 18, 2020), Toronto, CV-20-642097 (Ont. S.C.J. [Comm. List]); *JMB Crushing Systems Inc.* (October 16, 2020), Calgary 2001-05482 (A.B.K.B.); *Arrangement relatif à Nemaska Lithium Inc.*, 2020 QCCS 3218, leave to appeal refused, 2020 QCCA 1488; *In the Matter of a Plan of Compromise or Arrangement of Clearbeach Resources Inc. and Forbes Resources Corp.*, 2021 ONSC 5564*; In the Matter of the Notice of Intention to Make a Proposal of Junction Craft Brewing Inc*. (November 8 and December 20, 2021, Toronto, CV-31-2774500 (Ont. S.C.J. [Comm. List]; *Port Capital Development (EV) Inc. (Re)*, 2022 BCSC 1464, leave to appeal ref'd *1296371 B.C. Ltd. v. Domain Mortgage Corp.*, 2022 BCCA 331; *In the Matter of CannaPiece Group Inc.*, 2023 ONSC 841; *In the Matter of CannaPiece Group Inc.* (February 10, 2023), Toronto CV-22-689631-00CL (Ont. S.C.J. [Comm. List]); *Credit Suisse AG, Cayman Islands Branch v. Southern Pacific Resource Corp. et. al.* (May 13, 2022), Calgary 1501-05908 (A.B.K.B.).

22 In my view, the issue of whether this Court has jurisdiction to grant RVOs in proceedings under the *BIA* was raised squarely and decided in *PaySlate #1*. In my respectful view, the decision of Justice Walker was both correct and determinative of the issue.

23 The Province raises two arguments regarding jurisdiction.

24 First, it argues that the words of s. 183 of the *BIA* (or s. 243 which deals with receiverships) are insufficient to ground jurisdiction to grant an RVO.

25 In my view, this argument is met by *PaySlate #1*. As stated, Justice Walker has decided that the general words of s. 183 *are* sufficient to ground jurisdiction.

26 Second, the Province argues that even if s. 183 provides this Court with jurisdiction generally to grant an RVO, it does not do so in the context of this case. It says that that the *BIA* must be interpreted with regard to the *PTTA*, and it cites s. 72(1) of the *BIA* which states:

> 72 (1) The provisions of this Act shall not be deemed to abrogate or supersede the substantive provisions of any other law or statute relating to property and civil rights that are not in conflict with this Act, and the trustee is entitled to avail himself of all rights and remedies provided by that law or statute as supplementary to and in addition to the rights and remedies provided by this Act.

27 In my view, this submission is not one which relates to this Court's jurisdiction. Rather, it questions whether the granting of an RVO is appropriate in the particular circumstances of this case. The interplay between the RVO sought and the provisions of the *PTTA* will be addressed in detail below.

28 As stated above, the Applicants also argue that this Court has jurisdiction to grant an RVO under s. 39 of the *LEA*. Given my conclusion that it has jurisdiction under the *BIA*, it is not necessary for me to decide whether the *LEA* provides an additional basis for this Court's jurisdiction to grant an RVO and I decline to do so.

Appropriateness

29 This case, insofar as I am aware, is unique in the sense that there is no reported decision of a Canadian court in a contested proceeding that has addressed whether an RVO may be granted *solely* for the purpose of achieving a tax benefit.

30 In order to determine this issue, I will review the principles regarding the granting of RVOs, I will address the Province's argument that an RVO in this case would abrogate or supersede the provisions of the *PTTA*, and I will address the Province's argument that an RVO ought not to be granted in the face of reservations expressed by the Receiver about the Transaction proceeding by way of RVO.

Analysis of the Authorities Regarding RVOs

31 The Applicants argue that the case law supports the issuance of an RVO to support tax-related objectives. There are a number of cases in which tax benefits have been cited as reasons for granting an RVO.

32 In *Port Capital Development (EV) Inc. (Re)*2022 BCSC 1464 *[Port Capital]*, Justice Fitzpatrick held:

> [58] Finally, I am satisfied that approval of the Solterra Offer in the form of an RVO is appropriate, just as it was in relation to the Solterra Backup Offer. In the *BCSC Sale Reasons*, I set out the reasons why such a structure would be beneficial, albeit in relation to Landa's offer:
>
> > [20] Landa Offer #1 was in the form of an asset purchase, although the parties allowed for the possibility of completion pursuant to a Reverse Vesting Order ("RVO"). That scenario was seen as beneficial in order to allow the existing Petitioners to continue under Landa's ownership and control while preserving existing contractual rights, such as the building permit (but not the pre-sale contracts). The RVO structure also avoided payment of substantial property transfer tax.
>
> [emphasis added]

33 Further, in *Quest University Canada (Re)*2020 BCSC 1883 *[Quest]*, leave to appeal ref'd at 2020 BCCA 364, Justice Fitzpatrick cited two other cases in which courts found it appropriate to grant RVOs for tax planning purposes:

> a) At para. 131, she cited *Plasco Energy* (July 17, 2015), Toronto CV-15-10869-00C (Ont. S.C.J. [Comm. List]), in which an RVO was approved to implement an agreement "that 'effectively' transferred current tax losses and intellectual property to a purchaser"; and
>
> b) At para. 136, she cited *Comark Holdings Inc.* (July 13, 2020), Toronto CV-20-00642013-00CL (Ont. S.C.J. [Comm. List]), wherein Justice Hainey granted the RVO involving a share sale that "preserved the tax attributes of the debtor, which the purchaser viewed as critical for the success of the future business".

34 Moreover, in *PaySlate Inc. (Re)*2023 BCSC 977 [*PaySlate #2*], Justice Walker held:

> [11] Necessity has also been established. Not only does the share acquisition contemplated by the RVO preserve PaySlate's tax attributes and SR&ED credits, from additional evidence adduced by PaySlate and discussed by the Proposal Trustee, it is clear that the RVO is also necessary to preserve PaySlate's cyber security and cyber insurance policies.
>
> [emphasis added]

35 And in *Just Energy Group Inc. v. Morgan Stanley Capital Group Inc.* 2022 ONSC 6354 at para. 34 [*Just Energy*], the court held that one of the circumstances in which RVOs have been approved is where "maintaining the existing legal entities would preserve certain tax attributes that would otherwise be lost in a traditional vesting order transaction".

36 The Province argues that, in those cases, the preservation of tax attributes or the saving of tax were not the only benefits arising from the RVOs which were granted. Further, it submits that an RVO is usually granted to preserve a going concern which would otherwise be lost.

37 For example, in *Port Capital* , while the RVO structure did allow the parties to avoid property transfer tax, it also allowed the business to continue as a going concern and to preserve existing contractual rights such as a building permit.

38 Similarly, in *PaySlate* #2, an RVO was granted to preserve the debtor's existing tax attributes, but it also preserved scientific research and experimental development tax credits, as well as cyber security and cyber insurance policies which would otherwise not be transferable.

39 There is no doubt that a common use of RVOs is to preserve a going concern or to maintain licenses and permits which cannot be transferred easily: see *PaySlate #1* at para. 1, and *Harte Gold Corp. (Re)*2022 ONSC 653 *[Harte Gold]* at para. 71.

40 It is also clear that the jurisprudence is replete with cautionary words regarding the granting of RVOs.

41 In *PaySlate #1* at para. 87, Justice Walker held that "RVOs are not the norm and should only be granted in extraordinary circumstances".

42 Similarly, in *Harte Gold* at para. 38, Justice Penny stated as follows:

> . . . I think it would be wrong to regard employment of the RVO structure in an insolvency situation as the "norm" or something that is routine or ordinary course. Neither the BIA nor the CCAA deal specifically with the use or application of an RVO structure. The judicial authorities approving this approach, while there are now quite a few, do not generally provide much guidance on the positive and negative implications of this restructuring technique or what to look out for. Broader-based commentary and discussion is only now just now starting to emerge. This suggests to me that the RVO should continue to be regarded as an unusual or extraordinary measure; not an approach appropriate in any case merely because it may be more convenient or beneficial for the purchaser. Approval of the use of an RVO structure should, therefore, involve close scrutiny. The Monitor and the court must be diligent in ensuring that the restructuring is fair and reasonable to all parties having regard to the objectives and statutory constraints of the CCAA. This is particularly the case where there is no party with a significant stake in the outcome opposing the use of an RVO structure.

43 In *Quest*, Justice Fitzpatrick held at para. 171:

> A debtor should not seek an RVO structure simply to expedite their desired result without regard to the remedial objectives of the *CCAA*.

44 And in *Just Energy* at para 33:

> Reverse vesting orders are relatively new structures. I agree that reverse vesting orders should not be the "norm" and that a court should carefully consider whether a reverse vesting order is warranted in the circumstances . . .

45 There is no doubt that careful consideration is required when an RVO is sought. It is important to observe, however, that much of the reluctance expressed by courts about granting RVOs has arisen because RVOs may be used to circumvent processes in insolvency proceedings which entitle creditors to vote on plans, or may otherwise prejudice creditors.

46 In *PaySlate #1*, Justice Walker cited an article of Professor Janis Sarra for the proposition that "RVOs require special scrutiny by the courts, even where uncontested, since they deviate from [the] statutory framework intended to provide all creditors with an opportunity to be heard in the process".

47 In Dr. Sarra's article, "Reverse Vesting Orders - Developing Principles and Guardrails to Inform Judicial Decisions", 2022 CanLIIDocs 431 (the "Sarra Article"), she stated:

> [T]here must be exceptional circumstances for the court to be persuaded to bypass provisions of insolvency legislation aimed at giving both secured and unsecured creditors a meaningful voice/vote in the proceedings, as they are the residual claimants to the value of the debtor's assets during insolvency . . .
>
> This statutory framework represents a careful balancing of interests and prejudice, and gives voice and vote to the creditors that are the residual claimants to the value of the debtor company. Many of the provisions are aimed at mitigating the imbalance in power that secured creditors have in insolvency proceedings, at least during the period of negotiations for a plan, with a view to maximizing the value of the assets, preserving going-concern value, and protection of employees and the public interest.
>
> It makes sense, therefore, that in any application to bypass this carefully crafted statutory process, the court consider whether there are compelling and exceptional circumstances to justify this extraordinary remedy, even where the RVO is not specifically contested, as the court needs to be satisfied of the integrity of the system and the potential prejudice to creditors and other stakeholders that may not be appearing before it. Reasons are important for stakeholders to understand the benefits and prejudice that may accrue to any particular transaction.

48 And further:

> Weighed against these benefits is the concern that the RVO approach bypasses key components of the statutory framework that balances multiple creditor rights and interests, including the ability of creditors to vote on a plan. While one benefit of an RVO is often described as cost savings if a plan vote is avoided, the cases reveal that RVO can be complex and costly to structure and implement. There is also a question of whether companies will be able to shed substantial environmental remediation and reclamation obligations under this new structure, leaving few assets to satisfy the obligations.

49 In this case, there are three secured creditors who are collectively owed more than $83 million: Peakhill, Cenyard, and a group of entities referred to as "Woodbourne". The purchase price for the Real Property — which is the debtors' principal asset — is $72 million if the Transaction proceeds by way of RVO, and approximately $3.5 million less if it does not.

50 According to the Receiver's first report, the unsecured creditors are owed approximately $124,000. It is clear that as residual claimants to the value of the debtors' assets, they are "out of the money".

51 There is no suggestion in this case that the rights of creditors are being compromised or that their interests would be prejudiced by the granting of an RVO. There is no suggestion that any significant liabilities or obligations other than the PTT will be avoided. It appears that the only party by whom any prejudice will be allegedly suffered is the taxing authority. In the particular circumstances of this case, the reasons for caution typically considered when an RVO is contemplated do not weigh heavily.

52 The Province suggested that the avoidance of PPT in this case is akin to the avoidance of environmental and reclamation obligations referred to in the Sarra Article. However, in my view, the potential tax liabilities are different in kind. The avoidance of environmental obligations brings into play a significant public interest. The Province's interest in collecting PTT will be addressed below in the discussion regarding the interplay between the granting of an RVO and the *PTTA*.

53 Relatedly, the Province also advanced what might be characterized as a "floodgates argument". I understand its submission to be that if an RVO is granted in this case, there will be an excess of RVO applications.

54 In response, the Applicants observed that an RVO to avoid PPT may only be applied for when the property at issue is already held in the name of a company whose shares can be conveyed.

55 In any event, although it may well be true that the granting of an RVO in this context will cause them to be sought more often, I have been advised of no reason why this would be undesirable from a policy perspective or from the perspective of any stakeholder, other than the taxing authority, at least in the absence of prejudice to other stakeholders such as creditors.

56 As stated at the beginning of this section, the issue in this case is somewhat uncharted territory. On one hand, it does not appear that a Canadian court has ordered an RVO in a contested proceeding when tax savings were the only benefit. On the other hand, in the circumstances of this case, and subject to the Province's arguments addressed below regarding the interplay between the *BIA* and the *PTTA*, there does not seem to be any specific reason not to employ an RVO to preserve value for the creditors.

57 All of these issues must be viewed in the context of the objectives of insolvency law, one of which is to maximize recovery for creditors. In this regard, Chief Justice Paquette held as follows in *Arrangement relatif à Blackrock Metals Inc.* 2022 QCCS 2828 at para. 86, leave to appeal ref'd 2022 QCCA 1073, leave to appeal to SCC ref'd, 40401 (4 May 2023):

> Albeit new, RVOs have been confirmed by the courts as an appropriate way for a debtor to sell its business when the circumstances justify such structure. In particular, CCAA courts have approved RVO structures in several complex mining transactions and have recognized that their benefits, which include maximizing recovery for creditors, importantly limiting delays and transaction costs, and facilitating the preservation of the insolvent business' going concern, justify the use of this innovative restructuring tool.

The Interplay between the Granting of an RVO and the PTTA

58 The foregoing analysis leads to the critical issue on this application: whether it would be contrary to the *PTTA* to grant an RVO which would have the effect of saving the creditors approximately $3.5 million in PTT.

59 The Province argues that "to exercise jurisdiction and approve the RVO would be to bless the objective of avoiding a tax liability". Further, it argues:

> 77. Any statutory jurisdiction which could otherwise be found in the BIA or the LEA is negated in light of the specific provisions of the PTTA, which provide for (i) the payment of PTT when title is transferred (absent an applicable exemption), and (ii) mechanisms whereby the Province can assess PTT (and penalties) when a transaction or series of transactions are designed to avoid the payment of PTT.

60 In my view, with respect, the Province's arguments on this issue are unpersuasive, for at least two reasons.

61 First, I reiterate that in numerous cases, some of which are cited above, courts have granted RVOs which have conferred tax benefits on the parties in an insolvency proceeding. Those courts have already "blessed the objective of avoiding a tax liability", albeit in circumstances wherein the tax objective was not the only one. In all of these cases, it appears clear that the taxing authority became entitled to less tax than otherwise, either because tax credits or tax losses were preserved, or because taxes otherwise payable were avoided.

62 Second, the Province's arguments on this issue appear to be based on the premise that the transfer of property by means of the sale of the corporate property owner's shares constitutes unlawful tax avoidance. However, it seems clear that, at least outside of the insolvency context, this proposition is not correct.

63 To the extent that evidence on this point is required, the Applicants cite the Receiver's second report and an affidavit from an experienced corporate realtor for the proposition that it is common for a seller and purchaser to enter into a share purchase

agreement for the sale of shares in a company whereby all of the issued and outstanding shares of the company are transferred by the seller to the purchaser so that the purchaser can own the seller company's real property. In particular, it is common for purchasers to acquire land in British Columbia by acquiring the shares of a nominee to avoid paying PTT.

64 In a non-insolvency context, the parties would have been permitted to carry out the transfer of the property by means of the transfer of shares of the nominee company. Indeed, it seems evident that similarly situated parties in a non-insolvency context would have done so.

65 Therefore, this is a tax liability which is readily avoided in a non-insolvency context. The Province has not been able to satisfactorily explain why, given that premise, the proposed RVO transaction is unlawful or would attract the *PTTA*'s general anti-avoidance tax rules.

66 In the Province's submission quoted above, it refers to "specific provisions of the PTTA . . . which provide for . . . the payment of PTT *when title is transferred*". It is important to emphasize that if an RVO is granted in this case, title to the Real Property will not be transferred. This is not a case in which the title will be transferred but the parties will be permitted nonetheless to evade or avoid the tax. The entire point of the RVO is to create an alternative arrangement in which there is no transfer of the property, as can readily be done without attracting tax when property is owned by a solvent company.

67 In further support of its position on this issue, and in answer to the Province's argument that this Court's statutory jurisdiction to grant an RVO is negated by mechanisms in the *PTTA* by which the Province can assess PTT and penalties when a transaction is designed to avoid the payment of PTT, the Applicants point out that the Province has the ability to impose PTT on the transfer of property through the purchase of the shares of a nominee company by means of regulation and it has not done so.

68 In particular, s. 2(3) and (4) of the *PTTA* contemplate that the Province has the power to tax the transfer of beneficial interests in land:

> (3) The Lieutenant Governor in Council may prescribe that a transaction that consists of a purported transfer, by a prescribed method of a prescribed interest in land, is taxable under this Act, whether or not that interest is registrable under the Land Title Act.
>
> (4) A regulation under subsection (3) may prescribe
>
> (a) when the liability for the tax arises and when the tax is payable, and
>
> (b) the method by which
>
> (i) returns must be filed, and
>
> (ii) the tax may be remitted and collected.

69 At present, there are no regulations under the *PTTA* that would deem a sale of shares of a nominee holding real property to be a taxable transaction.

The Lack of a Positive Recommendation from the Receiver

70 The Province argues that the application ought to be dismissed because of the Receiver's decision not to recommend the Transaction by way of RVO.

71 There is no doubt that the recommendations of a court-appointed officer ought generally to weigh heavily in the deliberations of this Court. However, the Receiver did not recommend against the RVO. It simply declined to recommend it and it did not take a position on this application.

72 Further, the reservations that it expressed were legal ones. In particular, it took the view that the facts of this case did not have many of the features found in other cases in which RVOs were ordered. In my view, these observations were generally correct and reflected the uncharted nature of this application.

73 In my view, a receiver's recommendation is most valuable to the court when it reflects factual or other matters of which the receiver would have unique knowledge. In this case, while the Receiver's views on the application of the current jurisprudence are helpful, they do not weigh as heavily as they would in other circumstances.

74 This is not a case in which the Receiver has opined on something that it is uniquely qualified to know. It has expressed reservations about whether the tests in the legal authorities have been met, which is a matter for this Court to determine.

75 In my view, the fact that the Receiver declined to recommend approval of the Transaction by way of RVO does not preclude this Court from granting an RVO in the circumstances of this case.

The Harte Gold Factors

76 In *Harte Gold* at para. 38, Justice Penny set out what are commonly referred to in the insolvency bar as the "*Harte Gold* factors" which are to be considered in determining whether an RVO is appropriate. As I have concluded that this Court is not precluded from granting an RVO by the present jurisprudence, the interplay between an RVO and the *PTTA*, or the Receiver's decision not to recommend the RVO, I will turn to a consideration of those factors and their application to this case:

> The debtor, the purchaser and especially the Monitor, as the court appointed officer overseeing the process and answerable to the court (and in addition to all the usual enquiries and reporting obligations), must be prepared to answer questions such as:
>
> (a) Why is the RVO necessary in this case?
>
> (b) Does the RVO structure produce an economic result at least as favourable as any other viable alternative?
>
> (c) Is any stakeholder worse off under the RVO structure than they would have been under any other viable alternative? and
>
> (d) Does the consideration being paid for the debtor's business reflect the importance and value of the licences and permits (or other intangible assets) being preserved under the RVO structure?

77 In my view, these factors lead to the conclusion that an RVO ought to be granted in this matter:

a) While an RVO is not necessary to avoid foreclosure or bankruptcy, it is necessary to allow the parties to structure their affairs so as to preserve $3.5 million in value for the creditors and to maximize the return for creditors.

b) In my view, the RVO structure produces an economic result at least as favourable as any other viable alternative. It clearly creates more value for the creditors. To the extent that the Province is a stakeholder in the analysis, the overall economic result is at least as favourable overall, in the sense that the Province "loses" exactly the amount that the creditors gain.

c) As to whether any stakeholder is worse off under the RVO structure, the Province is undoubtedly worse off. However, for the reasons set out above, it is my view that the Province's argument that it is entitled to the PTT because would be unlawful for the creditors to avoid the tax in these circumstances is belied by the regime currently in place in the non-insolvency context. As stated above, it has not been suggested that any creditor or any other stakeholder is worse off.

d) Finally, the question of whether the consideration paid for the assets reflect the importance and value of the assets being preserved under the RVO structure may be answered in the affirmative. In the event that an RVO is granted, the saved funds go to the creditors.

78 In the circumstances of this case, and particularly in the absence of any suggestion that an RVO in this case would prejudice the rights of creditors, I find that the RVO sought ought to be granted, on the basis that the RVO will preserve and maximize the value of the assets available to creditors.

Releases

79 In considering whether to exercise the discretion to approve RVO release provisions, courts have considered the following factors set out in *Lydian International Limited (Re)* 2020 ONSC 4006 at para. 54:

> a) whether the parties to be released from claims were necessary and essential to the restructuring of the debtor;
>
> b) whether the claims to be released were rationally connected to the purpose of the plan and necessary for it;
>
> c) whether the plan could succeed without the releases;
>
> d) whether the parties being released were contributing to the plan; and
>
> e) whether the release benefitted the debtors as well as the creditors generally.

80 The submissions of the parties regarding the release provisions in this case were very limited. The primary objection voiced by the Province was that the releases "serve to potentially inhibit the Province from collecting PPT".

81 As I have determined that the granting of an RVO is appropriate so as to allow the creditors to save the amount of the PTT, the fact that the releases would also have this effect does not weigh heavily in the analysis. As the purpose of the RVO is to maximize the creditors' recovery by avoiding PPT, it would be inconsistent with that purpose to permit the Province to collect the tax from the proposed releasees.

82 In my view, the releases in this case are necessary to the Transaction if it is to be carried out by way of RVO, and they are rationally connected to it.

Conclusion

83 For the reasons stated, the relief sought at paragraph 1(b) of the Receiver's Notice of Application filed June 30, 2023 — which includes an approval and reverse vesting order, substantially in the form attached to the Notice of Application as Schedule "C" thereto — is granted.

Application granted.

TAB 17

2021 SCC 25, 2021 CSC 25
Supreme Court of Canada

Sherman Estate v. Donovan

2021 CarswellOnt 8340, 2021 CarswellOnt 8339, 2021 SCC 25, 2021 CSC 25, [2021] 2 S.C.R. 75, [2021] 2 R.C.S. 75, [2021] S.C.J. No. 25, 331 A.C.W.S. (3d) 489, 458 D.L.R. (4th) 361, 66 C.P.C. (8th) 1, 67 E.T.R. (4th) 163, 72 C.R. (7th) 223, EYB 2021-391973

Estate of Bernard Sherman and Trustees of the Estate and Estate of Honey Sherman and Trustees of the Estate (Appellants) and Kevin Donovan and Toronto Star Newspapers Ltd. (Respondents) and Attorney General of Ontario, Attorney General of British Columbia, Canadian Civil Liberties Association, Income Security Advocacy Centre, Ad IDEM/Canadian Media Lawyers Association, Postmedia Network Inc., CTV, a Division of Bell Media Inc., Global News, a division of Corus Television Limited Partnership, The Globe and Mail Inc., Citytv, a division of Rogers Media Inc., British Columbia Civil Liberties Association, HIV & AIDS Legal Clinic Ontario, HIV Legal Network and Mental Health Legal Committee (Interveners)

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

Heard: October 6, 2020
Judgment: June 11, 2021
Docket: 38695

Proceedings: affirming *Donovan v. Sherman Estate* (2019), 56 C.P.C. (8th) 82, 47 E.T.R. (4th) 1, 2019 CarswellOnt 6867, 2019 ONCA 376, C.W. Hourigan J.A., Doherty J.A., Paul Rouleau J.A. (Ont. C.A.); reversing *Toronto Star Newspapers Ltd. v. Sherman Estate* (2018), 41 E.T.R. (4th) 126, 2018 CarswellOnt 13017, 2018 ONSC 4706, 28 C.P.C. (8th) 102, 417 C.R.R. (2d) 321, S.F. Dunphy J. (Ont. S.C.J.)

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Robert S. Anderson, Q.C., for Interveners, Ad IDEM/Canadian Media Lawyers Association, Postmedia Network Inc., CTV, a Division of Bell Media Inc., Global News, a division of Corus Television Limited Partnership, The Globe and Mail Inc. and Citytv, a division of Rogers Media Inc.
Adam Goldenberg, for Intervener, British Columbia Civil Liberties Association
Khalid Janmohamed, for Interveners, HIV & AIDS Legal Clinic Ontario, the HIV Legal Network and the Mental Health Legal Committee

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

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s. 8 — considered

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POURVOI formé par les fiduciaires d'une succession à l'encontre d'un jugement publié à *Donovan v. Sherman Estate* (2019), 2019 ONCA 376, 2019 CarswellOnt 6867, 47 E.T.R. (4th) 1, 56 C.P.C. (8th) 82 (Ont. C.A.), ayant accueilli l'appel interjeté à l'encontre d'un jugement imposant une ordonnance de mise sous scellés.

A. The Test for Discretionary Limits on Court Openness

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

38 The test for discretionary limits on presumptive court openness has been expressed as a two-step inquiry involving the necessity and proportionality of the proposed order (*Sierra Club*, at para. 53). Upon examination, however, this test rests upon three core prerequisites that a person seeking such a limit must show. Recasting the test around these three prerequisites, without altering its essence, helps to clarify the burden on an applicant seeking an exception to the open court principle. In order to succeed, the person asking a court to exercise discretion in a way that limits the open court presumption must establish that:

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

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

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

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

39 The discretion is structured and controlled in this way to protect the open court principle, which is understood to be constitutionalized under the right to freedom of expression at s. 2(b) of the Charter (*New Brunswick*, at para. 23). Sustained by freedom of expression, the open court principle is one of the foundations of a free press given that access to courts is fundamental to newsgathering. This Court has often highlighted the importance of open judicial proceedings to maintaining the independence and impartiality of the courts, public confidence and understanding of their work and ultimately the legitimacy of the process (see, e.g., *Vancouver Sun*, at paras. 23-26). In *New Brunswick*, La Forest J. explained the presumption in favour of court openness had become "'one of the hallmarks of a democratic society'" (citing *Re Southam Inc. and The Queen (No.1)*, (1983), 41 O.R. (2d) 113 (C.A.), at p. 119), that "acts as a guarantee that justice is administered in a non-arbitrary manner, according to the rule of law ... thereby fostering public confidence in the integrity of the court system and understanding of the administration of justice" (para. 22). The centrality of this principle to the court system underlies the strong presumption — albeit one that is rebuttable — in favour of court openness (para. 40; *Mentuck*, at para. 39).

40 The test ensures that discretionary orders are subject to no lower standard than a legislative enactment limiting court openness would be (*Mentuck*, at para. 27; *Sierra Club*, at para. 45). To that end, this Court developed a scheme of analysis by analogy to the *Oakes* test, which courts use to understand whether a legislative limit on a right guaranteed under the *Charter* is reasonable and demonstrably justified in a free and democratic society (*Sierra Club*, at para. 40, citing *R. v. Oakes*, [1986] 1 S.C.R. 103; see also *Dagenais*, at p. 878; *Vancouver Sun*, at para. 30).

41 The recognized scope of what interests might justify a discretionary exception to open courts has broadened over time. In *Dagenais*, Lamer C.J. spoke of a requisite risk to the "fairness of the trial" (p. 878). In *Mentuck*, Iacobucci J. extended this to a risk affecting the "proper administration of justice" (para. 32). Finally, in *Sierra Club*, Iacobucci J., again writing for a unanimous Court, restated the test to capture any serious risk to an "important interest, including a commercial interest, in the context of litigation" (para. 53). He simultaneously clarified that the important interest must be expressed as a public interest. For example, on the facts of that case, a harm to a particular business interest would not have been sufficient, but the "general commercial interest of preserving confidential information" was an important interest because of its public character (para. 55). This is consistent with the fact that this test was developed in reference to the *Oakes* jurisprudence that focuses on the "pressing and substantial" objective of legislation of general application (*Oakes*, at pp. 138-39; see also *Mentuck*, at para. 31). The term "important interest" therefore captures a broad array of public objectives.

TAB 18

2022 YKSC 2
Supreme Court of Yukon

Yukon (Government of) v. Yukon Zinc Corporation

2022 CarswellYukon 3, 2022 YKSC 2, 343 A.C.W.S. (3d) 8, 96 C.B.R. (6th) 255

GOVERNMENT OF YUKON as represented by the Minister of the Department of Energy, Mines and Resources (PETITIONER) AND YUKON ZINC CORPORATION (RESPONDENT)

S.M. Duncan C.J.S.C.

Judgment: January 21, 2022
Docket: Whitehorse S.C. 19-A0067

Counsel: John T. Porter, Kimberly Sova, for Petitioner
No one for Yukon Zinc Corporation
H. Lance Williams, Forrest Finn, for Welichem Research General Partnership
Tevia Jeffries, Emma Newbery, for PricewaterhouseCoopers Inc.

Subject: Civil Practice and Procedure; Corporate and Commercial; Estates and Trusts; Insolvency; Natural Resources; Public

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Sherman Estate v. Donovan (2021), 2021 SCC 25, 2021 CSC 25, 2021 CarswellOnt 8339, 2021 CarswellOnt 8340, 66 C.P.C. (8th) 1, 67 E.T.R. (4th) 163, 458 D.L.R. (4th) 361, 72 C.R. (7th) 223 (S.C.C.) — followed

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

Vancouver Sun, Re (2004), 2004 SCC 43, 2004 CarswellBC 1376, 2004 CarswellBC 1377, (sub nom. *R. v. Bagri)* 184 C.C.C. (3d) 515, (sub nom. *R. v. Bagri)* 240 D.L.R. (4th) 147, (sub nom. *Application Under Section 83.28 of the Criminal Code, Re)* 322 N.R. 161, 21 C.R. (6th) 142, (sub nom. *Application Under Section 83.28 of the Criminal Code, Re)* 199 B.C.A.C. 1, [2004] 2 S.C.R. 332, 33 B.C.L.R. (4th) 261, 120 C.R.R. (2d) 203, [2005] 2 W.W.R. 671 (S.C.C.) — referred to

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Generally — referred to
Waters Act, S.Y. 2003, c. 19
Generally — referred to

APPLICATIONS by receiver for orders approving sale of certain mineral claims and termination of sale and investment solicitation plan, and for order sealing its confidential report on purchase process.

***S.M. Duncan C.J.S.C.*:**

Introduction

1 The court-appointed Receiver, PricewaterhouseCoopers Inc., brings two applications: one for Orders approving the sale of certain mineral claims and related assets of Yukon Zinc Corporation ("Yukon Zinc") to Almaden Minerals Ltd. ("Almaden") and for the termination of the sale and investment solicitation plan (the "SISP"), and the second for an Order sealing the Receiver's Confidential Supplemental Eighth Report to the Court, with appendices, currently unfiled.

2 The Government of Yukon supports these applications. The applications are unopposed or subject to no position taken by Welichem Research General Partnership ("Welichem") a secured creditor of Yukon Zinc and lessor of items comprising substantially all of the infrastructure, tools, vehicles and equipment at the Wolverine Mine (the "Mine"). No other interested party appeared on the application or made submissions.

3 For the following reasons, I will grant the Orders requested, subject to certain conditions as set out below.

Background

4 These applications arise in the context of the ongoing receivership of all the assets, undertakings and property of Yukon Zinc. Its principal asset is the Mine, a zinc-silver-lead mine located 282 km northeast of Whitehorse, Yukon. It holds 2,945 quartz mineral claims, a quartz mining license issued under the *Quartz Mining Act*, SY 2003, c.14, and a water licence issued under the *Waters Act*, SY 2003, c.19. Yukon Zinc carried out exploration and development activities between 2008 and 2011. The Mine began production in March 2012. In January 2015, the Mine ceased operating because of financial difficulties and was put into care and maintenance. Despite a successful restructuring in October 2015, Yukon Zinc was unable to obtain additional funds to operate the Mine and it continued in care and maintenance. In 2017, the underground portion of the Mine flooded and contaminated water was diverted to the tailings storage facility, creating an increased risk of the release of untreated water into the environment. In May 2018, the Yukon government requested from Yukon Zinc an increase in reclamation security from $10,588,966 to $35,548,650 to enable it to address the deteriorating condition of the Mine. Yukon Zinc never provided this increased amount. In September 2019, the Yukon government's petition for the appointment of the Receiver of Yukon Zinc's property and assets was granted by this Court. By October 2019, Yukon Zinc had not filed a proposal in the bankruptcy matter, commenced in British Columbia, and Yukon Zinc was deemed to have made an assignment into bankruptcy. PricewaterhouseCoopers Inc. was appointed the trustee in bankruptcy.

5 Pursuant to s. 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 as amended (the "*BIA*"), the Receiver became responsible for the care and maintenance of the Mine. It developed the SISP that proposed the evaluation of bids for the assets and property of Yukon Zinc on various factors. The SISP was approved by the Court on May 26, 2020 but was stayed pending the outcome of an appeal by Welichem. The Court's approval was confirmed on appeal.

6 The sale process began in April 2021. The Receiver contacted 559 potential bidders, advertised the SISP on-line and through media in British Columbia and Yukon and encouraged other stakeholders such as Yukon government and the Kaska Nation to provide additional contacts. Eighteen potential bidders signed non-disclosure agreements and were given access to the data room. By June 2021 several entities submitted non-binding expressions of interest. Throughout the summer of 2021, the Receiver held multiple calls with each of these potential bidders to discuss their plans and ensure the Receiver understood them, to explain and clarify the SISP evaluation criteria, and to support the bidders' due diligence work, including providing explanations of the regulatory requirements. The Receiver also discussed the progress of the SISP regularly with Yukon government and the Kaska Nation. The binding bid deadline was extended and by July the Receiver had received several binding bids. The Receiver began to evaluate these bids. By September 2021, however, some bidders withdrew from the process for various reasons. These withdrawals were confirmed in writing by the Receiver (the "Removal Letters").

7 On completion of the evaluation of the remaining bids, the Receiver concluded that no bid could result in a viable sale of substantially all of Yukon Zinc's assets. The Receiver advised the relevant stakeholders by letter, after consultation with Yukon government, that the sale process would be terminated (the "Termination Letters"). The Receiver also determined at that time that the preferred approach was to transfer the care and maintenance to the Yukon government.

8 In June 2021, the Receiver received a non-binding expression of interest and subsequently a binding bid from Almaden for a small portion of the assets of Yukon Zinc, the Logan interests. Almaden had entered into a joint venture agreement with Yukon Zinc (then called Expatriate Resources Ltd.) in 2005. This agreement led to the forming of a contractual joint venture to explore and develop the Logan interests. No such activity was ever commenced. The Logan interests consist of 156 mineral claims located approximately 100 km south of the Mine. Under the joint venture, Yukon Zinc had an interest of 60% and Almaden 40%. Almaden offered to purchase the Yukon Zinc 60% interest.

9 The Receiver believes the Almaden bid could be a viable sale of the Logan interests and has entered into a purchase and sale agreement with Almaden for this purpose, subject to court approval.

10 The Receiver has submitted copies of the non-binding expressions of interest, binding bids, Removal letters, Termination letters, the Almaden bid, and the Almaden purchase agreement as attachments to the Receiver's Confidential Supplemental Eighth Report. All of these documents along with the report are considered to contain sensitive commercial information and the Receiver seeks a sealing order over them.

Approval of Sale to Almaden

11 Subsections 3(k) and (l) of the Receiver's powers set out in the Order dated September 13, 2019 provide the Receiver with express power and authority to market any or all of the Yukon Zinc assets, undertakings or property, including advertising and soliciting offers for all or part of the property, negotiating appropriate terms and conditions, as well as authority to sell, convey, transfer, lease or assign the property with approval of this Court if the transaction exceeds $150,000.

12 The SISP sets out at s. 22 the evaluation criteria for qualified purchase bids. They are:

> (a) Price;
>
> (b) Structural complexity of the proposed transaction;
>
> (c) Nature and sufficiency of funding for the proposed transaction;
>
> (d) Probability of closing the proposed transaction and any relevant risks thereto, including nature of any remaining conditions and due diligence requirements;
>
> (e) Whether the proposed transaction leaves any of the YZC [Yukon Zinc Corporation] Assets within the receivership;
>
> (f) Impact on former employees of YZC;

> (g) Bidder's financial strength, technical and environmental expertise and relevant experience to carry out work required to maintain regulatory compliance at the Wolverine Mine after closing of the proposed transaction;
>
> (h) Bidder's historical environmental safety record, operational experience with undertakings of similar nature and/or scale and record of successful restart of mines out of care and maintenance;
>
> (i) Strength of a bidder's proposal for posted required Reclamation Security as required by the DEMR [Department of Energy, Mines and Resources] and any other security required by any other applicable regulator;
>
> (j) Qualified Bidder's willingness and demonstrated ability to obtain and maintain any necessary regulatory approval in connection with ownership and operation or case and maintenance of the Wolverine Mine, including from but not limited to the Water Board and the DEMR;
>
> (k) Benefits that may accrue to Yukon residents and businesses and the affected Kaska Nations of Ross River Dena Council, Liard First Nation, Kwadacha Nation and Dease River First Nation.

13 The SISP also requires the Receiver to report to the Court on the outcome of the solicitation process, including whether it intends to proceed with any one or more of the qualified purchase bids. The applicable statutory obligations on the Receiver are set out in s. 247(a) and (b) of the *BIA*: to act honestly and in good faith, and to deal with the property of the debtor in a commercially reasonable manner.

14 The principles to be applied by a court in determining whether to approve a proposed sale by a receiver are set out in the leading case of *Royal Bank v Soundair Corp*(1991), 4 OR (3d) 1 (CA) at para. 16:

> 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.

15 Here, the Receiver made extensive efforts through direct and indirect contacts of potential bidders and advertising to obtain the best price for the assets. There is no evidence of any improvident actions by the Receiver. The Receiver spent time with each interested potential bidder to assist with their due diligence activities and other aspects of the bidding process.

16 As the Receiver reported, a review of the submitted bids shows that Almaden was the only bidder specifically for the Logan interests. While other bidders referred to the Logan interests, and included them in their bids, their overall bids were withdrawn or unacceptable to the Receiver. Almaden provided the best price for the Logan interests. Almaden is an experienced mining exploration company based in Vancouver.

17 The Receiver noted that although the Logan interests represent a small fraction of the Yukon Zinc assets and property, their sale will generate some funds for the estate which is in the interests of all parties. Yukon government supports this sale and Welichem does not oppose it.

18 The Almaden offer was obtained through the SISP process. This process was approved by the Court as fair, transparent and commercially efficacious.

19 Finally, the evidence shows the SISP process was conducted by the Receiver honestly and in good faith. There is no suggestion or evidence of unfairness in the way the process was carried out.

20 The finalizing of this sale process will be simple: the 60% interest in the Logan assets under the joint venture agreement will be transferred to Almaden. The other 40% are already in the name of Almaden. The commercial joint venture agreement will become defunct on closing. The Receiver advised the splitting off of these interests from the remainder of the assets and property would not be detrimental to any future sale process as they represent a small portion and there was no other bidder interested in solely the Logan interests. The cost to the Receiver of this transaction is reasonable given Almaden's existing agreement and interests.

21 The Almaden Purchase Agreement, a redacted copy of which is included in the filed materials, is approved.

Termination of the SISP

22 As noted above, the Receiver concluded that the SISP process did not lead to a viable sale. None of the bids was acceptable, either because the bidder withdrew from the process, or the bids contained conditions for closing or available consideration that were unacceptably uncertain. The specifics of each bid were not disclosed in the publicly filed eighth report of the Receiver, for reasons of confidentiality. This issue is addressed below.

23 In general, the reasons why certain bidders withdrew from the process included:

(a) the realization during the SISP process of the need for the purchaser to obtain a new water licence instead of assuming the current water licence, a process which could take two years or more;

(b) the possibility of ongoing litigation over the Welichem assets which remain at the site (the Court has been advised that the matter is in the process of settling, although the settlement agreement is not yet finalized);

(c) the unknown extent and costs of reconstruction to make the Mine operational, given the flooded state of the underground part of the Mine and its questionable structural integrity;

(d) the inability to determine potential value of the mineral claims because of an absence of updated exploration results; and

(e) the uncertainty of reclamation or remediation costs and how they will be shared with the Yukon government.

24 The Receiver explained that there was not one issue that presented a bar to the bidders who withdrew or were rejected; the concerns were different for each bidder.

25 The Order approving the SISP or the SISP do not contain a provision for termination of the SISP process. However, s. 30(a) of the SISP states that the Receiver, in consultation with Yukon government, may reject at any time any bid that is:

(i) inadequate or insufficient;

(ii) not in conformity with the requirements of the BIA, this SISP or any orders of the Court applicable to YZC or the Receiver; or

(iii) contrary to the interests of YZC's estate and stakeholders as determined by the Receiver;

26 Further, s. 23(f) of the SISP contemplates the possibility that the Receiver may report to the Court that it will not proceed with any one or more of the bids.

27 The jurisprudence offers little guidance on the role of the court in a situation of termination of a sales process in the event of no acceptable bidders. The Receiver noted one decision in which the Supreme Court of British Columbia observed it saw no reason why the Receiver could not recommend against completion of a sale, and that it had a duty to advise the court of any reason why the court might conclude the sale should not be approved (*Bank of Montreal v On-Stream Natural Gas Ltd Partnership* (1992), 29 CBR (3) 203 (BC SC) at para. 24).

28 The case law is clear that in reviewing a sales process the court is to defer to the business expertise of the Receiver, and is not to intervene or "second guess" the Receiver's recommendations and conclusions (*Royal Bank of Canada v Keller & Sons Farming Ltd*, 2016 MBCA 46 at para. 11). The court is to ensure the integrity of the process is maintained through the exercise of procedural fairness in any negotiations and bidding.

> ... 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. ... [*Crown Trust Co v Rosenberg* (1986), 60 OR (2d) 87 (H Ct J) at para. 65]

29 Here, the Receiver undertook a thorough process in attempting to attract and identify an acceptable bidder and ultimate purchaser, in consultation with Yukon government and the Kaska Nation. By its own account, it provided substantial assistance to potential bidders throughout the summer of 2021, including extending deadlines, participating in multiple calls to clarify and understand their proposals, and providing them with necessary information and connections to enable them to complete their due diligence. The SISP has already been approved as fair and reasonable by this Court and as noted above, the Receiver's appears to have implemented the SISP fairly and in good faith.

30 Yukon government agreed with the termination of the SISP, indicating that the Receiver's good faith efforts were the best that could be achieved at this time. Welichem did not oppose the termination of the SISP.

31 While the confidential documents set out the more detailed reasons why the Receiver has concluded there are no appropriate bidders, scrutiny or assessment of these reasons is not the Court's role.

32 I note that the SISP process may have some value for future in that entities with interest in the project were identified and educated about the process, and a large amount of information was gathered and learned about the Mine both by the interested parties and the Receiver in consultation with Yukon government and the Kaska Nation. This may have some value for future bidding or sales processes.

33 For these reasons, the termination of the SISP is approved. The draft Approval and Vesting Order filed by the Receiver on this application is approved, with appropriate adjustments to reflect appearances of counsel.

Sealing Order

34 The Receiver seeks an order sealing its Confidential Supplemental Eighth Report to the Court containing the results of the SISP and attached documents. The report sets out details of the process including:

(a) the names of the bidders, and the kind of work the Receiver engaged in over the summer of 2021 to advance the bids according to the evaluation criteria;

(b) the details of each bid, including price and conditions;

(c) the challenges of each bid;

(d) the Receiver's review and application of the evaluation criteria; and

(e) the reasons why certain bidders withdrew or were eliminated from the process.

35 The documents attached to the report include unredacted:

(a) expressions of interest;

(b) binding bids;

(c) Removal Letters;

(d) Termination Letters;

(e) Almaden's bid; and

(f) Almaden's Purchase Agreement.

36 The Receiver argues that the information in this report disclosing its application of the evaluation criteria and the challenges and problems with the bids, as well as the documents themselves, contain sensitive commercial information that would cause harm to any future efforts to market the Mine. Information about the identity of bidders, the proposed purchase prices, the proposed terms and conditions, the reasons for the bidders' withdrawal or rejection would affect the possibility of free and open negotiation in any future sale process.

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

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

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

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

39 In the insolvency context, especially where there is a sale process, it is a standard practice to keep all aspects of the bidding or sales process confidential. Courts have found this appropriately meets the *Sierra Club* test as modified by *Sherman Estate*, as sealing this information ensures the integrity of the sales and marketing process and avoids misuse of information by bidders in a subsequent process to obtain an unfair advantage. The important public interest at stake is described as the commercial interests of the Receiver, bidders, creditors and stakeholders in ensuring a fair sales and marketing process is carried out, with all bidders on a level playing field.

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

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

> **bidders in the next round of bidding, thereby preventing them from gaining an unfair advantage in their subsequent bids. The integrity of the sale process necessitates keeping all bids confidential until a final sale of the assets has taken place.** [emphasis added].

41 *Look Communications Inc v Look Mobile Corp*, (2009), 183 ACWS (3d) 736 (Ont Sup Ct) ("*Look*") was decided not in the insolvency context but in the context of a court-approved sales process requiring the appointment of a monitor, and a plan of arrangement under the *Business Corporations Act*, R.S.C. 1985, c. C.44. The facts were like those of the case at bar in that only two of the five assets were sold through the initial sales process. The court ordered the monitor file an unredacted version of its report after the sale was completed and the monitor's certificate filed with the court. However, the company requested a further sealing of the report and documents for six months because it was continuing its efforts to sell the remaining assets and was in discussion with some of the same parties who submitted bids under the initial completed sales process. The court applied the principles in *Sierra Club*, noting that the "important commercial interest" must be more than the specific interest of the party requesting the confidentiality order, such as loss of business or profits. There must be a general principle at stake, such as a breach of a confidentiality agreement through the disclosure of the information.

42 The court in *Look* noted at para. 17:

> It is common when assets are being sold pursuant to a court process to seal the Monitor's report disclosing all of the various bids in case a further bidding process is required if the transaction being approved falls through. Invariably, no one comes back asking that the sealing order be set aside. That is because ordinarily all of the assets that were bid on during the court sale process end up being sold and approved by court order, and so long as the sale transaction or transactions closed, no one has any further interest in the information. In *8857574 Ontario Inc. v. Pizza Pizza Ltd.* (1994) 23 B.L.R. (2nd) 239, Farley J. discussed the fact that valuations submitted by a Receiver for the purpose of obtaining court approval are normally sealed. He pointed out that the purpose of that was to maintain fair play so that competitors or potential bidders do not obtain an unfair advantage by obtaining such information while others have to rely on their own resources. In that context, he stated that he thought the most appropriate sealing order in a court approval sale situation would be that the supporting valuation materials remain sealed until such time as the sale transaction had closed.

43 The court in *Look* granted the company's request for a sealing order for a further six months, finding that even though the remaining sales would not occur under the original sale process, the commercial interest in ensuring the assets were sold for the benefit of all stakeholders was the same.

44 Here, I acknowledge the importance of sealing the Receiver's Confidential Supplemental Eighth Report to the Court and attached documents during the sale process and until any ongoing sale process is complete. The important interest is the commercial interests of the bidders, the creditors, the stakeholders and maintaining the integrity of the sales process. The Receiver's counsel advised they represented to the bidders that the process would be confidential until completion. The bidders all signed non-disclosure agreements before they received access to the data. These interests outweigh the negative effects of a sealing order. Redaction of the documents or reports is not a reasonable alternative as virtually all of the information contained in the report and documents (other than the parts that are already public) is confidential for the reasons noted.

45 The issue of a future sales process of some kind however, is far less certain than it was in *Look*, where the new sales process was underway at the time of the court application. All parties in this case agree that the current Receiver-led SISP process is exhausted, and the unopposed or supported request for court approval of its termination confirms this. The Receiver has no intention of starting a new sales process.

46 Counsel for Yukon government indicated that they would be open to discussing the sale of some or all of the Yukon Zinc assets in future if approached by a potential purchaser. Yukon government confirmed it had no intention of commencing a similar sales process to the SISP in the near future, as their priority will be care and maintenance of the Mine when this responsibility is transitioned from the Receiver to them, likely in the fall of 2022.

47 The Receiver noted in its public reports several of the ongoing issues affecting a potential sale. These include the regulatory complexities of obtaining a new water licence, the uncertainty of the responsibilities and costs of restoring the Mine to an operable state, the uncertain value of the mineral claims, and the possibility of ongoing litigation over the Welichem assets if a settlement is not achieved. Unless one or more of these factors changes, the possibility of a future sale is unlikely, in the Receiver's view. This is different from *Look*, where the new sales process had commenced at the time the sealing order was requested.

48 The Supreme Court of Canada has emphasized the importance of the fundamental principle of open and accessible court proceedings. Court openness is protected by the constitutional guarantee of freedom of expression and is essential to the proper functioning of our democracy (*Canadian Broadcasting Corp v New Brunswick (Attorney General)*, [1996] 3 SCR 480 at para. 23 ("*New Brunswick*"); *Vancouver Sun (Re)*, 2004 SCC 43 at paras. 23-26). Public and media access to the courts is the way in which the judicial process is scrutinized and criticized. "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). There is a strong presumption in favour of court openness. Judicial discretion in determining confidentiality or sealing orders must be exercised against this backdrop.

49 Given these unique factual circumstances, and applying the legal principles described above, I conclude the following in relation to sealing the materials.

50 Once the Almaden sale is complete, and the Receiver's certificate has been filed with the Court, the redacted material related to Almaden's purchase of the Logan Interests will be unsealed. The Receiver has disclosed most of the information related to this purchase and sale but some information such as the purchase price remains redacted. As the sale of this portion of the assets will be over once this transaction is completed, there is no reason to continue to seal the Almaden documents contained in the Confidential Supplemental Eighth Report to Court that have not already been disclosed.

51 The remoteness of a future sale of the remaining assets evident from the Receiver's materials and submissions means that the length of a sealing order could be indefinite. As noted in *Sierra Club*, at 545, a court is to restrict the sealing order as much as is reasonably possible while preserving the important interest in question. While it is still in the public interest to maintain the sealing order where a future sale is a possibility, at some point that possibility may no longer be realistic. Or, so much time will have passed that the information in the original bids may have little relationship to the actual situation so the importance of the interest to be protected is diminished.

52 The Receiver in this case advised that some of the current circumstances that prevented the success of the sales process would have to change before a sale is likely. Yukon government confirmed that their focus in the near term will be on care and maintenance issues and not on the longer term issues related to remediation, reconstruction, or water licence. It is possible, however, over the next few years, that some of these circumstances may change. For example, the litigation between Welichem and the Receiver over its assets will either be settled or judicially determined, more clarity on the responsibilities for remediation or even further steps taken towards remediation and reconstruction may occur, or more work may be done to value the mineral claims. Some or all of these changes could lead to a successful sale.

53 I will grant the sealing order over the Receiver's Confidential Supplemental Eighth Report to the Court, and attached documents, except for the documents related to the Almaden purchase once the Receiver's certificate is filed with the Court, for a period of three years, or until further order of this Court. The report shall be filed as of the date of these Reasons.

54 The draft sealing order filed by the Receiver on this application should be modified to reflect the terms set out in these reasons and to reflect the presence of all counsel.

Applications granted.

End of Document

TAB 19

KeyCite treatment
Most Negative Treatment: Recently added (treatment not yet designated)
Most Recent Recently added (treatment not yet designated): Hudson's Bay Company, Re | 2025 ONSC 3328, 2025 CarswellOnt 9289 | (Ont. S.C.J. [Commercial List], Jun 3, 2025)

2022 ONSC 1857
Ontario Superior Court of Justice

Ontario Securities Commission v. Bridging Finance Inc.

2022 CarswellOnt 4279, 2022 ONSC 1857, 2022 A.C.W.S. 646, 99 C.B.R. (6th) 139

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

G.B. Morawetz C.J. Ont. S.C.J.

Heard: March 25, 2022
Judgment: March 25, 2022
Written reasons: March 30, 2022
Docket: CV-21-00661458-00CL

Counsel: John Finnigan, Grant Moffat, Adam Driedger, for Receiver, PricewaterhouseCoopers Inc.
Adam Gotfried, for Ontario Securities Commission
Robert Staley, Kevin Zych, for Bridging Unitholders
David Bish, for Coco Group, 2693600 Ontario Inc., Rocky Coco and Jenny Coco
Marc Wasserman, Martino Calvaruso, Justine Erickson, for BlackRock Financial Management, Inc.
Steve Graff, for Several investors in various Bridging Funds
Steve Weisz, for University of Minnesota Foundation
Melissa Mackewn, for David Sharpe
David Ullman, for Thomas Canning (Maidstone) Limited
Lawrence Thacker, for Natasha Sharpe
Domenico Magisano, Spencer Jones, for Unitholder in the Bridging Funds
Sharon Kour, for Certain Unitholders
Jason Wadden, for Certain Unitholders

Subject: Civil Practice and Procedure; Corporate and Commercial; Insolvency; Securities
Table of Authorities
Cases considered by *G.B. Morawetz C.J. Ont. S.C.J.*:

Marchant Realty Partners Inc. v. 2407553 Ontario Inc. (2021), 2021 ONCA 375, 2021 CarswellOnt 7770, 90 C.B.R. (6th) 39 (Ont. C.A.) — referred to

Royal Bank of Canada v. Keller & Sons Farming Ltd. (2016), 2016 MBCA 46, 2016 CarswellMan 147, 397 D.L.R. (4th) 573, 39 C.B.R. (6th) 219, 330 Man. R. (2d) 12, 675 W.A.C. 12 (Man. C.A.) — referred to

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

Sherman Estate v. Donovan (2021), 2021 SCC 25, 2021 CSC 25, 2021 CarswellOnt 8339, 2021 CarswellOnt 8340, 66 C.P.C. (8th) 1, 67 E.T.R. (4th) 163, 458 D.L.R. (4th) 361, 72 C.R. (7th) 223 (S.C.C.) — referred to

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

Statutes considered:

Courts of Justice Act, R.S.O. 1990, c. C.43

s. 137(2) — referred to

MOTION by receiver for approval of decision in bankruptcy proceedings and sealing order; MOTION by opposing unitholder for adjournment of proceedings.

***G.B. Morawetz C.J. Ont. S.C.J.*:**

1 PricewaterhouseCoopers Inc. (the "Receiver") of Bridging Finance Inc. and the other respondents ("Bridging") seeks an order:

(a) approving the decision by the Receiver to reject the Remaining Revised Final Bids and to terminate the sale and investment solicitation process (the "SISP") approved by order dated August 6, 2021 (the "SISP Approval Order"); and

(b) the sealing of Confidential Appendices "A", "B", and "C" (the "Confidential Appendices") to the Tenth Report of the Receiver dated February 18, 2022 (the "Tenth Report") until further order.

2 The motion was originally returnable on February 25, 2022. It was adjourned to allow stakeholders time to fully review the recommendations of the Receiver and to provide a response, if so advised.

3 The Receiver has since delivered its Supplement to the Tenth Report (the "Supplement") providing information on the Receiver's engagement with Unitholders and on the voting requirements in the constating documents of the various Bridging Funds. Representative Counsel ("RC") delivered its Second Report (the "Second Report of RC") which details its engagement with Unitholders and reasons for its recommendations to the Receiver. All capitalized terms not expressly referred to in this endorsement are as defined in the Tenth Report.

4 RC and Lerners LLP, on behalf of a Unitholder in the Bridging Funds (the "Opposing Unitholder") each filed a factum. A Reply Factum was filed by the Receiver.

5 The Opposing Unitholder opposed the relief sought and also sought a further adjournment to permit: (i) a more fulsome discussion of the Investment Proposal, the Cash Proposal, and the Status Quo Option; (ii) a Unitholder vote; and (iii) a further process to solicit bids for an orderly liquidation of the Bridging Funds.

6 Counsel on behalf of the Opposing Unitholder submits that as an alternative to terminating the SISP, there should be further consultation with Unitholders, including:

(a) further information sessions, including live sessions, with presentations from all relevant parties, and sessions that occur outside of traditional business hours; and

(b) providing opportunities for meaningful feedback from Unitholders, including a formal vote.

7 In addition, and regardless of whether the SISP is terminated, counsel for the Opposing Unitholder submits that the Receiver and RC should commence a process to solicit bids for managing the orderly liquidation process through the realization period. Counsel takes the position that this will assist the Receiver and RC in determining whether the Status Quo Option is the most economical process and will yield the highest recovery to Unitholders.

8 The adjournment request was considered as a threshold issue.

9 In considering the merits of the adjournment requests, it is necessary to consider developments leading up to the original return date of February 25, 2022.

10 On February 24, 2022, a motion record was served by Lerners LLP on behalf of the Opposing Unitholder. The motion record consisted of an affidavit from a law clerk, which in turn attached a letter from Lerners LLP. The letter raised a number of concerns in respect of the SISP, and the process by which RC obtained feedback from the Unitholders.

11 The identity of the Opposing Unitholder remains undisclosed. The Opposing Unitholder's holdings are not disclosed beyond information provided by counsel and that it is his understanding that the holdings are approximately $123,000 out of approximately $2 billion in total pre-Receivership "value" of all Bridging Funds.

12 Counsel for the Opposing Unitholder submitted that bidders were not given the opportunity to submit proposals on managing an orderly liquidation of Bridging's portfolio and that the Receiver and RC should therefore commence the process to solicit bids for managing the orderly liquidation process of the Bridging Loan Portfolio.

13 The difficulty with the position being put forth by the Opposing Unitholder is that, notwithstanding an adjournment was granted four weeks ago, no evidence has been filed to support the concerns expressed in the Lerners letter, or in opposition to the evidence filed by the Receiver and RC.

14 The Tenth Report, the Supplement, and the Second Report of the RC provide details with respect to the SISP process, the Investment Proposal, the Cash Proposal and the Status Quo Option, and the communications with Unitholders, including feedback from Unitholders.

15 During the four week adjournment period, no party has changed its position and there is no indication that a further adjournment period would produce a change in position. On the other hand, there is evidence that Unitholders want to see this process proceed expeditiously in the hopes that distributions can be made.

16 Simply put, there is no evidence before the court to support the adjournment request and I have not been satisfied that there is any benefit to be gained by granting a further adjournment.

17 The adjournment request of the Opposing Unitholder is denied.

18 Turning now to the merits of the motion, the Tenth Report and the Supplement provide detailed information on the Receiver's engagement with Unitholders and on the voting requirements in the constating documents of the Bridging Funds.

19 RC delivered its Second Report which details Unitholder engagement and the reasons for its recommendation to the Receiver.

20 The Reply Factum filed by the Receiver is in response the Opposing Unitholder's factum which raises the two issues: (i) whether the SISP should be terminated without further Unitholder consultation and a Unitholder vote; and (ii) regardless of whether the SISP is terminated, whether the Receiver should solicit bids for managing the orderly liquidation of the Bridging Loan Portfolio.

21 With respect to the first issue, the Receiver submits that it has exercised its business judgment and determined that the best path forward for stakeholders is to reject the Remaining Revised Final Bids, terminate the SISP and continue with the Status Quo. The Receiver states that it has reached this conclusion based on the economic analysis of the Remaining Revised Final Bids, feedback from RC and through extensive Unitholder and other stakeholder engagement since the date of the Receiver's appointment. The Receiver is of the view that the time and expense of engaging in further stakeholder consultation is not justified given that extensive stakeholder consultation has already taken place.

22 The Receiver also submits that the SISP provides the Receiver with the discretion to terminate the SISP and does not contemplate nor require that a vote of the Unitholders be conducted to validate any decisions taken by the Receiver in connection

with the SISP. The SISP Approval Order was obtained on notice and no party sought the inclusion of a Unitholder vote on bids received. Further, the Receiver submits that no evidence has been adduced that the Receiver has conducted the SISP otherwise than in accordance with the SISP Approval Order.

23 The SISP provides that the Receiver may consult with Unitholders and other stakeholders regarding the conduct of the SISP. The Receiver points out that it made extensive efforts to consult with Unitholders and other stakeholders since the date of appointment including by: (i) consulting with RC; (ii) consulting with the Limited Partner Advisory Committee; (iii) responding to over 1200 inquiries from stakeholders through the Receiver's hotline and the Receiver's mailbox; scheduling and attending over 110 conference calls/video platform meetings with Unitholders and other stakeholders; (v) holding approximately 60 recurring video meetings with Institutional Unitholders; and (vi) engaging in various other *ad hoc* communications with stakeholders.

24 Paragraph 47 of the SISP gives the Receiver the authority to terminate the SISP at any time. The Receiver states that it has determined, in its business judgment, that the best path forward for stakeholders is to reject the Remaining Revised Final Bids, terminate the SISP and continue with the Status Quo.

25 The Receiver submits that there is no evidence that the Receiver's implementation of the SISP was improvident or unfair in terms of process. Further, no party has objected to the Receiver's activities or conduct.

26 The Receiver also submits that there is a fundamental flaw with the Opposing Unitholder's request for a vote: key terms of the Investment Proposal are unknown and would have to be finalized and documented before a Unitholder vote could be held. Those terms would be essential to Unitholders making an informed decision to vote for or against the Investment Proposal. In addition, the Receiver points out that the manner in which one or more Unitholder meetings would be called and voting would occur would have to be determined having regard to the terms of the Limited Partnership Agreements and Trust Agreements governing voting by each Fund. The Limited Partnership Agreements and Trust Agreements do not contemplate the holding of a single meeting of all Unitholders, and do not provide the same thresholds for Unitholder approval of the Investment Proposal. Consequently, if a vote (or a series of votes) were required, these issues would have to be resolved.

27 RC has provided to the Receiver its independent recommendation that the SISP be terminated. The Receiver points out that RC was appointed to independently represent the interests of Unitholders. Based on RC's consultative process, the Receiver submits there is clear support for the continuation of the Status Quo and there is no evidence that the consultative process was improvident or unfair or that the results of that process should be ignored or discounted.

28 The second issue raised by the Opposing Unitholder is, regardless of whether the SISP is terminated, whether the Receiver should be required to undertake a further process to solicit bids for an orderly liquidation of the Loan Portfolio. Under the Receiver's proposal, the Receiver will continue to consult with RC to ensure that the orderly liquidation of the Bridging Loan Portfolio is conducted in the most cost-effective way possible. RC will provide oversight and input to the Receiver and ensure that the orderly liquidation is conducted as cost-effectively as possible. Finally, the Receiver points out that there is no evidence to suggest that a further sales process, solely in respect of liquidation proposals, would yield any superior alternatives.

29 RC supports the submissions of the Receiver.

30 The feedback received by RC indicates that, approximately:

(a) 65% expressed a preference for the Receiver's Continued Realization Plan;

(b) 25% expressed a preference for the going concern proposal;

(c) 3% expressed a preference for the Cash Proposal; and

(d) 8% indicated that they did not have sufficient information to make a decision or provided feedback that was clear not clearly in favour of one option.

31 RC is of the view that, in light of the results of the solicitation for feedback, the support level demonstrated for the Receiver's Continued Realization Plan, and the expressed desire of Unitholders to accelerate distributions to them, a formal vote would be a waste of time and money, and contrary to the wishes of a strong majority of Unitholders, with no realistic expectation of a materially different outcome. RC also emphasizes that there is no evidence before the court that the assertion of the Opposing Unitholder is accurate, or that a new sale process would result in superior offers to those that were received during the SISP.

32 Further, RC points out that much of the feedback received was from investment advisors ("IAs") on behalf of Unitholders and there is no evidence that Unitholders were uncomfortable with IAs submitting feedback on their behalf.

33 Based on the feedback received, RC is of the view that a substantial majority of Unitholders prefer that the SISP be terminated, and that the Receiver's Continued Realization Plan be pursued.

34 RC also points out that the identity of the Unitholder remains undisclosed, as is the investment exposure beyond counsel's advice that his understanding is that, as noted above, it is approximately $123,000 based on pre-Receivership evaluations, out of approximately $2 billion in total pre-Receivership "value" of all Bridging funds.

35 RC is of the view that there is no need for further consultation, an Information Circular or a formal vote. There is no evidence that Unitholders were provided insufficient opportunity to provide feedback, or that further consultations would lead to a material difference in the feedback received. The feedback materially favours the Receiver's Continued Realization Plan, and RC is of the view that there is little utility (and significant cost and expense) in continuing consultations with Unitholders and taking the steps required to hold a formal vote of Unitholders.

36 Further, as referenced in the Second Report, RC points out that the going concern proposal would require the support, in a formal vote (which is not yet possible), of 66 2/3% of value of each class of Unitholders. Since 65% of Unitholders responding expressed support for the Receiver's Continued Realization Plan, and in so doing conveyed views that are antagonistic to the going concern proposal, there is no realistic prospect that the requisite levels of support could be achieved and that the cost of providing for such a meeting is not a prudent use of Bridging's limited financial resources.

37 RC submits that deference is warranted with respect to the Receiver's decision in the present case to terminate the SISP, a decision made in the exercise of business judgment after a fair and transparent SISP was carried out under the supervision of the court.

38 Messrs. Graff, Wadden, Weisz and Ms. Kour, on behalf of their respective clients, support the position of the Receiver.

39 Counsel on behalf of the Opposing Unitholder submits that while presented at the Information Sessions, the Status Quo Option did not form part of the SISP and as such, offers were not solicited, and bidders were not given the opportunity to submit proposals on managing an orderly liquidation of the Bridging portfolio. Counsel also submits that while termination of the SISP and approving the Status Quo Option may be the correct decision, there is simply insufficient information and insufficient consultation with Unitholders to approve the step at this time. Further, to approve the Receiver's recommendations at this time would be tantamount to providing the Receiver with a single source contract to liquidate the response Loan Portfolio without any evidence that this option was exposed to the market. Counsel also submitted that the feedback received by RC from IAs may not properly reflect the views of retail investors.

40 The Opposing Unitholder submitted no evidence on any of these issues. Conversely, I find that the detailed evidence of the Receiver as presented in its Tenth Report, the Supplement and in the Second Report of Representative Counsel, as well as the previous Receiver's Reports, establishes the basis on which the Receiver has put forth its recommendation.

41 Counsel to the Opposing Unitholder submits that as an alternative to terminating the SISP, there should be further consultation with Unitholders. I reject this submission. In my view, the evidence establishes that there has been significant

consultation with Unitholders. Further, there is no evidence that would suggest that feedback from retail investors has not been taken into account.

42 Counsel for the Opposing Unitholder also submits that regardless of whether the SISP is terminated, the Receiver and RC should commence a process to solicit bids for managing the orderly liquidation process through the realization. I reject this submission. No evidence has been filed that challenges the evidence put forth by the Receiver and RC, that it is both appropriate and reasonable to proceed with the Status Quo Option. Further, as noted in [28], the Receiver will continue to consult with RC to ensure that the liquidation will be conducted in a cost effective manner.

43 The law is clear that in reviewing a sales process, the court is to defer to the business expertise of the Receiver and should not intervene or "second-guess" the Receiver's recommendations (see: *Royal Bank of Canada v. Keller and Sons*, 2016, MBCA 46 at para. 11).

44 RC referenced *Marchant Realty Partners Inc.*v. *2407533 Ontario Inc.*, 2021 ONCA 375 (Ont. C.A.) at para. 15, where Jamal J.A. (as he then was) quoted the following passage in *Soundair*, "they [courts] rely upon the expertise of their appointed receivers and are reluctant to second-guess the considered business decisions made by the receiver in arriving at its recommendations. The court will assume that the receiver is acting properly unless evidence to the contrary is clearly shown".

45 Further, as held by the Court of Appeal for Ontario and *Royal Bank v. Soundair Corp.*, [1991] O.J. number 1137(ONCA*)* ("*Soundair*") at paras. 14, 21, 29 and 58, it is only in "exceptional" circumstances will a court intervene and proceed contrary to the recommendation of its officer, the Receiver.

46 The Receiver submits that there are no "exceptional" or "special" circumstances that would lead the court to proceed contrary to the recommendation of the Receiver.

47 Further, no evidence has been tendered that would raise any concern with respect to the actions of the Receiver. I am satisfied that the submissions of the Receiver and RC provide a complete answer to the submissions of the Opposing Unitholder.

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

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

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

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

> [37] Court proceedings are presumptively open to the public.
>
> [38] The test for discretionary limits on presumptive court openness has been expressed as a two-step inquiry involving the necessity and proportionality of the proposed order (*Sierra Club*, at para. 53). Upon examination, however, this test rests upon three core prerequisites that a person seeking such limit must show. Recasting the test around these three prerequisites, without altering its essence, helps to clarify the burden on applicants seeking an exception to the open court principle. In

order to succeed, the person asking a court to exercise discretion in a way that limits the open court presumption must establish that:

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

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

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

52 No party opposed the sealing request.

53 In my view, I am satisfied that the Receiver has satisfied the foregoing test in that the disclosure of the information in the Confidential Appendices would have a negative impact on future realizations on the assets and thus the Receiver's efforts to maximize value for stakeholders. Further, there are no reasonable alternatives to the sealing order in the circumstances and in my view, no stakeholders will be materially prejudiced by sealing the Confidential Appendices and the salutary effects of granting the relief outweigh any deleterious effects.

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

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

Disposition

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

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

Receiver's motion granted; unitholder's motion dismissed.

End of Document

TAB 20

2014 BCSC 1855
British Columbia Supreme Court

Leslie & Irene Dube Foundation Inc. v. P218 Enterprises Ltd.

2014 CarswellBC 2916, 2014 BCSC 1855, [2014] B.C.W.L.D. 7241, [2014] B.C.W.L.D. 7242, [2015] 1 W.W.R. 606, 17 C.B.R. (6th) 41, 245 A.C.W.S. (3d) 21, 72 B.C.L.R. (5th) 294

Leslie & Irene Dube Foundation Inc. and 1076586 Alberta Ltd., Petitioners and P218 Enterprises Ltd., Wayne Holdings Ltd., Okanagan Valley Asset Management Corporation, Willow Green Estates Inc., BMK 112 Holdings Inc., 0720609 B.C. Ltd., 0757736 B.C. Ltd., 0748768 B.C. Ltd., Dr. T. O'Farrell Inc., Pinloco Holdings Inc., 602033 B.C. Ltd., Andrian W. Bak, MD, FRCPC, Inc., Interior Savings Credit Union, Valiant Trust Company, Mara Lumber (Kelowna) (2007) Ltd., Rona Revy Inc., Rocky Point Engineering Ltd., Mitsubishi Electric Sales Canada Inc., BFI Canada Inc., John Byrson & Partners, Winn Rentals Ltd., 0964502 B.C. Ltd., Denby Land Surveying Limited, Mega Cranes Ltd., Weq Britco LP, Roynat Inc., Mcap Leasing Inc., Bodkin Leasing Corporation, HSBC Bank Canada, and Bank of Montreal, Respondents

G.C. Weatherill J.

Heard: September 24, 2014
Judgment: October 2, 2014
Docket: Vancouver S-139627

Counsel: J.D. Schultz, J.R. Sandrelli, for Receiver, Ernest & Young Inc.
D.E. Gruber, for Petitioners
J.D. Shields, for Valiant Trust Company
C.K. Wendell, for 0964502 B.C. Ltd.
S.A. Dubo, for Interior Savings Credit Union
R.H. Harrison, for Maynards Financial Ltd.

Subject: Corporate and Commercial; Insolvency; Property

Table of Authorities

Cases considered by *G.C. Weatherill J.*:

Bank of America Canada v. Willann Investments Ltd. (1993), 1993 CarswellOnt 216, 17 C.P.C. (3d) 296, 20 C.B.R. (3d) 223 (Ont. Gen. Div.) — referred to

Bank of America Canada v. Willann Investments Ltd. (1996), 1996 CarswellOnt 2969 (Ont. C.A.) — referred to

Bank of Montreal v. Baysong Developments Inc. (2011), 2011 ONSC 4450, 2011 CarswellOnt 8285 (Ont. S.C.J.) — referred to

CCM Master Qualified Fund Ltd. v. blutip Power Technologies Ltd. (2012), 2012 CarswellOnt 3158, 2012 ONSC 1750, 90 C.B.R. (5th) 74 (Ont. S.C.J. [Commercial List]) — referred to

Digital Domain Media Group Inc., Re (2012), 3 C.B.R. (6th) 320, 2012 BCSC 1567, 2012 CarswellBC 3245 (B.C. S.C. [In Chambers]) — referred to

Lang Michener v. American Bullion Minerals Ltd. (2005), 2005 BCSC 684, 2005 CarswellBC 1106 (B.C. S.C.) — referred to

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

Words and phrases considered:

stalking horse sale process

[A] stalking horse sale process . . . involves the receiver identifying a potential buyer (the "stalking horse") and negotiating an agreement with the stalking horse for the purchase of the assets. The stalking horse's purchase price becomes the floor price for a subsequent bidding process which takes place to determine if a better price can be achieved. . . . If no bid is received during the bidding process that exceeds the stalking horse's bid, the stalking horse becomes the purchaser. If a qualified bid is received that exceeds the stalking horse bid, the stalking horse receives a termination or break fee.

APPLICATION by receiver for approval of "stalking horse" bid and other relief.

***G.C. Weatherill J.*:**

Introduction

1 This proceeding concerns the receivership of a retail, office and residential real estate development in Kelowna, British Columbia called "Sopa Square" (the "Development").

2 The Receiver (the "Receiver") of the Respondents, P218 Enterprises Ltd., Wayne Holdings Ltd. and The Sopa Square Joint Venture (collectively the "Debtors"), seeks the following orders:

> a) approval of a stalking horse bidding process in respect of the sale of the assets of the Development in the form of the Bidding Procedures Order attached as Schedule B to the Notice of Application;
>
> b) a vesting of title to the Development in the stalking horse bidder, subject to the outcome of the stalking horse bidding process;
>
> c) approval of a pre-stratification contract for purchase and sale of one of the proposed strata lots in the retail/office phase of the Development;
>
> d) an increase in the Receiver's borrowing charge by $1 million from $2.5 million to $3.5 million; and
>
> e) approval of the Receiver's activities as set out in the Receiver's First Report dated January 30, 2014 and the Receiver's Second Report dated August 26, 2014.

3 The Receiver also seeks an order sealing an appraisal of the Development dated March 3, 2014 on the basis that it may unduly prejudice the marketing of the Development.

Background

4 The Development consists of two phases: Phase 1 is a two story building comprised of retail outlets on the first floor and office space on the second floor and Phase 2 is a multi-story residential tower.

5 The Respondent, Valiant Trust Company ("Valiant Trust"), is the trustee for 36 original investors in the Development, each of whom holds a bond from the Debtors entitling the bondholder to purchase a unit in the Development (the "Bond Holders").

6 The Development ran into financial difficulty several times over the course of its development and construction. Builders liens were filed and the project was halted due to lack of financing. As part of a recapitalization plan, these lien claimants (the "Lien Claimants") agreed to discharge their liens and consolidate the amounts they were owed into a subordinated mortgage, which allowed additional financing to be provided by the lead lender, the Petitioner, Leslie & Irene Dube Foundation Inc. ("Dube Foundation").

7 Ultimately the recapitalization plan failed prior to completion of Phase 1, resulting in the commencement of this receivership proceeding in December 2013. The Receiver was appointed on January 27, 2014.

8 The Receiver is empowered by its appointment to market the Development and to negotiate such terms and conditions of sale as it, in its discretion, deems appropriate.

9 The Receiver determined that the best course of action to preserve value was to complete Phase 1 of the Development and to market it without completing Phase 2. It did so, at least substantially, and has begun to market the units in Phase 1. Construction of Phase 2 has not yet commenced.

10 In order to complete Phase 1, the Receiver borrowed $2.5 million from Maynards Financial Ltd. ("Maynards") secured by a priority Receiver's Borrowing Charge subordinate only to the existing first mortgage of Interior Savings Credit Union ("ISCU"). This borrowing charge was approved by a court order dated February 6, 2014.

11 The Receiver has entered into various leases of the first floor retail space. It has also entered into a contract of purchase and sale with respect to proposed Strata Lot 6 in the second floor office space with Dr. Keith Yap. Dr. Yap has spent substantial money on improvements to that space and, pursuant to an arrangement with the Receiver, is currently occupying the space for his medical practice awaiting stratification and completion of the purchase and sale agreement.

12 The major creditor in the receivership, Dube Foundation, is currently owed approximately $21.3 million and has made it clear to the Receiver that it will oppose any sale of the Development that results in it receiving less than substantially all of its mortgage security. Dube Foundation's mortgage ranks behind the ISCU mortgage (approx. $5.0 million), the Maynards mortgage ($2.5 million) and property taxes owing of approx. $275,000. In order for Dube Foundation to be paid out in full, sale proceeds for the Development of at least $29 million will be required.

13 An appraisal of the Development dated April 22, 2013, nine months before the appointment of the Receiver and prior to the completion of Phase 1, valued the Development as follows:

a) Phase 1:	$21,575,000
b) Phase 2:	$6,830,000
	$28,405,000

14 The Receiver obtained a second appraisal of Phase 2 by Altus Group dated March 3, 2014 which was based upon an inspection of the Development on December 30, 2013. The Receiver seeks an order that this appraisal be sealed on the basis that it may compromise any future bidding process in respect of the sale of the Development.

15 Instead of implementing a tender process in which bidders can submit a bid within a specific period without knowledge of other bids, the Receiver concluded that the most effective and efficient way to sell the Development was through a stalking horse sale process. That process involves the receiver identifying a potential buyer (the "stalking horse") and negotiating an agreement with the stalking horse for the purchase of the assets. The stalking horse's purchase price becomes the floor price for a subsequent bidding process which takes place to determine if a better price can be achieved. The premise is that the stalking horse has undertaken considerable due diligence for determining the value of the assets and other bidders can then rely, at least to some extent, on the value attached by the stalking horse to those assets. If no bid is received during the bidding process that exceeds the stalking horse's bid, the stalking horse becomes the purchaser. If a qualified bid is received that exceeds the stalking horse bid, the stalking horse receives a termination or break fee.

16 In July 2014, Dube Foundation, with the assistance of the Receiver, entered into a Term Sheet with an experienced real estate developer known as the Aquilini Investment Group ("Aquilini"). It contemplated that Aquilini would submit a stalking horse bid to the Receiver and Dube Foundation would provide financing to Aquilini if its bid was successful, on terms to be negotiated.

17 By agreement dated August 12, 2014 (the "SH Agreement"), Aquilini (through an entity called AD Sopa Limited Partnership) entered into a stalking horse bid agreement with the Receiver, the key terms of which are:

a) a purchase price of $29.5 million;

b) a deposit of $1.0 million;

c) the bid is conditional on approval of the court, the granting of a conditional vesting order and the completion of a stalking horse bidding process with no better bid being submitted; and

d) a termination fee of $1.5 million if a better bid is submitted in the bidding process (the "Termination Fee").

18 The SH Agreement includes detailed stalking horse bidding procedures (the "Bidding Procedures").

19 The Receiver seeks an order approving the SH Agreement and vesting the assets in Aquilini, subject to the Bidding Procedures and no better bid being received.

Analysis

The Stalking Horse Bid

20 The use of stalking horse bids to set a baseline for a bidding process in receivership proceedings has been recognized by Canadian courts as a legitimate means of maximizing recovery in a bankruptcy or receivership sales process: *CCM Master Qualified Fund Ltd. v. blutip Power Technologies Ltd.*, 2012 ONSC 1750 (Ont. S.C.J. [Commercial List]) at para. 7 [*CCM*]; *Bank of Montreal v. Baysong Developments Inc.*, 2011 ONSC 4450 (Ont. S.C.J.) at para. 44 [*Baysong*]; *Digital Domain Media Group Inc., Re*, 2012 BCSC 1567 (B.C. S.C. [In Chambers]).

21 The factors to be considered when determining the reasonableness of a stalking horse bid are those used by the court when determining whether a proposed sale should be approved: *CCM* at para. 6. Some of those factors were set out in *Royal Bank v. Soundair Corp.*, [1991] O.J. No. 1137 (Ont. C.A.) at para. 16:

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

b) the efficacy and integrity of the receiver's sale process by which offers were obtained;

c) whether there has been unfairness in the working out of the process; and

d) the interests of all parties.

22 The Receiver submits that the SH Agreement is reasonable based upon the appraisals it has received. If the SH Agreement is approved, the Receiver proposes to follow the Bidding Procedures by publishing several newspaper advertisements and retaining the firm of Colliers International ("Colliers"), a well know firm that provides a variety of real estate services, to assist in the marketing of the project to potential bidders. The Receiver has populated a detailed data room to streamline due diligence by potential bidders.

23 The Receiver submits that the stalking horse bidding process will provide a public and transparent process under which potential purchasers will be identified and the Development will be marketed. The Receiver has put forward a detailed timetable by which it expects the Bidding Procedures to be completed.

24 The Receiver submits that each of the factors set out in *Soundair* has been or will be met in this case. It says that the process has been designed to obtain the highest price for the assets because the SH Agreement sets a floor price that is at least sufficient to pay the majority of the claims of the major creditors in a reasonable period of time.

25 The Receiver submits further that the Termination Fee is reasonable because it not only reflects the expenses that Aquilini has incurred in conducting its due diligence and the structuring of the transaction, which will be of benefit to any other bidder that submits a bid exceeding that set out in the SH Agreement, but also provides compensation to Aquilini for having committed

the deposit funds, thereby foregoing the use of the funds for other potential opportunities. It says that the Termination Fee also provides value for the cost of stability that is being achieved through the process. It also submits that the Termination Fee in this case is within the range for termination fees of 1% to 5% that have been approved in other stalking horse cases: *Baysong* at para. 44.

26 Mr. Shields, counsel for Valiant Trust, strenuously opposes an approval by the court of the SH Agreement. He submits that there is a complete absence of evidence that would allow the court to make a determination as to whether the SH Agreement is reasonable. He argues that there is no evidence from the Receiver regarding what, if any, alternate marketing steps have been considered or taken or why, if any were considered or taken, they were rejected. He points out that the first appraisal is approximately 18 months old, was done before Phase 1 was completed and has not been updated. The second appraisal report is based upon an inspection of the Development that took place over nine months ago, also before Phase 1 was completed. Moreover, he says that the veracity of the second appraisal cannot be tested due to the non-disclosure restrictions placed upon it by the Receiver.

27 He argues that the Receiver has, to date, not marketed the Development at all. Instead, the Receiver identified three potential developers, who are all located in Western Canada, entered into negotiations with two of them and chose Aquilini to be the stalking horse. It has not provided the court with any particulars of how the three developers were chosen or why, what was discussed or what took place during the negotiations. As a result, he argues, the court is in no position to say that the proposed stalking horse bidding process will likely result in a more favourable outcome.

28 Moreover, Mr. Shields argues that the Receiver's submission that the Termination Fee is justified because it will minimize the due diligence costs of other potential bidders cannot be supported. Plainly, he says, Aquilini is not about to disclose to competitors its strategies or the due diligence it performed and, as a result, all other bidders will have to do their own due diligence, saving them nothing. Moreover, he emphatically submits that the Termination Fee of $1.5 million will put a "millstone" around the necks of potential bidders because they will have to bid at least $1.5 million more than the SH Agreement price in order to qualify. This, he argues, effectively gives Aquilini a $1.5 million credit in the bidding process.

29 Simply put, Mr. Shields submits that, while the SH Agreement may be in the best interests of the ISCU and the Dube Foundation, the Receiver has not properly considered the interests of the Bond Holders and Lien Claimants who will lose everything if the SH Agreement completes.

30 There are many stakeholders in this matter. They include the Bond Holders and the Lien Claimants who will likely end up with nothing if significantly better bids are not received and the Stalking Horse Bid ultimately completes.

31 To be effective for such stakeholders, the sale process must allow a sufficient opportunity for potential purchasers to come forward with offers, recognizing that a timetable for the sale of the project requires that interested parties move relatively quickly in order that the value of the project is preserved and not allowed to deteriorate. The timetable must be realistic.

32 In this case, I have several concerns.

The Stalking Horse Process

33 No course of action other than a stalking horse bidding process appears to have been considered, including the traditional tendering process. There is no evidence that the Receiver has attempted to market the Development beyond discussions with three developers. There is no evidence regarding the extent to which the Receiver attempted to identify other developers who might be interested in bidding through a stalking horse bid. There is no evidence from which the court can assess whether the economic incentives behind the SH Agreement are fair and reasonable or whether they are excessive given the circumstances of the Bond Holders and the Lien Claimants.

The Appraisals.

34 The accuracy of the stalking horse bid is key to the integrity of the stalking horse bid process because it establishes the benchmark against which other potential bidders will decide whether or not to submit a bit. One of the few tools available to the court for assessing the reasonableness of the stalking horse bid is a comparison of the bid to a valuation of the asset in question. Accordingly, an accurate valuation is also key to the integrity of the process.

35 The appraisals of the Development are dated. Neither of them was prepared after the completion of Phase 1. I am not satisfied that the appraisals accurately reflect the current value of the Development.

Termination Fee

36 While I accept that the SH Agreement effectively serves as a guaranteed floor bid over the course of the proposed marketing process and that a termination fee is warranted if a higher qualified bid is approved, the mere fact that the proposed Termination Fee is within the "range of reasonableness" as determined in other cases does not mean that it is reasonable in this case. The court has a gatekeeping function to ensure that the fee is reasonable in each case. The court is not simply a rubber stamp for the agreement that was made.

37 The foregoing notwithstanding, given the Receiver's function and role, the Court will often defer to the Receiver's recommendation unless there is a compelling reason to reject it. In Frank Bennett's *Bennett on Receiverships*, 3d ed (Toronto: Carswell, 2011) at 329, the learned author writes:

> ...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 has made its decision. If the receiver's recommendation is challenged, the court should have evidence of other offers that are significantly or substantially higher before it can adjudicate on this point. The court should readily accept the receiver's recommendation on the motion for court approval and reject the receiver's recommendation only in the exceptional cases since it would weaken the role and function of the receiver. The receiver deserves respect and deference.

38 In this case, there is no evidence regarding how the Termination Fee was arrived at or how the $1.5 million fee compares to the expenses incurred by Aquilini in respect of its due diligence, the SH Agreement or its lost opportunity cost with respect to the deposit. Indeed, there is no evidence whatsoever upon which the court is able to gauge whether the Termination Fee is reasonable other than that it is within the "range", albeit the high end of the range. In my view, such evidence is required. A termination fee of $1.5 million may well have a substantial adverse effect on the Bond Holders and the Lien Claimants.

39 I accept that the court must balance the expenses, efficiencies and delays that will necessarily result if the Receiver has to go through what may prove to be a fruitless additional process due to the possibility that a more provident bid will be received which results in some recovery for the Lien Claimants and Bond Holders. However, the dearth of evidence regarding (i) the extent to which marketing processes other than a stalking horse process have been considered; (ii) the value of the Development; and (iii) the basis upon which the Termination Fee was arrived at is such that the court has no benchmark against which to assess the reasonableness of the SH Agreement.

40 There is no evidence before me of any urgency regarding the sale of the Development.

41 Accordingly, I conclude that the Receiver has not demonstrated that the SH Agreement is in the best interests of the creditors as a whole. The application for a Bidding Procedures Order is dismissed.

Conditional Vesting Order

42 Given my finding regarding the reasonableness of the SH Agreement and my decision regarding the Bidding Procedures Order, there is no need to consider this issue.

The SL6 Purchase Agreement

43 At the time of the Receiver's appointment, the Debtors had entered into a contract of purchase and sale with Dr. Keith Yap and 0720609 B.C. Ltd. ("Dr. Yap") in respect of certain office space, known as SL 6, in Phase 1 of the Development (the "SL 6 Purchase Agreement"). The space is intended to become Strata Lot 6 following stratification of the building.

44 Prior to the Receivership and in anticipation of completion of construction of the Development, Dr. Yap spent considerable sums improving SL 6.

45 The Receiver has entered into an addendum to the SL 6 Purchase Agreement on terms that it considers to be commercially reasonable. The addendum contemplates a sale of SL 6, after stratification, at a price of $628,000. Before entering into the SL 6 Purchase Agreement, the Receiver considered comparable sales for strata office property in the Kelowna marketplace.

46 The Receiver seeks court approval of the addendum. The Bond Holders and the Lien Claimants oppose such an order on the basis that a further appraisal is required.

47 On the basis of the evidence before me, particularly that Dr. Yap has already installed fixtures and has set up a specialized office for his medical practice, that the terms of the SL 6 Purchase Agreement are considered reasonable by the Receiver and Aquilini and that Dr. Yip will be paying his portion of the Development's operating costs thereby not only reducing, at least to a small degree, the overall operating costs being paid by the Receiver but also adding occupancy to the Development which will undoubtedly assist in the lease or sale of other portions, I am satisfied that the SL 6 Purchase Agreement should be approved.

Increasing the Receiver's Borrowing Charge

48 The Receiver has provided to the court a breakdown of the additional expenses it anticipates will be incurred through to the end of the stalking horse process as follows:

a)	Phase 1 completion costs:	
	i. completion payables:	$200,000
	ii. parking lot and courtyard landscaping:	$100,000
b)	interest and fees on financing:	
	i. Interest accrued to date:	$150,000
	ii. future fees and interest:	$100,000
c)	Professional fees:	$450,000
d)	fees from leasing activities:	$125,000
e)	engagement of Colliers for SH Process:	$50,000
f)	other consulting fees:	$75,000
g)	office, utility and operating expenses:	$52,500
h)	contingency:	$55,000
	TOTAL	$1,357,500

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

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

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

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

Approval of the Receiver's Activities to Date

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

54 The court has inherent jurisdiction to review and approve or disapprove the activities of a court appointed receiver. If the receiver has met the objective test of demonstrating that it has acted reasonably, prudently and not arbitrarily, the court may approve the activities set out in its report to the court: *Bank of America Canada v. Willann Investments Ltd.*, [1993] O.J. No. 1647 (Ont. Gen. Div.) at paras. 3-5, aff'd [1996] O.J. No. 2806 (Ont. C.A.); *Lang Michener v. American Bullion Minerals Ltd.*, 2005 BCSC 684 (B.C. S.C.) at para. 21.

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

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

Sealing Order

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

Conclusion

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

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

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

61 The activities of the Receiver as set out in its first report dated January 30, 2014 are approved. Approval of the Receiver's activities as set out in its second report dated August 14, 2014 is premature.

62 The Receiver's application for an order sealing the appraisal of the Development dated March 3, 2014 by Altus Group is adjourned.

Application granted in part.

End of Document

TAB 21

KeyCite treatment
Most Negative Treatment: Check subsequent history and related treatments.

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

Regal Constellation Hotel Ltd., Re.

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

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

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

Farley J.

Heard: January 15, 2004
Judgment: January 15, 2004 *
Docket: 03-CL-5044

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

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

Subject: Corporate and Commercial; Civil Practice and Procedure; Property; Insolvency

MOTION by receiver for approval of activities as set out in reports.

***Farley J.*:**

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

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

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

4 Having now reviewed the material once again in light of the unanticipated objection and "new" information (to be fair it would have been new no earlier than January 8, 2004 as Mr. Rueter did not get the unsealed supplemental report to report #1

until then), I have concluded that it is unnecessary and inappropriate to grant the requested Holdings adjournment - and that in refusing that request, I do not see that Holdings will suffer any prejudice. In that respect, I will deal with certain non-Receiver aspects later as to the effect of this order on others aside from the Receiver.

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

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

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

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

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

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

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

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

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

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

Motion granted.

APPENDIX — A

HSBC Bank of Canada and Regal Constellation Hotel Limited

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

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

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

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

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

Respectfully submitted,

"Robert Rueter"

Counsel for Regal Pacific (Holdings) Limited

Footnotes

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