Estate No. 31-2008366
Court File No. 31-2008366

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED

AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF ONE KENTON ALZHEIMER CENTER FOR EXCELLENCE (NON-PROFIT) INC.

BOOK OF AUTHORITIES
(Returnable October 15, 2015)

October 8, 2015

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LIST OF AUTHORITIES

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TAB 1

2010 ONSC 5647
Ontario Superior Court of Justice

Outdoor Broadcast Networks Inc., Re

2010 CarswellOnt 7710, 2010 ONSC 5647, 196 A.C.W.S. (3d) 319, 71 C.B.R. (5th) 311

In Bankruptcy and Insolvency

In the Matter of the Proposal of Outdoor Broadcast Networks Inc. of the City of Toronto, in the Province of Ontario

Reg. Scott W. Nettie

Heard: September 27, 2010
Judgment: October 13, 2010
Docket: Estate No. 31-1385780

Counsel: Jonathan H. Wigley for Proponent
Sanjeev Mitra for Trustee
John C.M. Sayers for ATEC
Lisa Brost for Maple Leaf Sports & Entertainment Ltd.

Subject: Insolvency; Civil Practice and Procedure

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Bankruptcy and insolvency --- Proposal — General principles

O Inc. filed Notice of Intention (NOI) to make proposal under Bankruptcy and Insolvency Act — Amendments were made to Act such that s. 65.13(1) provides that where insolvent person has filed NOI under s. 50.4 of Act, that person may not dispose of assets outside ordinary course of business, unless authorized by Bankruptcy Court — O Inc. brought application seeking Court's approval to sell six billboards as liquidation of its assets, to raise cash to fund intended proposal — Application granted — Grant of order was appropriate exercise of Registrar's jurisdiction — Factors set out in s. 65.13(4) of Act were considered in determining whether to exercise discretion to authorize sale — Process leading to sale was reasonable, trustee was in support and had filed requisite report, creditors had been consulted, and consideration proposed was reasonable — O Inc.'s major secured creditor supported sale — Any deemed bankruptcy flowing from failure of proposal process would result in no funds for ordinary unsecured creditors; thus, proceeding without broader notice to ordinary unsecured creditors was appropriate.

Bankruptcy and insolvency --- Proposal — Practice and procedure

O Inc. filed Notice of Intention (NOI) to make proposal under Bankruptcy and Insolvency Act (BIA) — Amendments

were made to BIA such that s. 65.13(1) provides that where insolvent person has filed NOI under s. 50.4 of BIA, that person may not dispose of assets outside ordinary course of business, unless authorized by Bankruptcy Court — O Inc. brought application seeking Court's approval to sell six of its billboards as liquidation of assets to raise cash to fund intended proposal — Application granted on other grounds — All appropriate parties were involved in application, and it proceeded as unopposed — Registrar in Bankruptcy has jurisdiction under s. 192(1)(f) of BIA to hear and determine any unopposed matter — Prima facie conclusion that Bulk Sales Act (BSA) ought to apply to proposed sale of signs was ousted by s. 65.13(7) of BIA — Section 65.13(7) of BIA authorizes Court making order under s. 65.13(1) to authorize sale free and clear of "other restriction" implicit in application of BSA to sale — So long as Court makes proceeds of s. 65.13(1) BIA sale transaction subject to restrictions of BSA, compliance with s. 65.13(7) is had, and application of BSA is not only ousted, but may be so ousted not by judge of Superior Court of Justice, but by duly authorized judicial officer of Bankruptcy Court, be that judge or registrar.

Table of Authorities

Statutes considered:

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

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

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

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

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

s. 65.13(7) [en. 2007, c. 36, s. 27] — considered

s. 192(1)(f) — referred to

Bulk Sales Act, R.S.O. 1990, c. B.14
Generally — referred to

s. 2 — considered

s. 3 — considered

APPLICATION for order approving sale of assets.

***Reg. Scott W. Nettie*:**

1 On September 27, 2010, I granted the requested approval of a certain sale, and vesting Order, for Reasons to follow. These are those Reasons.

2 Outdoor Broadcast Networks Inc. ("OBN") has filed a Notice of Intention to make a proposal, in accordance with the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA"). Schonfeld Inc. (the "Trustee") is the trustee in the proposal estate.

3 OBN is in the business of providing marketing solutions to advertisers. In particular, it owns a number of large, full motion LED digital billboards. These billboards are located in the Provinces of Ontario and British Columbia.

4 OBN would like to sell six such signs, located in five locations. Four of those locations are in the City of Toronto, comprising five signs. The fifth location is in the City of Pitt Meadow, British Columbia.

5 Ordinarily, OBN would be at liberty to sell its signs, without application to this Court. Having filed an NOI, the assets of OBN remain vested in it, and it retains capacity to deal with its own assets. It would have been, of course, subject to the provisions, in Ontario, of the *Bulk Sales Act*, R.S.O. 1990, c. B-14 ("BSA"), if any proposed sale constituted a sale in bulk, out of the ordinary course of business.

6 That changed September 18, 2009, with the most recent amendments to the BIA. Section 65.13(1) BIA now provides that where an insolvent person has filed an NOI under s. 50.4 BIA, as OBN has, then that person may not sell or dispose of assets outside of the ordinary course of business, unless authorized to do so by the Bankruptcy Court.

7 According to the Affidavit of Kevin Clay, filed on the application, the sales by OBN of these billboards are intended to be a liquidation of its assets, so as to raise cash to fund the proposal which it intends to make. No one disputes that such a liquidation constitutes a sale outside of the ordinary course of business for OBN. Hence this application.

8 Section 65.13(4) BIA sets out the factors which the Court is to consider in exercising its discretion to authorize such a sale, or not. All six of those factors were addressed by counsel or in the materials, or both, and I duly considered them in granting the requested Order. The process leading to the sale was reasonable; the Trustee was in support, and had filed the requisite report; creditors had been consulted; and the consideration proposed is reasonable.

9 On the point of creditor consultation, I note that Fraser Kearney Capital Corporation ("FKCC") is the major secured creditor of OBN. Kevin Clay, the affiant in support of the application, is an officer of FKCC and a director of OBN. FKCC supports the sale transactions, and intends to permit the proposal to proceed despite its apparent prior security position over the assets of OBN (including the sale proceeds of the signs) in order to benefit from certain tax losses of OBN. The evidence before me was that the security of FKCC is in a shortfall position, such that any deemed bankruptcy flowing from a failure of the proposal process would result in no funds for ordinary unsecured creditors. Thus, I was satisfied that proceeding without broader notice to the ordinary unsecured creditors was appropriate. Further, a number of the larger unsecured creditors, being landlords where the signs are located, were waiving their lease claims as part of the sale terms of the signs to them. In short, I was satisfied that the grant of the Order was an appropriate exercise of my jurisdiction.

10 Ordinarily, the record could have simply reflected my satisfaction, and that an Order was to go as signed. These Reasons were required in respect of two points, both of which relate to my jurisdiction, as Registrar in Bankruptcy, to hear and determine this application.

11 The first, and least contentious, is my jurisdiction to hear an application under s. 65.13(1) BIA. In the case at bar, all appropriate parties were involved in the application, and it proceeded as unopposed, subject only, of course, to my being persuaded to exercise my discretion in favour of OBN, which I was. A Registrar in Bankruptcy has the jurisdiction, under s. 192(1)(f) BIA to hear and determine any unopposed matter. Thus, I had jurisdiction to hear the application.

12 The second point is whether or not I have the ability, as Registrar, to not only approve the sale, under s. 65.13(1) BIA, but to make that sale not subject to the provisions of the BSA which might otherwise apply, absent the Order of a Judge of the Superior Court of Justice exempting the sale from the BSA under s. 3 BSA. As all who regularly practise in this area know, a s. 3 BSA exemption is routinely added into the majority of vesting orders, even where the sales are by a trustee, and thus expressly already exempt from the BSA under s. 2 BSA.

13 *Prima facie*, it would seem that the BSA ought to apply to the proposed sale of the signs by OBN. While the sale in bulk is broken up amongst a number of purchasers, it is admittedly a sale out of the ordinary course of business, and, in effect, a liquidation. It is not being conducted by a trustee or FKCC as a creditor realizing under its security, but directly by OBN itself, as OBN still owns and controls the assets.

14 This *prima facie* conclusion is ousted, in my view, by the provisions of s. 65.13(7) BIA. That section provides that in making the within Order, the Court may authorize the sale to be "free and clear of any security, charge or *other restriction* (emphasis added), and, if it does, it shall also order that...the proceeds of the sale...be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order."

15 I find that s. 65.13(7) BIA authorizes the Court making the Order under s. 65.13(1) BIA to authorize the sale free and clear of the "other restriction" implicit in application of the BSA to the sale. After all, what is the BSA but a series of restrictions on alienability by a property owner of its assets, in order to protect ordinary creditors, who may be unaware of the alienation, occurring as it must, out of the ordinary course of the seller's business. So long as the Court makes the proceeds of the s. 65.13(1) BIA sale transaction themselves subject to the restrictions of the BSA, compliance with s. 65.13(7) BIA is had, and the application of the BSA is not only ousted, but may be so ousted not by a Judge of the Superior Court of Justice, but by the duly authorized judicial officer of the Bankruptcy Court, be that a Judge or a Registrar.

16 I am equally confident in this conclusion when I consider further the issue of paramountcy between a validly enacted Dominion statute, made in pursuit of the Dominion's clear jurisdiction over bankruptcy and insolvency and that of a validly enacted Provincial statute going to issues of property and civil rights in the Province. Where they conflict, precedence must be given to the Dominion legislation, especially when it serves to continue to protect the interests of the very creditors which the BSA seeks to safeguard.

17 By way of illustration of this latter point, let us consider to what use OBN might put the sale proceeds. If OBN dispenses them in the ordinary course of business, both the BIA and the BSA will be content. If, however, OBN were to dispose of them outside of the ordinary course of business, both s. 65.13(1) BIA and s. 2 BSA would be invoked, and the

creditors would have all of the same protections which they had before this Court authorised the sale of the signs.

18 Moreover, this analysis permits the proper pursuit by an insolvent, OBN, of its rights to compromise its debts under the BIA. A finding which serves both the intent of the Dominion and Provincial acts, while protecting creditors and allowing an insolvent debtor proper access to the Dominion statute is in my view the proper conclusion.

19 Any remaining doubt that this conclusion is correct is dispelled, I find, by a consideration of the November, 2003, *Report of the Standing Senate Committee on Banking, Trade and Commerce*[1], a report by a Committee of the Upper House of the Dominion Parliament. That Report, at page 148 recommended to Parliament that:

> The *Bankruptcy and Insolvency Act* and the *Companies' Creditors Arrangements Act* be amended to permit the debtor, subject to prior approval of the Court, to sell part or all of its assets out of the ordinary course of business, during reorganization and *without complying with bulk sales legislation* (emphasis added). Similarly, the debtor should be permitted to sell all or substantially all of its assets on a going concern basis. On an application for permission to sell, the Court should take into consideration whether the sales process was conducted in a fair and reasonable manner, and whether major creditors were given reasonable notice, in the circumstances, of the proposed sale and had input into the decision to sell. No such sale to controlling shareholders, directors, officers or senior management of the debtor having a significant financial interest in the purchaser or in the sales transaction should be permitted, other than in exceptional circumstances.

20 A review of s. 65.13 indicates that essentially every other of the recommendations, above, were adopted by Parliament. One can but conclude from that that the intent of s. 65.13(7) BIA, in respect of the "other restrictions" language was also an adoption by Parliament of the recommendation that the BIA provide for sale by insolvent debtors of assets out of the ordinary course - free from compliance with the BSA, including s.3 thereof.

21 Having concluded that I had jurisdiction to hear the application under s. 192(1)(f) BIA, and having concluded that sitting in such a capacity constituted my actions as those of the Court under s. 2 BIA, and having concluded that the Court has the ability to authorize the proposed sale by OBN free and clear of the other restriction of the BSA, I granted my Order herein on September 27, 2010.

Application granted.

Footnotes

[1] *http://www.cfs-fcee.ca/html/english/campaigns/Senate_Cmte_Report_2003_11-a.pdf*

TAB 2

2010 ONSC 2987
Ontario Superior Court of Justice [Commercial List]

Hypnotic Clubs Inc., Re

2010 CarswellOnt 3463, 2010 ONSC 2987, 189 A.C.W.S. (3d) 29, 68 C.B.R. (5th) 267

IN THE MATTER OF THE PROPOSAL OF HYPNOTIC CLUBS INC., A COMPANY DULY INCORPORATED PURSUANT TO THE LAWS OF THE PROVINCE OF ONTARIO WITH A HEAD OFFICE IN THE CITY OF TORONTO IN THE PROVINCE OF ONTARIO (Applicant)

Cumming J.

Heard: May 18, 21, 2010
Judgment: May 21, 2010
Docket: 31-1323465

Counsel: Domenico Magisano, Catherine DiMarco for Hypnotic Clubs Inc.
Kenneth H. Page for Jenny Telios
John Salmas for Muzik Clubs Inc.
M. Solomon for Generation of Dance, Inc.
John Hendriks for Trustee, A. Farber & Partners Inc.

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

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

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

Debtor operated nightclub — Debtor was tenant under sublease from M Inc. — M Inc. was related person to debtor — M Inc. was tenant under head lease from Canadian National Exhibition (CNE) — Debtor filed notice of intention to make proposal — M Inc. had purported claim against debtor for unpaid rent — GD Inc. was secured creditor — T was unsecured creditor — Debtor entered into revised asset purchase agreement (APA) to sell its assets to corporation that was related person to M Inc. — Debtor brought motion for sale of its assets pursuant to revised APA — T brought cross-motion for production of head lease — Motions dismissed — Factors to be considered under Bankruptcy and Insolvency Act (Act) were met because revised APA provided for better recovery to creditors than bankruptcy — If revised APA were approved, creditors would not be able to vote upon proposal in their self-interest — Good faith efforts were not made to sell debtor's assets to unrelated parties within intent of s. 65.13(5)(a) of Act — M Inc. could sublet to non-related party, subject to consent by CNE — M Inc. wanted to keep economic benefit of nightclub business for itself — M Inc. would only rent to related party so there was no market for third party to purchase assets and operate business.

Bankruptcy and insolvency --- Practice and procedure in courts — Miscellaneous

Jurisdiction of court to order production of document — Debtor operated nightclub at Exhibition Place — Debtor was tenant under sublease from M Inc. — M Inc. was related person to debtor — M Inc. was tenant under head lease from Canadian National Exhibition (CNE) — Debtor filed notice of intention to make proposal — T was unsecured creditor — Debtor entered into revised asset purchase agreement (APA) to sell its assets to corporation that was related person to M Inc. — Debtor brought motion for sale of its assets pursuant to revised APA — T brought cross-motion for production of head lease between CNE and M Inc. — Motions dismissed — Court had no jurisdiction to compel production of head lease — Debtor was not party to head lease — Head lease was agreement between M Inc. and CNE.

Bankruptcy and insolvency --- Proposal — Time period to file — Extension of time

Debtor operated nightclub at Exhibition Place — Debtor was tenant under sublease from M Inc. — M Inc. was related person to debtor — M Inc. was tenant under head lease from Canadian National Exhibition (CNE) — Debtor filed notice of intention to make proposal — M Inc. had purported claim against debtor for unpaid rent — GD Inc. was secured creditor — T was unsecured creditor — Debtor entered into revised asset purchase agreement (APA) to sell its assets to corporation that was related person to M Inc. — Debtor brought motion for sale of its assets pursuant to revised APA — T brought cross-motion for production of head lease — Motions dismissed — Debtor's request under s. 50.4(9) of Bankruptcy and Insolvency Act brief extension for filing of proposal was reasonable — All parties consented to brief extension of time.

Table of Authorities

Statutes considered:

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

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

s. 50.4(8) [en. 1992, c. 27, s. 19] — referred to

s. 50.4(9) [en. 1992, c. 27, s. 19] — pursuant to

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

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

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

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

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

s. 136 — referred to

MOTION by debtor corporation for sale of its assets; CROSS-MOTION by unsecured creditor for order for production of head lease between two third parties.

Cumming J.:

The Motion

1 A motion is made by the debtor corporation, Hypnotic Club Inc. ("Hypnotic" or the "debtor"), for a sale of its assets pursuant to s. 65.13 of the *Bankruptcy and Insolvency Act* ('*BIA*") R.S.C. 1985, c.B-3, as am.

Background

2 The debtor is a private company, operating a nightclub management company at Exhibition Place in Toronto.

3 The debtor filed a Notice of Intention to Make a Proposal (the "NOI") on February 17, 2010 under s. 50.4 of the *BIA*. A. Farber & Partners Inc. ("Farber" or "Proposal Trustee") was named Proposal Trustee. Court Orders have twice been made extending the time for the debtor to file its proposal. The last extension expires today, May 21, 2010.

4 Hypnotic is a tenant under a sublease from Muzik Club's Inc. ("Muzik"). Muzik is a related person to Hypnotic.

5 On May 5, 2010, the debtor entered into an Asset Purchase Agreement (the "APA") to sell its assets to Muzik (in trust for its nominee) subject to Court approval. On May 13, 2010, the APA was revised ("Revised APA") on the recommendation of the Proposal Trustee.

6 Hence, the intended sale of assets is to a new corporation which will be a related person to Muzik.

7 (If the Revised APA is approved, Hypnotic also requests a 32-day extension to June 22, 2010 pursuant to s. 50.4 (9) of the *BIA* to allow the Purchaser time to deal with various liquor licensing issues and to make a viable proposal upon the closing of the Revised APA.)

8 Muzik is the tenant under an existing head lease from the Canadian National Exhibition ("CNE"). Muzik has some 12 years remaining on the 20-year term of the head lease. Muzik has a purported claim against Hypnotic of $1.5 million for unpaid rent. No proof of claim has been filed in respect of this alleged unpaid rent. Muzik also states that $210,000. in rent arrears is a preferred claim pursuant to s. 136 of the *BIA*.

9 The Proposal Trustee is of the opinion that the process leading to the proposed sale and disposition to Muzik (in trust for its nominee) is reasonable in the circumstances because the sublease has expired and Hypnotic is now on a month-to-month tenancy. Muzik has the unfettered discretion as to who is acceptable as a new tenant. The clear intent of Muzik is to give a lease to the property to a related person tenant.

10 It is also noted that s. 15.2 of the sublease to Hypnotic provides the tenant shall not effect any assignment or major sublease and there shall be no change of control of the tenant without the prior written consent of Muzik, which consent may be arbitrarily and unreasonably withheld.

11 Mr. Starkovski, the principal of Muzik, also states that the head lease from the CNE only allows Muzik to sublet the premises to related parties without obtaining the prior written consent of the CNE; however, Muzik states that it will not entertain offers to lease from an unrelated party even if the CNE's consent were to be given.

12 The Proposal Trustee's third report notes that two independent appraisals estimate the assets (equipment and inventory) of Hypnotic have a gross liquidation value of less than $282,000.

13 The only secured creditor of Hypnotic, Generation of Dance Inc., is a related person to Muzik, owed some $325,000. A legal opinion has been provided that the security is valid and enforceable.

14 Ms. Penny Telios, by far the largest arms-length unsecured creditor of Hypnotic, has a judgment against Hypnotic for $740,879.78 for monies loaned on or about May 27, 2005. Ms. Telios, in effect, has a veto over any proposal that Hypnotic makes to its creditors.

15 In his affidavit, Mr. John Telios (the brother of Ms. Penny Telios) alleges, amongst other things, that Mr. Zlatko Starkovski (the principal behind Muzik) made misrepresentations at the time of the loan to Hypnotic and specifically, misrepresented that Hypnotic was the tenant of the long-term lease from the CNE. Such allegation has no relevancy to the proceeding at hand.

16 Ms. Telios has brought a cross motion seeking an order that Muzik produce the head lease from the CNE for the examination by Ms. Telios. Muzik refuses to produce the head lease. I have no jurisdiction (and the counsel for Ms. Telios does not suggest I have jurisdiction) to compel production of the head lease, being an agreement between two parties who are not the debtor. Accordingly, the cross motion is dismissed.

17 Mr. Telios questions the validity of the Muzik purported claim against Hypnotic for unpaid rent of $1.5 million. The materials throw up suspicions as to the merits of this asserted claim.

18 However, Muzik has agreed to waive the entirety of its purported claim of $1.5 million if the Revised APA is approved. Moreover, leaving aside the claim for $1.5 million by Muzik as landlord, it appears the appraised assets (inventory and equipment) of Hypnotic have a liquidation value that probably would not satisfy the secured creditor claim.

19 The purchase price under the Revised APA is $450,000. In addition, as stated above, the landlord, Muzik, has agreed to not submit a claim against Hypnotic for asserted rent arrears of some $1.5 million. As well, subject to Court approval of the Revised APA, Muzik has agreed to fund 100% of any source deduction deemed trust and the directors' liabilities, including GST (some $130,874.83), and unremitted corporate taxes (some $110,199.72) and not file subrogated claims in the debtor's proposal if the Revised APA is accepted. Assuming the Revised APA is approved, Hypnotic intends to file a viable proposal after the closing of the sale under the Revised APA, with the $450,000. purchase price having replaced the sold assets of Hypnotic.

20 Mr. Telios makes various allegations against Mr. Starkovski. I leave aside these various accusations. They are not relevant to this proceeding.

21 Mr. Starkovski in his affidavit states that Ms. Telios will not agree to a compromise of her judgment and recognizes that she holds a veto power over any proposal. Ms. Telios's position is that the Revised APA should not be given Court approval and a formal proposal should be made by Hypnotic. The record suggests that Ms. Telios will not vote in favour of any proposal that does not satisfy her judgment.

22 Mr. Starkovski is concerned that the Telioses have an ulterior motive of desiring to subvert the relationship of Muzik with the CNE for their own benefit.

23 It is apparent that Mr. Telios and Mr. Starkovski have other business dealings and an acrimonious relationship. Whatever the merit, or lack of merit of their respective allegations about the other, those allegations are not relevant to this motion.

24 Realistically, Muzik is the only potential purchaser of Hypnotic's assets given Muzik's position that it will not agree to any subtenant who is not a related party to Muzik. Accordingly, there has not been any sales process undertaken by Hypnotic to offer the assets for sale to the public.

The Factors for Consideration in Considering the Motion

25 The factors to be considered by the Court in respect of this Motion are set forth in s. 65.13 (4) and (5) of the *BIA*, which provide:

> **65.13 (4) Factors to be considered-**
>
> In deciding whether to grant the authorization, the court is to consider, among other things,
>
> (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
>
> (b) whether the trustee approved the process leading to the proposed sale or disposition;
>
> (c) whether the trustee filed with the court a report stating that in their opinion the sale or disposition would be

more beneficial to the creditors than a sale or disposition under a bankruptcy;

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

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

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

(5) Additional factors - related persons -

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

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

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

26 Muzik has stated that it will only rent to a related party and no one else can enter the premises to run the business in the current location. Thus, there is no market for any third party to purchase the assets and operate from the current location.

27 The Proposal Trustee approves the process leading to the proposed sale. Farber has also stated that in its opinion the Revised APA "provides for a superior realization to the secured and arms-length unsecured creditors .... [and] permits the business to continue...[with] ongoing employment for 157 [7 full time and 150 part time] employees". In the Proposal Trustee's view, the consideration to be received for the sale of the assets is fair and reasonable, taking into account their market value as estimated by the two appraisals, attributing a value of about one-half the amount of the offer through the Revised APA.

28 Muzik has advised that if the Revised APA is not approved it will withdraw its offer. Given the inability to find another purchaser, the resulting bankruptcy would quite probably result in a shortfall for the (related person) secured creditor and no recovery for the unsecured creditors, in particular, Ms. Telios.

29 The opinion of the Proposal Trustee, reasonably founded upon the record as set forth above, is that the Revised APA provides for a better recovery to the secured creditor and the arms-length creditors than a bankruptcy.

30 Thus, the factors to be considered as required by s. 65.13(4) of the *BIA* have been taken into account.

31 The additional factor to be considered when the proposed sale is to a related person as required by s. 65.13 (5) (b) is also met. Given the impossibility of any real market for a sale of Hypnotic's assets to other than Muzik, a related person, and given the appraisals as to the liquidation value of those assets, the reasonable conclusion is that the consideration to be received by the Revised APA is superior to the consideration that would be received under any other conceivable offer.

32 This brings me to the factor required to be met by s. 65.13(5) (a). Giving consideration to the entirety of the evidentiary record and the intent and policy underlying the *BIA*, I am not satisfied that good faith efforts have been made to sell or otherwise dispose of Hypnotic's assets to unrelated parties of Hypnotic within the intent and meaning of this provision.

33 The intent and policy underlying the *BIA* is that creditors should consider and vote upon a proposal advanced pursuant to a NOI as they see fit in their own self interest. That objective is defeated in the instant situation if the Revised APA is approved.

34 Section 65.13 (4) and (5) allow for exceptional situations to be considered by the Court provided the factors discussed are met.

35 In the situation at hand, if the proposed sale is approved, Muzik ends up with the benefit of the nightclub establishment with a payment of approximately $150,000 to the unsecured creditors, their total claims being about $850,000. Muzik is in the position of effectively controlling who the subtenant replacing Hypnotic might be and insists that only a person related to Muzik can be the subtenant of Muzik. Thus, given the position of Muzik, there is no real market for the nightclub business. It is clear that the nightclub business of Hypnotic has considerable value to Muzik. In the course of submissions counsel for Muzik stated that Muzik had expended more than $1 million in improvements to the business property of Hypnotic. However, given its control of the granting of the sublease, Muzik in effect removes itself from having to bid a competitive price for the business of Hypnotic. Moreover, Muzik could agree to sublet to a non-related party, subject to the CNE consenting to the sublet, however, Muzik wants to capture the economic benefit of the ongoing nightclub business for itself.

36 Given these circumstances, and taking into account the underlying policy of the *BIA* of letting creditors vote as they choose in respect of accepting or rejecting a proposal, in my view, the factor of required good faith efforts stipulated by s. 65.13(5)(a) has not been met.

37 It is obvious that a deemed assignment into bankruptcy by s. 50.1 (8), consequential to no proposal having being made, will quite probably result in Ms. Telios and the other unsecured creditors not recovering anything at all. However, that is a consequence that should be determined by the unsecured creditors through a vote upon a proposal without a prior disposition of Hypnotic's assets through the proposed Revised APA.

Disposition

38 For the reasons given, the motion is dismissed.

39 I have advised all parties in court this morning as to my intended disposition of this motion, with these written reasons to follow. The debtor requested under s. 50.4 (9) of the *BIA* a further brief extension for the possible filing of a proposal. All parties present consent to the request. In my view, the request is reasonable in the circumstances and accordingly, an

extension is given to June 7, 2010, and an Order shall issue to that effect.

Motions dismissed.

TAB 3

2011 ONSC 3230
Ontario Superior Court of Justice

Komtech Inc., Re

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

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

Paul Kane J.

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

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

Subject: Insolvency; Estates and Trusts; Corporate and Commercial

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

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

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

Table of Authorities

Cases considered by *Paul Kane J.*:

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

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

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

Statutes considered:

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

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

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

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

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

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

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

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

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

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

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

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

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

s. 36 — considered

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

MOTION by company for approval of sale of assets.

***Paul Kane J.*:**

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

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

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

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

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

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

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

Evaluation of the APA and Bid Process

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

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

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

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

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

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

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

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

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

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

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

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

Remaining Issue

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

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

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

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

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

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

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

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

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

Restriction on disposition of business assets

36. (1) A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

Notice to creditors

(2) A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

Factors to be considered

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

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

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

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

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

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

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

Additional factors — related persons

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

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

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

Related persons

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

(a) a director or officer of the company;

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

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

Assets may be disposed of free and clear

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

charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

Restriction — employers

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

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

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

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

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

It is widely accepted that inadequate provisions exist for workers whose employers becomes bankrupt. Previous attempts to bring about better protection for workers have failed, as the Minister of Labour has pointed out. ...

Experience has shown that restructuring provides much greater protection than liquidations through bankruptcy. Jobs are saved, creditors obtain better recovery and more competition is stimulated. Therefore, it is a cornerstone of Bill C-55 to promote restructuring. Bill C-55 encourages a culture of restructuring by increasing transparency in the proceedings, providing better opportunities for affected parties to participate, and improving the system of checks and balances to create greater fairness and efficiency.

To achieve its aims, the bill provides the courts with legislative guidance to ensure greater certainty and predictability with reference to such items as interim financing, the disclaimer and assignment of agreements, the sale of assets out of the ordinary course of business, governance arrangements of the debtor company, and the application of regulatory measures during the restructuring process. These issues were addressed in recommendations contained in your 2003 committee report and are largely reflected in the provisions of this bill.

(Emphasis added)

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

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

Interim Charges

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

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

Motion granted.

TAB 4

2000 CarswellOnt 1625
Ontario Court of Appeal

Cosgrove-Moore Bindery Services Ltd., Re

2000 CarswellOnt 1625, 17 C.B.R. (4th) 203

The Matter of the Proposal of Cosgrove-Moore Bindery Services Limited

Lane J.

Judgment: March 31, 2000
Docket: Toronto 31-372219

Counsel: *Harvey G. Chaiton*, for Applicant.

Subject: Insolvency

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Bankruptcy --- Proposal — Practice and procedure

Trustee brought motion to extend time for filing proposal under Bankruptcy and Insolvency Act for 45 days — Time was required to obtain commitment for financing — Motion granted — Debtor's financial situation had improved over recent months and production had increased — Bank, which held security over receivables, could be prejudiced by erosion of security but new production was generating new receivables — Extension did not materially prejudice creditors — Debtor acted in good faith in developing proposal — Debtor's alleged bad faith actions prior to notice were not material in decision to grant extension — It was likely that viable proposal could be made — Debtor's refusal to consent to receivership was act of bad faith but was not sufficient to exclude debtor from benefiting from Act's proposals — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 50.4(9).

Table of Authorities

Statutes considered:

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

s. 50.4(9) [en. 1992, c. 27, s. 19] — referred to

MOTION by trustee to extend time for filing proposal in bankruptcy.

Endorsement. ***Lane J.*****:**

1 The Trustee of the Proposal money to extend the time for filing the Proposal for 45 days. There is a commitment for part of the financing required and time is asked to enable a letter of intent from another financier to the firmed up to a commitment. There is also some evidence that problems with certain new equipment which contributed to the Company's problems have been overcome and the Company is able to produce at a better rate. It is clear that the Company is still in financial trouble but the picture is not as bleak as some months ago. Several creditors oppose. The Bank is the holder of security over receivables and argues it will be prejudiced by erosion of the security. On the other hand, new production is generating new receivables. The Bank's position in effect requires a company seeking such an extension to have a positive cash flow so that there is no erosion of security. With respect, that cannot be regarded as a practical definition of material prejudice as referred to in s. 50.4(9). It is rare indeed that debtors in this situation present with positive cash flow. It is the prejudice caused by the extension itself that is to be measured and I do not find that any of the creditors is materially prejudiced. The objections of the landlord as to the rent on an occupation basis from March 4th can be brought forward by motion to resolve the legal issue. There seems to be no doubt it is entitled to rent for April and onwards. The problem about March exists; it will not be made worse by the extension. Similarly, Westcoast's position will not be worsened by the extension.

2 So far as the good faith of the debtor is concerned, think the primary focus is on whether it is proceeding in good faith towards developing a proposal and not on whether it acted in good faith during its pre-notice dealings. There is evidence, in the form of the commitment and the letter of intent that there is progress. I can see no lack of good faith or of diligence since the Notice. I am also satisfied that, given the resolution of the production problems, the commitment and letter of intent and the long history of profitable operation, it is likely that a viable proposal can be made.

3 There is one matter raised that I should address. It was submitted that the Company's refusal to consent to the receivership even though it has agreed to consent, was an act of bad faith. No doubt it was a breach of contract, but in my view it is not such an act as ought to disqualify the Company from taking advantage of the B1A provisions for Proposals. They are remedial in nature and often have the beneficial effect of keeping a business alive for the benefit not only of creditors, but of employees, shareholders and the community generally. Given the prevalence in security documents of consent to receivership clauses, it would gut the BIA proposal provisions to hold that refusal to consent was an act of such bad faith as to prevent any extension of time.

4 The motion to extend for 45 days is allowed.

5 No costs are sought.

Motion granted.

End of Document

TAB 5

2005 NSSC 346
Nova Scotia Supreme Court

H & H Fisheries Ltd., Re

2005 CarswellNS 541, 2005 NSSC 346, [2005] N.S.J. No. 513, 144 A.C.W.S. (3d) 407, 18 C.B.R. (5th) 293, 239 N.S.R. (2d) 229, 760 A.P.R. 229

In the Matter of H & H Fisheries Limited

Goodfellow J.

Heard: December 14, 2005
Judgment: December 19, 2005
Docket: SH B259148

Counsel: Victor J. Goldberg, Martha L. Mann for H & H Fisheries Limited
Stephen J. Kingston, Bob Mann (articled clerk) for Bank of Nova Scotia

Subject: Insolvency

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Bankruptcy and insolvency --- Proposal — Time period to file — Extension of time

Debtor agreed to maintain all operating accounts with bank as condition of financing — Debtor breached agreement by depositing funds with other bank — Debtor had net loss of nearly $600,000 for fiscal year ending June 30, 2005 — Debtor applied for 45-day extension to file proposal — Application granted — Debtor met requirements of s. 50.4(9) of Bankruptcy and Insolvency Act — Debtor acted in good faith notwithstanding breach of agreement — Debtor acted to stay in operation as bank would have used funds to pay down debt — Debtor's good faith was supported by respected trustee — Debtor was likely to make viable proposal in sense of reasonable one to reasonable creditor — Bank as largest secured creditor should not be able to veto proposal at this early stage — Bank would not be unduly prejudiced by extension given debtor's current receivables of nearly $1 million were double its indebtedness to bank.

Table of Authorities

Cases considered by *Goodfellow J.*:

Baldwin Valley Investors Inc., Re (1994), 23 C.B.R. (3d) 219, 1994 CarswellOnt 253 (Ont. Gen. Div. [Commercial List]) — referred to

Cumberland Trading Inc., Re (1994), 23 C.B.R. (3d) 225, 1994 CarswellOnt 255 (Ont. Gen. Div. [Commercial List]) — considered

St. Isidore Meats Inc. / Viandes St. Isidore Inc. v. Paquette Fine Foods Inc. (1997), 1997 CarswellOnt 1524, 46 C.B.R. (3d) 280, 36 O.T.C. 76 (Ont. Bktcy.) — considered

Statutes considered:

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

s. 1 [rep. & sub. 1992, c. 27, s. 2] — referred to

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

s. 50.4(9) [en. 1992, c. 27, s. 19] — considered

s. 50.4(9)(b) [en. 1992, c. 27, s. 19] — considered

s. 54(2.2) [en. 1992, c. 27, s. 22] — considered

s. 54(3) — considered

s. 62(1.2) [en. 1992, c. 12, s. 39] — considered

s. 62(2) — considered

Interpretation Act, R.S.C. 1985, c. I-21
Generally — referred to

s. 10 — considered

s. 12 — considered

APPLICATION by debtor for extension of time for filing proposal under Bankruptcy and Insolvency Act.

***Goodfellow J.*:**

Backgound

1 H & H Fisheries Limited (HHFL) owns and operates a fish processing plant at Eastern Passage, Halifax, Nova Scotia, which is a somewhat seasonal operation and it presently employs seventy-five people which diminishes to approximately twelve people off-season.

2 Reginald P. Hartlen is the president, a founding shareholder and director of HHFL and the company became a customer of the Bank of Nova Scotia (BNS) in May of 2003.

3 HHFL and BNS secured a commitment letter December 2, 2004 with the stated purpose of BNS "to finance trade receivables and inventory". It provided that BNS would have a first charge over accounts receivable and inventory and set out the terms and conditions of their agreement including "for ongoing credit risk management purposes, all operating accounts of the borrower shall be maintained with the Bank as long as the borrower has any operating line facilities with the Bank". There were several additional terms and conditions dealing with reporting ratios of current assets to current liabilities, ratio of debt to tangible net worth, etc. The letter of commitment contained a clear outline of the general borrower reporting conditions. The letter of commitment made reference to two specific receivables outstanding; Emporio and Simone, upon which I will comment further.

4 In November 2004 HHFL applied to increase its limit on its operating credit line from $400,000 to $1,100,000 and this increase was approved subject to confirmation as to the collection of the Emporio and Simone accounts.

5 In December 2004 the Simone account was paid in full but Emporio remained outstanding. Because the lobster season was approaching, HHFL requested BNS to waive the condition relating to the Emporio account. BNS did not waive the requirement in relation to that account but did allow access to the full operating line of $1,100,000 to January 31, 2005 when the limit was reduced to $750,000.

6 In February 2005, HHFL again requested access to the $1,100,000 credit limit to February 28, 2005 when again it would be reduced to $750,000 and this was agreed upon by the parties. HHFL provided BNS with an update on the status of the Emporio account which continued to remain outstanding. BNS became increasingly concerned with respect to the impact of the potential write-off of the Emporio account and as a result in March 2005 conversations took place between BNS and Reginald Hartlen, who undertook April 7, 2005 to inject equity of $200,000 into HHFL by April 22, 2005. Mr. Hartlen did come up with $100,000 and endeavoured to obtain additional funds in relation to mortgaging his residence but unfortunately there was a lien/judgment against his property and his financing has not been possible.

7 In June 2005 HHFL advised that as part of its 2005 fiscal year ending June 30, 2005, the company would write off the Emporio account which would give it an operating loss of $300,000 which would be partially set off by an SR&ED refund of $200,000, leaving a net loss of $100,000 for the fiscal year 2005.

8 In September 2005 BNS received a copy of HHFL's unaudited financial statement for the year ending June 30, 2005 which showed a net loss of $596,043. This compared with a net loss of $21,003 for the year ending June 30, 2004.

9 HHFL had problems with cash flow and operating and contrary to the letter of commitment started to deposit funds to its accounts with CIBC and this was acknowledged by the director of finance of the company in September 2005. There followed innumerable meetings, correspondence between the parties and Mark S. Rosen, a licensed trustee in bankruptcy, who has consented to act as trustee for any proposal in this matter.

Legislation

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 1; 1992, c. 27, s. 2.

Ss. 50.4(9)

Extension of Time for Filing Proposal

In order to obtain an extension, the debtor must establish the following three items

(a) that it is acting in good faith and with due diligence;

(b) that it would likely be able to make a viable proposal if an extension were granted; and

(c) that no creditor would be materially prejudiced.

S. 54(2.2)(3)

Related creditor — A creditor who is related to the debtor may vote against but not for the acceptance of the proposal.

62(1.2)(2)

On whom approval binding — A proposal accepted by the creditors and approved by the court is binding on creditors in respect of

(a) All unsecured claims, and

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

but does not release the insolvent person from the debts and liabilities referred to in section 178, unless the creditor assents thereto. (S.C. 1992, c. 27, s. 26).

Interpretation Act, R.C.C. 1985, c. I-21

Law Always Speaking

Law always speaking

10. The law shall be considered as always speaking, and where a matter or thing is expressed in the present tense, it shall be applied to the circumstances as they arise, so that effect may be given to the enactment according to its true spirit, intent and meaning.

Enactments Remedial

Enactments deemed remedial

12. Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

Application

10 HHFL filed a Notice of Intention dated November 3, 2005 under ss. 50.4(1) to make a Proposal of H & H Fisheries Limited. An order was granted extending the time to file a proposal November 29, 2005 to December 8, 2005. Unfortunately, the Chambers' docket was so heavy that the Justice presiding on December 8, 2005 was unable to address the matter and I was asked to deal with it and it was put over by consent to December 14, 2005. The application is comprised of several affidavits and both parties declined cross-examination of the other sides' supporting affidavits. On December 14th I heard almost four hours of argument and reserved my decision in order to thoroughly review the extensive material filed by both parties and arrive at a determination.

Onus

11 The court, as directed by s. 50.4(9) above, must be satisfied on each application that:

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

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

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

12 The onus is upon the applicant, in this case HHFL), to satisfy the court on a balance of probabilities that all three prerequisites of s. 50.4(9) have been established on the application.

13 This is so because of the use of the "semi-colon" and the use of the word "and" in (b), rendering the requirements conjunctive. This requires the court to consider each of the subsections as to whether the applicant has established the prerequisite contained in the subsection on a balance of probabilities. For the application to be successful the court must be satisfied that all three prerequisites of the application have been established on a balance of probabilities before extending the time for filing a proposal. It is, in essence, a three part test and if the applicant fails on any part the court would not then be satisfied, requiring the application to be dismissed.

14 **Has HHFL satisfied the court that it has acted in good faith and exercised due diligence?**

15 There is some merit to the arguments advanced by BNS and the court is particularly concerned about a party HHFL signing a commitment letter with the clear undertaking noted above that all its operating accounts were to be maintained with BNS. This is for the obvious purpose of providing BNS with an opportunity to monitor and protects its interests as a creditor and clearly HHFL in moving all its trading, operating business to its CIBC accounts has committed a breach of contract, a breach of the commitment it made in the original committal letter executed by both parties December 2, 2004.

16 Does a breach of contract automatically constitute bad faith? The answer is, "not necessarily", but it is evidence that must be weighed very carefully and the evidence here does show a deliberate failure to notify BNS of this redirection of operating funds and at one point a signed invoice or record which was somewhat misleading with respect to the possibility of some relatively minor accounts having been directed to the CIBC in error.

17 The converse of good faith is bad faith and bad faith requires a motivation and conduct that is unacceptable. If, for example, the diversion of operating/trading proceeds had been diverted to the CIBC for the purposes of personal gain for any officer, director or shareholder of HHFL, an example of which would be payment to ones family or a pay-down on a mortgage or judgment on ones home, etc., or to enhance the third level of a secured creditor being Mr. Hartlen's company, R. Hartlen Investments Inc., then clearly such would amount to bad faith and quite possibly fraud. It is clear that the motivation for moving the funds to the CIBC account was, in one word, for the purpose of "survival". Funds were essential in that I accept the view expressed by HHFL that had it continued to direct its operating/trading funds to BNS the probability is almost a certainty that BNS would have utilized such funds to pay-down its advances precluding the company from having any operating funds and the door to the plant would have been shut. This result would not have been, and is not at this time, in the best interest of either party and coincidentally the seventy-five employees who are at the moment gainfully employed by HHFL. I make it clear that it is not necessary that there be fraud for the conduct to fall short of good faith. HHFL have also fallen behind in many other aspects of the original commitment letter but they have responded and provided documentation, bank records, reconciliation of invoices with cash withdrawals. Its recent conduct probably directed by the trustee entirely mitigates against any suggestion of the diversion being for personal gain other than as I have said, a course of conduct taken for the benefit of both parties some other ninety-six outstanding creditors and the seventy-five employees. In some cases a breach of contract may be such of itself that it precludes acceptance on a balance of probabilities that the overall conduct meets the good faith requirement.

18 It is argued by HHFL that only its conduct since the filing of the Notice of intention November 3, 2005 should be considered and with respect, I am inclined to disagree. The manner in which a party conducts itself in the past, particularly the immediate past, is often an indicator of likely conduct in the immediate future. In addition, what you have here is a breach of the contract/commitment letter which occurred before November 3, 2005 and continued and overlapped the date of the filing of the Notice of intention.

19 The court does have the opinion of a respected trustee whose sworn testimony by affidavit has not been challenged and Mark S. Rosen, LLB, FCIRP, has been involved for some time and very active in endeavouring to come to grips with the challenge and has met with and communicated with officials of BNS, BDC and many of the unsecured creditors. After reciting in detail the extent of such activity he deposes in paragraph 14 of his affidavit of December 1, 2005 as follows:

> 14. I have been working with and receiving information from Messrs. Hartlen and Limpert as well as Harley Hiltz, the director of marketing and production for the Company, who at all times have been fully co-operative. From my experience and dealings with the Company, I believe that the Company has acted and is acting in good faith and with due diligence in working towards formulating a viable proposal. I believe that the Company would likely be able to make a viable proposal if the extension is granted.

My finding on this prerequisite is that by a relatively small margin HHFL has satisfied the court on a balance of probabilities that it has been and is likely to act in good faith. In reaching this conclusion I have not taken into account the representation made in oral argument that Mr. Hartlen has probably advanced $90,000 to $95,000 to HHFL recently because I do not recall seeing anything in the evidence, particularly documentation confirming this infusion and therefore I am unable to give it any weight.

20 The second wing of subparagraph (a) is in relation to due diligence and while the company has not acted in quite the timely manner it ought to have acted its deficiency in this regard is not severe and the cumulative evidence before me including the summary contained in Mr. Rosen's affidavit of December 1, 2005 and the volume of response which has been made to the BNS's requests and entitlement for documentation, combined with the efforts being made by the trustee in bankruptcy, Mark S. Rosen, to address a resolution constitutes satisfaction on a balance of probabilities of due diligence to this date.

21 **Would HHFL likely to be able to make a viable proposal if the extension being applied for were granted?**

22 "Viable" in this context means a proposal which seems reasonable on its face to a reasonable creditor (*Baldwin Valley Investors Inc., Re* (1994), 23 C.B.R. (3d) 219 (Ont. Gen. Div. [Commercial List])). Again, the court must be satisfied on a balance of probabilities that HHFL **would likely**. This at the very least means that a reasonable level of effort dictated by the circumstances must have been made that gives some indication of the likelihood a viable proposal will be advanced within the time frame of the extension applied for.

23 Lack of detail and assurance of this kind was considered in *St. Isidore Meats Inc. / Viandes St. Isidore Inc. v. Paquette Fine Foods Inc.*, [1997] O.J. No. 1863 (Ont. Bktcy.). In dismissing an application for an extension of time, Justice Chadwick stated (at para. 16):

> ...[T]he debtors have not been able to put forth any meaningful financial plan which would support a proposal. There is a vague reference in the affidavit material that they have approached at least two prospective purchasers, however there is no evidence that any of these parties are interested in assisting the debtor either now or in the future.

24 The BNS points to a number of specifics of what it considers a lack of effort that should result in a finding that there is little likelihood of HHFL making a viable proposal. BNS notes the fact that it has stated clearly that it no longer has any interest of being involved in the affairs of HHFL which will necessitate, in all probability, an alternate financial institution and to date no inquiries have been made by HHFL or the Trustee of any financial institution. The absence of this step will take on weight depending upon the totality of the circumstances that exist at the time of the Notice of intention and that have developed since the Notice of intention was filed.

25 There has been a considerable degree of activity before and since the Notice of intention was filed November 3, 2005. It seems in the total evidence available to the court through the affidavits filed that it is a reasonable inference to draw that it is highly unlikely that any financial institution would show any interest in filling the shoes of BNS until a determination is made with respect to this application for an extension of time to January 30, 2006. Since the Notice of intention has been filed the evidence is that HHFL has made a profit for November 2005 greater than that was anticipated. It had been anticipated that the profit would have been $7,000 and it appears to be approximately $19,600. There is an indication that the company is operating a new business model as a processing facility and there is evidence of the projected sales. In addition, there is evidence of a company, Pesca Pronta, having entered into a contract which by now would have had two substantial deliveries of lobster and in response to my inquiry during argument it appears that the first delivery has been paid for. HHFL advances the affidavit of Francesco Amoruso of Rome, Italy as to a possible solution and substitution by financial injection from that company, however, at this stage all that affidavit establishes is that an effort is being made by HHFL to address their situation. It further confirms that this is a busy, crucial period for HHFL but it does not at this point provide any comfort

to be BNS or the court as to being a probable element of a viable proposal.

26 Paragraph 5 of Francesco Amoruso's affidavit merely states:

> I have had discussions with Mr. Hartlen with respect to a potential share investment in H & H by Pesca Pronta in the approximate amount of $400,000.00 Cdn. I am very interested in pursuing the investment opportunity but will require 30 days to discuss the situation with my brothers/partners. I am hopeful that the transaction can be finalized. In the meantime, my company will continue to deal with H & H.

27 To this point the court has not been advised nor has BNS of any further developments, inquiries or progress with respect to Amoruso's affidavit which can only be classified as a statement of interest.

28 HHFL has made a concerted effort to secure government financing by way of a grant. The company has spent $6,000 for the services of a consultant in the preparation of its grant application and on December 9, 2005 a science officer who is preforming the due diligence for the grant indicated her satisfaction with the scientific basis of the claim and that she would be making a positive recommendation. The only weight that can be given at this stage to the grant application is that it is another example of the efforts being made by HHFL and its proposed trustee but until the grant reaches the stage of being a balance sheet item it can be given no further weight.

29 BNS raises an objection to a determination that HHFL can satisfy the requirement pointing out that BNS and BDC as one class of secured creditor represent a substantial majority position of the secured claims. R. Hartlen Investments Inc. is bound by s. 54.2.2(3) as noted above.

30 BNS takes the position that it has a clear veto over any proposal that may be advanced and that it will not be supporting any proposal to secured creditors that might be filed by HHFL.

31 In *Cumberland Trading Inc., Re*, [1994] O.J. No. 132 (Ont. Gen. Div. [Commercial List]), wherein Farley J. stated at para. 4:

> Cumberland's Notice of Intention to File a Proposal acknowledges that Skyview is owed $750,000. On that basis, Skyview has 95% in value of Cumberland's admitted secured creditors' claims and 67% of all creditors' claims of whatever nature. No matter what, Skyview's claim is so large that Skyview cannot be swamped in any class in which it could be put. Clearly, Skyview would have a veto on any vote as to a proposal, at least so far as the secured class, assuming the secureds are treated as a separate class. This leaves the interesting aspect that under BIA regime, one could have a proposal turned down by the secured creditor class but approved by the unsecured creditor class and effective vis-a-vis this latter class, but with the secured class being able to enforce their security. One may question the practicality of a proposal affecting only unsecured creditors becoming effective in similar circumstances to this situation.

32 In that case Farley, J. held that Skyview's position was satisfactory proof that the company would not likely be able to make a proposal that would be accepted by the creditors. In that case Skyview had 95% in value of Cumberland's admitted

secured creditors and here the math appears to give BNS a virtual veto. HHFL counters that when you look at the funds in the company's bank accounts at the end of November 2005 of approximately $170,000 that such reduces the debt outstanding of BNS and again reiterates that BNS has since the Notice of intention being filed received approximately $90,000 U.S. on its account. BNS is correct in that the mere presence of money in a debtor's bank account does not reduce indebtedness unless it is applied to the indebtedness. Since the notice of intention was filed HHFL has paid the required interest to BNS for November 2005. In this case, it is clear from the evidence before me and particularly the affidavit of the Trustee that there is a recognition of the proposal providing either alternate financing, such as speculated in Mr. Amoruso's affidavit or approaching alternate financial institutions. It would seem reasonable to assume that the proposal that will be advanced *if* it has a means of essentially paying out by substitution injection of capital of BNS indebtedness then the proposal presumably would be acceptable. It is inconceivable that if the BNS indebtedness were satisfied that BNS should retain the right to apply a guillotine effect to the extreme prejudice of itself and all other interested parties including the probable closure of the plant. The second largest secured creditor is the Business Development Corporation and they are in agreement to the granting of an extension to HHFL.

33 In these circumstances, again by the a fairly narrow margin, I conclude that HHFL has met this prerequisite on a balance of probabilities. In doing so, I am not overlooking the considerable debt of HHFL that, while the projections for the next couple of months are favourable, clearly, the proposal will require addressing BNS.

34 The third step is: **Will any creditor be materially prejudiced if the extension being applied for were granted?** As noted, there has been some improvement in the position of BNS since the Notice of intention was filed in that it has received approximately $95,000 U.S. which the Bank's solicitor points out came direct to it and not through any exercise of direction by HHFL. BNS has also received the November 2005 interest. In this case there are only two significant unrelated secured creditors, BNS and BDC. BDC consents to the extension of time but I am mindful of the fact that its security is a first charge over the fixed assets which are by themselves not likely to significantly decrease in value but on the other hand would probably have some measure of increased value by virtue of an operating going concern and also there is an indication of additional land being acquired from government by HHFL. I do agree with BNS that additional land, even if the obtaining of it is imminent, does not by itself provide any comfort to the Bank which has as its security a first charge on trade receivables and inventory. What does come through from the totality of the evidence is that this is a busy and likely profitable time for the industry and Mr. Rosen, in his affidavit, deposes at paragraphs 11 and 12:

> 11. I believe that the forty five day extension for filing the proposal is critical to the operations of the Company. It is my opinion that no creditor would be materially prejudiced if the extension is granted. The security of BNS would actually be enhanced during the extension period because of the profitable time of year and increase in inventory and receivables. BDC would have an opportunity to add to their security the land which I understand is to be conveyed to the Company by the government.
>
> 12. In the event the Company were to become bankrupt, it is my opinion that both BDC and R. Hartlen Investments Inc., which has a third charge on the assets would be severely prejudiced. It is also my opinion that the unsecured creditors would lose any opportunity of recovery.

35 I struggle with what constitutes material prejudice and there is some guidance in *Cumberland Trading Inc., Re* above. In that case the creditor under the BIA applied to have a stay, etc. In paragraph 11 Justice Farley stated:

> Is Skyview entitled to the benefit of s. 69.4(a) BIA? I am of the view that the material prejudice referred to therein is an objective prejudice as opposed to a subjective one — ie., it refers to the degree of the prejudice suffered vis-a-vis the indebtedness and the attendant security and not to the extent that such prejudice may affect the creditor *quo* person, organization or entity. If it were otherwise then a "big creditor" may be so financially strong that it could never have the benefit of this clause. ...

36 In the case before the court, the accounts receivables as of November 31, 2005 amounted to $956,532.16, almost double the indebtedness outstanding to BNS. HHFL certainly has as great if not greater motive in pursuing and collecting receivables as does BNS and I do not think there need be any concern as to the attempts in the short run for collection. Arguably, if an accounts receivable is uncollectible now its position cannot be any worse a few weeks from now. Extending the time period obviously creates some risk and some possibility of benefit. Provided a proper monitoring scheme is in effect, what normally should follow an extension is a flowing of proceeds from existing accounts receivables, new sales and new accounts receivables into the operating costs in an operation where in the immediate future a degree of profitability is projected.

37 This section of the *Act* contemplates some prejudice to creditors and I am of the view that the prejudice must be of a degree that raises significant concern to a level that it would be unreasonable for a creditor or creditors to accept. Overall, I am satisfied that HHFL has met the requirement of establishing on the balance of probabilities that the granting of an extension will not materially prejudice any of the creditors and in particular BNS.

Conditions

38 During the course of argument I indicated if an extension was granted that BNS at the very least was entitled to have timely full disclosure of the utilization of funds for the continued operation of the company. This could be achieved by requiring HHFL to return to the commitment of having all operating funds passed through its accounts with BNS but it will also require a direction that other than interest entitlement, if not paid, BNS would not be able in the intervening period to encroach upon the trading funds which are absolutely necessary for the continued operation and survival chances of the business. The direction would probably also require any outstanding documentation, possibly requiring HHFL to produce the invoices in the reconciliation it provided for cash withdrawals for cash purchases from Pacmar Norway, etc. There would be a requirement of timely disclosure. There are a number of other possible conditions that come to mind. However, as both counsel indicated if the extension was granted they requested the opportunity to address possible conditions, I readily accede to their offer of assistance. Counsel, if they agree, may take some time to consult with each other and put their views in writing or alternatively address the matter orally and, in any event, I will, as scheduled be available at 2:00 p.m. this afternoon unless both counsel agree on the appropriate terms and conditions of the order of extension.

Application granted.

End of Document

TAB 6

1994 CarswellOnt 253
Ontario Court of Justice (General Division [Commercial List]), In Bankruptcy

Baldwin Valley Investors Inc., Re

1994 CarswellOnt 253, [1994] O.J. No. 271, 23 C.B.R. (3d) 219

Re proposal of BALDWIN VALLEY INVESTORS INC. and of VARION INCORPORATED

Farley J.

Judgment: February 3, 1994*
Docket: Doc. 32-65038

Counsel: *Frank Bennett*, for debtor companies.
Larry Crozier, for secured creditor, Royal Bank of Canada.

Subject: Corporate and Commercial; Insolvency

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Bankruptcy --- Proposal — General

Proposals — Notice of intention — Extension of time — Debtor companies applying for extension of time to file proposal and failing to file within extended time — Companies again applying for extension — Registrar dismissing application upon finding that companies would not be able to make viable proposal — Companies' appeal from registrar's decision dismissed.

Two related debtor companies defaulted on their obligations to their bank. The bank demanded payment from the companies and served notice of intention to enforce its security. The companies filed a notice of intention to file proposals, and each subsequently received an extension to file a proposal. When they failed to file a proposal by the extended time, the companies again applied for an extension of time to file.

The Registrar in Bankruptcy dismissed the applications, upon a finding that the bank, which held about 92 per cent of one company's debt and almost 100 per cent of the other, had lost all confidence in the companies and wanted only to enforce its security. As a result, a viable proposal was not possible. The companies were, therefore, unable to satisfy the statutory burden imposed upon them by s. 50.4(9) of the *Bankruptcy and Insolvency Act*.

The companies appealed.

Held:

The appeal was dismissed.

The registrar did not err in finding that the companies had not satisfied the onus imposed on them by s. 50.4(9).

Table of Authorities

Cases considered:

Cumberland Trading Inc., Re (1994), 23 C.B.R. (2d) 225 (Ont. Gen. Div. [Commercial List]) — *referred to*

Statutes considered:

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

s. 50.4(9)

s. 50.4(11)

Appeal from decision of Registrar in Bankruptcy [reported at 23 C.B.R. (3d) 219 at 223] dismissing second application for extension of time to file proposal under *Bankruptcy and Insolvency Act* .

***Farley J.*:**

1 Baldwin Valley Investors Inc. ("Baldwin") and Varion Incorporated ("Varion"), the debtor companies appealed the dismissal of their extension of time to file proposals requests heard January 27, 1994 by Registrar Ferron. The Registrar indicated that he had refused extensions that day with reasons to follow shortly [reported at 23 C.B.R. (3d) 219 at 223]. The matter came before me on January 28th and on consent was adjourned to be heard today when it was expected that reasons would be available, as they in fact were. The Registrar was of the view that the debtor companies had failed to meet all three tests under s. 50.4(9) of the *Bankruptcy and Insolvency Act* , R.S.C. 1985, c. B-3 as amended ("BIA"). That section provides that:

> (9) The insolvent person may, before the expiration of the thirty day period mentioned in subsection (8) or any extension thereof granted under this subsection, apply to the court for an extension, or further extension, as the case may be, of that period, and the court may grant such extensions, not exceeding forty-five days for any individual extension and not exceeding in the aggregate five months after the expiration of the thirty day period mentioned in subsection (8), if satisfied on each application that
>
> (*a*) the insolvent person has acted, and is acting, in good faith and with due diligence;
>
> (*b*) the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted;

and

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

This should be contrasted with the termination provisions of s. 50.4(11) which provide that:

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

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

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

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

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

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

2 The facts are as set out in the Registrar's reasons released today. Counsel were agreed that the standard of review was that I had to be satisfied that the Registrar either erred in law or in principle.

3 Let me deal with the middle test of s. 50.4(9)(*b*) that the debtor companies must show that they "would likely be able to make a viable proposal if the extension being applied for were granted". The Registrar appeared to focus on the fact that the Bank, as the 92% creditor of Baldwin and almost 100% creditor of Varion, had lost all confidence in the debtor companies and would not vote for any proposal put forth. However, in my view this is not the test of s. 50.4(9)(*b*). This becomes clear when one examines s. 50.4(11)(*b*) and (*c*); it appears that Parliament wished to distinguish between a situation of a viable proposal (s. 50.4(9)(*b*) and (11)(*b*)) versus a situation in which it is likely that the creditors will not vote for this proposal, no matter how viable that proposal (s. 50.4(11)(*c*) but with no corresponding clause in s. 50.4(9)).

4 It seems to me that "viable proposal" should have to take on some meaning akin to one that seems reasonable on its face to the "reasonable creditor"; this ignores the possible idiosyncrasies of any specific creditor. However, it does appear to me that the draft proposal being floated by the debtor companies is one which proposes making the Bank (which has lost faith with the management of the debtor companies) a partner with the owners of the debtor companies, failing which (a likely certainty in these circumstances) the debtor companies propose that third parties become equity participants instead of the Bank; yet there is no indication of the names and substance of these fallback partners. It does not appear to me that the debtor companies have shown that they are likely to be able to make a viable proposal. While that need not be a certainty: see my views at pp. 10-11 in *Re Cumberland Trading Inc.* released January 24, 1994 [now reported at 23 C.B.R. (3d) 225 , at p. 231]. "Likely" as defined in *The Concise Oxford Dictionary of Current English* , 7th ed. (1987; Oxford, The Claredon Press) means:

likely 1. such as *might well happen* , or turn out to be the thing specified; *probable* . 2. to be *reasonably expected* . [emphasis added]

I do not see the conjecture of the debtor companies' rough submission as being "*likely* ".

5 While one may well fault the Bank for its approach to this situation, one has to recognize that the onus is on the debtor companies to show that they have acted in good faith and with due diligence. I am satisfied that the Registrar correctly assessed the situation in that regard that the debtor companies could have and should have proceeded with laying the foundation for their proposal and in fact building on that foundation rather than relying on anything that may be forthcoming from the Bank. In particular, see Cohn, *Good Faith and the Single Asset Debtor* (1988) 62 Am. Bankr. L.J. 131 on which it appears the Registrar relied. However, it is noted that there was no examination of the jurisprudential principles therein.

6 I discussed the question of material prejudice in *Cumberland, supra* , at pp. 11-13 [pp. 231-232]. The debtor companies have provided no information in that regard for the 45 day extension period from February 28, 1994. The only information close to this is the cash-flow statement of the previous extension granted December 16, 1993. However, for this extension there was no information. It appears therefore, that the debtor companies did not even attempt to meet this condition.

7 I am therefore, of the view that on all three tests (one failure of a test being sufficient to disqualify a debtor company from being able to ask for an extension) the debtor companies have failed to overcome the onus on them. The Registrar was correct in the result on all counts, although I feel that he inadvertently used the wrong test in s. 50.4(9)(*b*), a quite understandable situation given the terminology used in the legislation.

8 I would also point out that it was clear that if the debtor companies had won a victory in this appeal, it would have been a Pyhrric victory. The Bank would have been able to come right back in with a motion based on s. 50.4(11)(*c*).

9 The appeal is dismissed. Costs were agreed at $2,500 and are payable by the debtor companies jointly and severally to the Bank forthwith.

Appeal dismissed.

Footnotes

* This judgment is an appeal from the decision reported at 23 C.B.R. (3d) 219 at 223 .

TAB 7

2000 CarswellNS 216
Nova Scotia Supreme Court

Scotia Rainbow Inc. v. Bank of Montreal

2000 CarswellNS 216, 186 N.S.R. (2d) 153, 18 C.B.R. (4th) 114, 581 A.P.R. 153, 98 A.C.W.S. (3d) 1156

Bankruptcy of Scotia Rain Bow Incorporated, Escasoni Fisheries Ltd., Saddle Island Fisheries, Liscot Enterprises Inc., Madam Isle Sea Farms Ltd., Loch Bras D'or Farms Ltd., Applicants and Bank of Montreal, Respondent

Kennedy C.J.S.C.

Heard: May 17 and 18, 2000
Judgment: May 19, 2000
Docket: B2257, B22611, B22610, B22602, B22603, B22604

Counsel: *Stephen Kingston* and *R. Cluney*, for Applicant, Deloitte Touche.
Gregory Cooper, for Trout Lodge.
R. Carmichael and *Craig McCrea*, for Ernst & Young.
Tom Boyne, for Farm Canadian Commercial.
George Khattar, for Scotia Group of Companies.
Joe Wild, for E.C.B.C.
Kevin Zych, for Shur Gain.
A. Douglas Tupper and *Anthony Tam*, for Respondent, Bank of Montreal.

Subject: Insolvency

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Bankruptcy --- Proposal — Practice and procedure

S.R. Inc. and affiliated companies carried on business in aquaculture industry, primarily in growing and selling trout and salmon — Interim receivership order was made against S.R. Inc., which then filed notice of intention to make proposal — Applicants hoped federal government agencies would provide substantial equity injection but government agencies decided not to do so — Applicants then pursued investment from private sources and sought extension of time to file proposal — Application for extension was supported by all of applicants' primary secured creditors except respondent bank — Bank claimed it would be materially prejudiced by extention since main asset was 8 million fish costing $200,000 per week to feed — Bank claimed such loss would continue to escalate as long as it was prevented from realizing on security — Application for extension granted — Given quality, experience and expertise of supporting creditors, it was likely reorganization would be successful — Also, time frame given by bank for marketing security was

greater than extension sought by applicants — Order granting extension was to permit bank to commence marketing security immediately — Order would allow applicants one further effort to save S.R. Inc. and permit such extension without material prejudice to bank — Extension to be granted until June 30, 2000.

Table of Authorities

Cases considered by *Kennedy C.J.S.C.*:

Baldwin Valley Investors Inc., Re (1994), 23 C.B.R. (3d) 219 (Ont. Gen. Div. [Commercial List]) — applied

Cumberland Trading Inc., Re (1994), 23 C.B.R. (3d) 225 (Ont. Gen. Div. [Commercial List]) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
s. 47(1) [rep. & sub. 1992, c. 27, s. 16(1)] — referred to

s. 50.4(9) [en. 1992, c. 27, s. 19] — considered

s. 50.4(9)(a) [en. 1992, c. 27, s. 19] — considered

s. 50.4(9)(b) [en. 1992, c. 27, s. 19] — considered

s. 50.4(9)(c) [en. 1992, c. 27, s. 19] — referred to

Words and phrases considered

viable proposal

. . . the phrase a viable proposal as set out in subsection (b) of s. 50.4(9) [of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3] . . . should take on a meaning akin to one that seems reasonable, a proposal that seems reasonable on its face to the reasonable creditor. Reasonable on its face to the reasonable creditor. . . . this ignores the possible idiosyncrasies of any specific creditor.

APPLICATION by trustee for order for further extension of time for filing proposals.

***Kennedy C.J.S.C.*:**

1 This is an oral decision, I would ask counsel to bear with me. It is somewhat convoluted. I reserve the opportunity to add to, but not subtract from this decision, should I consider it to be necessary. I do that because of the time constraints that I have had to deal with in trying to get this decision done, so that a matter that needs to be addressed is addressed as quickly as possible.

2 This is an application brought on behalf of Scotia Rainbow and its affiliated companies. It is brought by its Trustee in bankruptcy, Deloitte Touche, seeking a further extension of time for filing proposals pursuant to s. 50.4(9) of the *Bankruptcy and Insolvency Act*, R.S., 1985, c. B-3, s. 1; 1992, c. 27, s. 2 that further extension that they now wish is until June 30th, 2000.

3 The applicants are supported by the primary secured creditors of the company, with the notable exception of the Bank of Montreal (the Bank), which strongly opposes the application. I will review some of the facts that are not contested.

4 Scotia Rainbow is based in Arichat, Cape Breton. It and its five wholly owned subsidiary companies carry on business in the aquiculture industry. They are primarily active in growing and selling trout and salmon.

5 On March 2nd, 2000, Justice Moir of this Court issued an interim receivership order regarding Scotia Rainbow Incorporated, pursuant to s. 47(1) of the *Act*. The application was brought by the Bank. Ernst and Young was appointed Interim Receiver. Further orders were issued by the court on March 10th and 14th, 2000, extending the interim receivership to the subsidiary companies of Scotia Rainbow. The interim receivership continues in place and Scotia Rainbow continues to operate under it.

6 Scotia Rainbow filed a notice of intention to make a proposal under the *Act* on March 9th, 2000. Its subsidiary companies filed similar notices on March 17th, 2000, and Deloitte Touche was Trustee under these notices.

7 On April 10, 2000, I issued an order extending the time for Scotia Rainbow to file its proposal by 18 days to April 28th, 2000. Similar orders were issued with respect to the subsidiary companies on April 10th, 2000, extending the time for filing proposals in those cases by 11 days and to the same date, April 28th, 2000. The Bank did not oppose any of these applications to extend time. The Bank did not oppose any of the applications at that time.

8 On April 26th, 2000, pleadings were filed with this Court for an application to be heard on April 28th, 2000, for a further extension of time for filing proposals. The company sought to extend the time to May 29th, 2000.

9 The Bank, through its solicitors, advised that it now would be opposed to the application. Justice Goodfellow of this Court, who was to preside on April 28th, 2000, determined that the application should be adjourned to May 10, 2000, and ordered that such adjournment were deemed to be extensions pursuant to the *Act*.

10 On May 10th, 2000, Justice Stewart of this Court, adjourned the applications and extended the time until May 15th, when with the consent of all parties, I adjourned and extended the matter until May 17th, so that the consent in the case of the bank was only to extend it from May 15th to May 17th.

11 At the commencement of this hearing on May 17th, Scotia Rainbow indicated that because of recently changed circumstances, which I will speak of later, it was now asking the Court to extend the time for filing proposals to June 30th, 2000. In response, the Bank argued that they couldn't change that date from May 29th until June 30th, 2000, without notice, sufficient notice, the Bank suggested that they did not receive sufficient notice. I am satisfied that I have discretion in circumstances such as these, to allow such a change to be made and in the circumstances that it was requested, I am going to exercise my discretion and allow that to take place.

12 The creditors who are in support of the application have agreed to a memorandum of understanding, a copy of that memorandum is attached as schedule "A" to the supplementary affidavit of Karen Cram. The memorandum sets out the arrangements by which these primary secured creditors are prepared to work towards the reorganization of the principal secured debt of Scotia Rainbow and the finalization of the Scotia Rainbow proposal. If you will bear with me I will read s. 50.4(9) for the record, it provides as follows:

> The insolvent person may, before the expiration of the thirty day period mentioned in subsection (8) or any extension thereof granted under the subsection, apply to the court for an extension, or further extension as the case may be, of that period, and the court may grant such extensions, not exceeding forty-five days for any individual extension and not exceeding the aggregate of five months after the expiration of the thirty day period mentioned in subsection (8), if satisfied on each application that
>
> (a) the insolvent person has acted and is acting, in good faith and with due diligence;
>
> (b) the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and
>
> (c) no creditor will be materially prejudiced if the extension being applied for were granted.

13 The burden lies on the applicant, Scotia Rainbow to show that the three requirements set out in s. 50.4(9) are satisfied, if it is to succeed on this application. It is acknowledged that this burden is on the balance of probabilities.

14 As to subsection (a), that requirement, the requirement that the insolvent person has acted and is acting in good faith and with due diligence, this is a non issue in this matter.

15 The Bank, the creditor opposing, has not questioned the evidence that the applicant has been so acting and I find on sub (a) that the requirement is addressed and satisfied on the balance of probabilities.

16 There remain then, two main issues to be determined by this Court. Those being whether the applicant can satisfy the requirements of sub (b) and (c) on the balance of probabilities.

17 As to s. 50.4(9)(b), that the insolvent person would likely be able to make a viable proposal of the extension being applied for were granted. Counsel for the primary creditor Shur Gain, in support of the applicant, has brought to this Court's attention the case of *Baldwin Valley Investors Inc., Re* (1994), 23 C.B.R. (3d) 219 (Ont. Gen. Div. [Commercial List]). In that matter Justice Farley of the Ontario Court of Justice (General Division) (which it then was), Justice Farley considers the

phrase a viable proposal as set out in subsection (b) of s. 50.4(9). He says that that phrase should take on a meaning akin to one that seems reasonable, a proposal that seems reasonable on its face to the reasonable creditor. Reasonable on its face to the reasonable creditor. Justice Farley says this ignores the possible idiosyncrasies of any specific creditor. Justice Farley also examines the meaning of the word 'likely', and refers to the Concise Oxford Dictionary of current English where likely is defined, and I quote:

> Might well happen or turn out to be the thing specified.

18 Might well happen or turn out to be the thing specified...I am in agreement with Justice Farley's determinations as to the meaning of these words, and I adopt his findings as to their meanings for our purposes. When I make reference to those words for our purposes, I am adopting Justice Farley's definitions.

19 The applicant argues that it is likely to be able to make a viable proposal if the extension is granted. It does so, notwithstanding that one of its key suggestions in its brief, and then the memorandum of agreement, that is, that there was going to be support from federal agencies, no longer is going to happen.

20 Prior to the March 17th application date, the applicant expected that the federal government agencies would provide a substantial equity injection into Scotia Rainbow, in return for a majority of shares. The applicant has indicated, disclosed at the start of this hearing, that after more recent negotiation with the agencies involved, it now concludes that this is not going to happen, or at least it will not be a component of a proposal to the creditors, and it was this changed circumstance that caused the applicant to change the request with respect to the length of the extension.

21 Scotia Rainbow now says it is pursuing investment from private sources, but does so with the assistance of the secured creditors who are in support of the application. Ms. Karen Cramn, the senior vice-president of the Trustee, Deloitte Touche is able to tell this Court that she is "cautiously optimistic", that such funding from private sources will be available. Notwithstanding the changed circumstances, counsel for the applicant submits that the memorandum of agreement shows that the primary creditors are prepared to work with Scotia Rainbow to make significant monetary commitments as part of the accepted proposal, including the provision of a line-of-credit and the delay of the repayment of loans. This, says the applicant, is evidence that Scotia Rainbow is likely to be able to make a viable proposal if the extension is granted.

22 The Bank of Montreal, though, argues otherwise. It says that the applicant's submission is wishful thinking: For instance, the Bank of Montreal argues that the suggested proposal, the memorandum, understanding of agreement, refers to a new bank that will provide funds to pay out the Bank of Montreal's line-of-credit and obtain a release of the Bank of Montreal's security.

23 Counsel for the Bank of Montreal asks this Court the question, what new bank? Where is the bank that is prepared to go where the Bank of Montreal has been? The applicant has produced a letter from a bank, that at this time constitutes I guess what might be described as an expression of interest, but no more than that.

24 The Bank of Montreal says, where is the private source of money likely to come from when federal agencies mandated to support Cape Breton Industry won't commit to the proposal. If you can't get the feds involved, what is the likelihood of

getting private money?

25 The Bank of Montreal says the applicant has had both the time permitted by the *Act* and a number of extensions to put together a viable proposal and has not been able to do so. The Bank argues that there comes a time when reality must be faced and the Bank says that time is now and the reality is that no proposal of this nature is going to make it. The Bank says the time is now, that this is the time to face that reality because the Bank claims that it is materially prejudiced to the delay in realizing against its security. Which brings us to s. 50.4(9)(c), the requirement that the applicant show that no creditor would be materially prejudice if the extension being applied for is granted.

26 This issue of material prejudice, in this case is characterized by the unique nature of the Bank's security. Fish, 8 million fish, fish that have to be fed, fish that are subject to disease, fish that have been known at least in the Province of Alberta they tell me, to escape, fish that eventually have to be sold in a fluctuating market.

27 The Bank points out that, to protect and maintain this perishable and fragile asset, the Interim Receiver, on behalf of the Bank, has incurred substantial costs. The Interim Receiver has estimated the costs to continue to operate and protect the asset to be approximately $200,000.00 a week. $200,000.00 a week that the Bank covers and will be forced to continue to cover during any extension.

28 The Bank says that had the realization process been able to be commenced as early as April 13th of this year, the Interim Receiver has estimated that even back then the Bank had already lost approximately $800,000.00. A loss that the Bank says will continue to escalate as long as it is prevented from realizing on that security.

29 The Bank has argued that to allow the stay, the extension sought by the applicant, would increase the Bank's risk by approximately, approximately being the operative word, 2 million dollars.

30 I have listened to two days of hard numbers, of past and present fact, speculations, projections and counter projections. I do not intend to try to reconcile the contradictions or to recap or summarize that evidence at this time. I heard it all. It is the nature of this type of application that this Court is being asked to consider, both what will happen, what could happen. Also what is not ever likely to happen. The Court is asked to predict the future. Let me say that after having considered all of the evidence, and please understand that I mean all of the evidence, all of the arguments, it is the balance of probabilities that I attempt to get at, that I attempt to establish, that I attempt to discover. And I repeat, the onus is on the applicant.

31 I will address then, the requirement under s. 50.4(9) of the *Act* that the applicant show on the balance of probabilities that Scotia Rainbow would likely be able to make a viable proposal if the extension applied for was granted. I find that the applicant has met this requirement. I do so, mindful of the Bank's insistence that the applicant's predictions are unrealistic given Scotia Rainbow's inability to put together a viable proposal, despite the best efforts of these people for 11 weeks since the filing of the notice of intention. I am aware of that argument. I was though, impressed by the evidence of Karen Cramn on behalf of the Trustee and I find that her "cautious optimism" was a sincere statement of her belief, that were the process to be allowed to continue, the applicant and its supporting creditors would be able to reorganize the principle secured debt of the companies.

32 These creditors, in support have been described as sophisticated companies, understanding the reality of the task required to be accomplished over limited time. This is the essence. It is relevant and proper for this Court to consider the quality, the experience and the expertise of the people attempting to accomplish the proposal. It is proper for me to look at who is trying to do this, who are these people. And having done so, considering all of the various factors, I conclude that it is likely that they will, based on the framework of the memorandum of understanding, memorandum of agreement, succeed. I so find.

33 The Bank has argued that despite the best efforts of the applicant, it is in a position to veto any proposal made under the *Act*. The Bank cites *Cumberland Trading Inc., Re* (1994), 23 C.B.R. (3d) 225 (Ont. Gen. Div. [Commercial List]). which is another decision of Justice Farley of the Ontario Court of Justice (General Division). I am satisfied, however, that such claim to a veto is not established before me, because it is dependant upon an estimate of total Scotia Rainbow indebtedness to the Bank which includes a third party guarantee of 2.2 million referred to as the Viramair Guarantee. The viability of this guarantee is uncertain at this time. I am told by the applicant counsel, specifically Shur Gain, I remember counsel for Shur Gain and also Mr. Kingston, on behalf of Scotia, I am told by those counsel that the enforce ability of this guarantee is presently a live issue and they have explained why, and I believe it is a live issue. It would have to be established, the enforce- ability of that guarantee would have to be established to put the Bank in a veto position. It is not for this Court, on the evidence before me, to determine the quality of that guarantee. I cannot find that the Bank then, is in a position to veto at this time. I do not so find.

34 Let's then move on to the requirement that the applicant show that on the balance of probabilities, no creditor will be materially prejudice if the extension sought is granted, subsection (c). It is, of course, material prejudice that we speak of, not simple prejudice. While acknowledging the Interim Receiver's expenditures during the stay period, the applicant asks this Court to consider that the bulk of these expenditures actually do benefit the Bank, because they are directed to the maintenance and growth of the fish inventory over which the Bank claims first charge. The expenditures say the applicant not only keeps the company operating, which is a good thing, according to the applicant, but those expenditures increase the market value of the fish, and as a result, the quality of the Bank's security.

35 Central to the debate on this issue therefore, was the disagreement as to the effect that a further stay would have on the Bank and that was the issue that took much of the day and a half of the argument that was made before this Court. There is disagreement as to the effect that the stay has on the Bank. There is disagreement as to what the costs feeding the fish amounts to in the sense that who gets the benefit, what is the extent of the benefit to the various parties, there was debate as to the nature of the contract with the American/Japanese company, with respect to additional monies that might be forthcoming from that company, and how that situation was affected by the potential stay. There was the issue raised in relation to the Bank's agreement with C.C.C., the federal agency that is involved with supporting Canadian Exports. How a stay would affect the Bank's relationship with that agency, given the contract, the arrangement between the two, with respect to guarantees made by the agency, specific to the Bank.

36 A very significant question raised by the Bank was that, should the extension be accomplished, it would further set back the Bank's ability to realize on and market its security and that this delay, this further delay cause the Bank material prejudice.

37 The Bank estimated that it would take, should a proposal not succeed, it would take 10 to 12 weeks to realize on its assets from the date the extension had ended. It is, of course, a given that during that period of time the fish would continue to eat, cost would continue to rise.

38 The applicant offered a response to this suggestion of prejudice and I find that that response not only addresses the issue of delay in the commencement of the marketing process, but it addresses the entire suggestion of material prejudice to the Bank.

39 The applicant has pointed out that the time frame for marketing the security, that the Bank suggests, and that I repeat was 10 to 12 weeks from commencement, is greater than the extension sought by the applicant.

40 The applicant has suggested, I think it was initially counsel for Shur Gain and certainly joined in and further argued by Mr. Kingston on behalf of the applicant, has suggested that this Court draft an order for extension that allows the receiver to commence the marketing of the Bank's security immediately. An order that would allow both the applicant's effort to develop a viable proposal and the Bank's effort to market its security to be carried on simultaneously. Thus allowing the applicant one further effort to save this company, and at the same time addressing the Bank's suggestion of prejudice caused by a further stay, which prejudice of course the applicant does not admit.

41 The Bank countered by asking how the Interim Receiver could be expected to organize a sale of this nature when it had no authority to sell until such time as this process had ended; until the stay had expired. The Bank asked the question, who is going to deal with the Receiver who has no authority to sell? The response to that counsel, again on behalf of Shur Gain, said that just such orders, orders of this nature, have been crafted in other jurisdictions and it was his suggestion at least, that there are indeed people who would negotiate given that contingency, given that situation. Common sense tells me that there is likely to be. Frankly, notwithstanding the obvious compromise that has to be acknowledged in relation to the process, given the time frames involved, I am satisfied that it is possible that there would be people interested in negotiating under those circumstances. Possible purchaser. Although this marketing process would be imperfect, until the proposal possibility was exhausted, I am satisfied that the suggestion has merit and significantly, I am further satisfied that an order that allows the marketing process to take place during the term of the extension period, would permit such extension to be accomplished without material prejudice to the Bank.

42 The suggestion made by the applicant, therefore, in combination with all of the evidence, has satisfied this Court that an extension that allows the Bank this option would not materially prejudice the Bank on the balance of probabilities. Being satisfied that all of the prerequisite requirements as set out by s. 50.4(9) have now been shown to be true to be so on the balance of probabilities, I will grant the order sought, extending the period for the filing of proposal pursuant to s. 50.4(9) of the *Act* until June 30th, 2000. It will be a term of that order that the Interim Receiver will be permitted, at the request of the Bank, to market the Bank's security during that period of extension, seeking purchasers should the sale of that security become available to the Bank. I will review an order when drafted. Should there be costs requested I will receive briefs.

Application granted.

End of Document

TAB 8

2007 CarswellOnt 3907
Ontario Superior Court of Justice

Goldman Hotels v. Power Workers' Union

2007 CarswellOnt 3907, 34 C.B.R. (5th) 25

GOLDMAN HOTELS (Applicant) and POWER WORKERS UNION (Defendant) and BUSINESS DEVELOPMENT BANK OF CANADA (3rd Party)

C. Campbell J.

Judgment: June 11, 2007
Docket: 31-454965

Counsel: Harvey Chaiton for Goldman Hotels
Massimo (Max) Starnino for Power Workers Union
Stephanie Fraser for Business Development Bank of Canada

Subject: Insolvency

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Bankruptcy and insolvency --- Proposal — Time period to file — Extension of time

Hotel filed notice of intention to make proposal to creditors pursuant to Bankruptcy and Insolvency Act ("BIA") — Notice of intention was filed on May 14, 2007, and period for filing proposal was to expire on June 13, 2007 — Proposed purchaser made offer to interim receiver for hotel property — Court was advised that signing of agreement with proposed purchaser was imminent, and that conditions to agreement would require 45 days to complete — Union representing hotel workers opposed extending time for filing proposal — Hotel brought application for extension — Application granted — Extension was granted to July 26, 2007 — Criteria for extension under s. 50.4(9) of BIA were met — Hotel's proposal met definition of "viable" from leading case, which is proposal that seems reasonable on its face to reasonable creditors — There was no doubt that indebtedness owed to hotel's secured creditors absent viable proposal would leave no return for unsecured creditors — To deny extension would very likely condemn hotel into bankruptcy for no good purpose — Many issues raised by union were associated with labour relations rather than insolvency — Labour issues should not prevent reasonable unsecured creditor being in receipt of proposal which is only way such creditor would likely see any recovery.

Table of Authorities

Cases considered by *C. Campbell J.*:

Baldwin Valley Investors Inc., Re (1994), 1994 CarswellOnt 253, 23 C.B.R. (3d) 219 (Ont. Gen. Div. [Commercial List]) — followed

Statutes considered:

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

s. 50.4(9) [en. 1992, c. 27, s. 19] — considered

Words and phrases considered

viable proposal

The leading case [on whether a proposal is "viable" for the purposes of granting an extension under s. 50.4(9) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3] remains the decision of Farley J. in *Baldwin Valley Investors Inc., Re* (1994), 23 C.B.R. (3d) (Ont. Gen. Div. [Commercial List]) 219. At paragraph 4 he said as follows:

It seems to me that "viable proposal" should have to take on some meaning akin to one that seems reasonable on its face to the "reasonable creditors."

[Counsel] on behalf of the debtor company recognizes that to be viable, it is most likely that the unsecured creditors, including the union members, will have to receive the prospect of recovering something. This is more than is likely in a bankruptcy.

APPLICATION by debtor company for extension of time to file proposal under *Bankruptcy and Insolvency Act*.

***C. Campbell J.*:**

1 On May 14, 2007 Goldman Hotels ("Hotels") filed a Notice of Intention to make a Proposal ("NOI") to its creditors pursuant to the BIA. The time period for filing a proposal currently expires on Wednesday, June 13/2007. This is the first request for extension, which is opposed by Power Workers Union Local 1000. The request for extension is supported by the Business Development Bank.

2 The issue is whether or not the applicant has met the criteria and the Court is satisfied pursuant to s.50.43(9) of the BIA that:

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

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

granted; and

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

3 There is no issue that Hotels is insolvent. The Union takes the position that the actions of Hotels in the period leading up to and since the filing of the NOI demonstrate that it is unlikely that there will be a proposal forthcoming that will meet the approval of unsecured creditors in general and the Union members in particular.

4 The position of the company is that the Interim Receiver has received an unsolicited offer to purchase the Property, which is comprised of a Conference Centre located on approximately 200 acres of land in the hills of Hockley Valley, east of Orangeville. The Conference Centre has ceased to operate as a going concern. There is space on the property operated by a private school until June 22, 2007.

5 The employees were laid off on May 18, 2007 and the evidence is that several management personnel and employees have been retained on a contract basis to assist with the closure of the centre. There is no doubt that the indebtedness owed to secured creditors absent a viable proposal will leave no return for unsecured creditors.

6 The Court has been apprised that the signing of an agreement with the proposed purchaser is imminent and that the conditions attached to that agreement will require 45 days to complete and allow for a proposal to be put before the Court.

7 Counsel for the Union urges that on the material before the Court, there is nothing before the Court to suggest that there will be any benefit for his clients, and if there is to be, that can be contained in a proposal placed before the Court before Wed. June 13, 2007.

8 The Union submits that the material before the Court does not meet any of the requirements of s. 50.4(9) of the BIA.

9 The leading case in this area remains the decision of Farley J. in *Baldwin Valley Investors Inc., Re* (1994), 23 C.B.R. (3d) 219 (Ont. Gen. Div. [Commercial List]). At paragraph 4 he said as follows:

> It seems to me that "viable proposal" should have to take on some meaning akin to one that seems reasonable on its face to the "reasonable creditors."

10 Mr. Chaiton on behalf of the debtor company recognizes that to be viable, it is most likely that the unsecured creditors, including the union members, will have to receive the prospect of recovering something. This is more than is likely in a bankruptcy.

11 It is urged that with this recognition the s. 50.4(9) criteria are met and that anything less than the 45 day period requested would materially interfere with the process of what is hoped be a viable proposal.

12 Having carefully considered the matter, I accept the submissions made on behalf of the debtor company. To do otherwise would, in my view, very likely condemn the debtor company into bankruptcy likely for no good purpose.

13 The s.50.4(9) criteria are met for extending purposes. I recognize that granting an extension does have some cost and expense associated therewith. In my view in this case it is justified. Many of the issues raised by Mr. Starnino on behalf of his clients are those associated with labour relations, not insolvency. To allow the use of labour issues to put undue pressure on the debtor should not prevent the "reasonable" unsecured creditor being in receipt of a proposal which is the only way they would likely see any recovery. For the above reasons an extension of the proposal of Goldman Hotels is granted to July 26, 1007.

Application granted.

TAB 9

2005 BCSC 351
British Columbia Master

Cantrail Coach Lines Ltd., Re

2005 CarswellBC 581, 2005 BCSC 351, [2005] B.C.W.L.D. 2533, [2005] B.C.J. No. 552, 10 C.B.R. (5th) 164, 138 A.C.W.S. (3d) 1010

IN THE MATTER OF THE PROPOSAL OF CANTRAIL COACH LINES LTD.

Master Groves

Heard: March 1, 2005
Judgment: March 1, 2005
Docket: Vancouver B050363

Counsel: H. Ferris for Petitioner
R. Finlay for Creditor (Volvo)

Subject: Insolvency

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Bankruptcy and insolvency --- Proposal — Time period to file — Extension of time

Petitioner company was tour bus operation with 25 years experience — Petitioner suffered serious drop-off in business in recent years — Petitioner missed payment to secured creditor in January 2005 — Petitioner filed notice of intention to make bankruptcy proposal — Petitioner brought application for extension of time in filing proposal — Secured creditor opposed application — Application granted — Extension of time would allow petitioner to make viable proposal — It was disingenuous for secured creditor to oppose proposal even before proposal was made — No evidence existed that extension would substantially prejudice secured creditor — Although circumstances of petitioner clearly prejudiced secured creditor to some degree, minor prejudice did not jeopardize their security.

Table of Authorities

Cases considered by *Master Groves*:

N.T.W. Management Group Ltd., Re (1993), 19 C.B.R. (3d) 162, 1993 CarswellOnt 208 (Ont. Bktcy.) — considered

Statutes considered:

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

s. 50.4(9) [en. 1992, c. 27, s. 19] — considered

s. 50.4(11) [en. 1992, c. 27, s. 19] — considered

APPLICATION for extension of time for filing bankruptcy proposal.

***Master Groves*:**

1 This is my decision on the matter of the proposal of Cantrail Coach Lines Ltd. who I will refer to as Cantrail.

2 Cantrail applies to the Court pursuant to s. 50.4(9) of the *Bankruptcy and Insolvency Act* for extension of time for filing a proposal.

3 VFS Canada Inc., who I will refer to as Volvo, a secured creditor of Cantrail, opposes the application and cross-applies for a termination of the proposal period and for an order to substitute the current trustee for a trustee of their choosing, though the substance of the substitution of the trustee application was not argued before me.

4 The facts are that Cantrail is a tour bus operation, a family-owned business, operating in the Lower Mainland of British Columbia, on Vancouver Island and into Washington State. They are a company of some 25 years standing. They have 26 employees and they have 22 buses in their operations and two headquarters, one in Delta, British Columbia and one in Port Alberni.

5 Over one half of their buses, 13 in total, are secured by the secured creditor Volvo. Cantrail appears to have been facing some financial difficulties recently which a number of companies in the travel industry are facing. It is certainly true in this part of the world that there has been a general decline in the travel industry related to what are now historical factors such as September 11th and SARS. More recently, and more significantly, the decline in the US dollar has made the travel industry generally and the travel industry specifically for Cantrail difficult. It appears to have caused a significant challenge for Cantrail to continue to operate profitably.

6 Cantrail was apparently able to meet its obligations up until the 16th of January 2005. On that date it missed a payment to its secured creditor Volvo. Demand was made by Volvo on the 20th of January 2005 and perhaps in response to that, but in any event, on the 1st of February, 2005 Cantrail issued a Notice of Intention to make a Proposal. There are, I am advised, 81

creditors of Cantrail who have been notified of this application and only Volvo objects.

7 I am satisfied that under the proposal thus far, and this is not contested in the affidavit, Cantrail has been able to meet its obligations to its employees as well as the obligations to statutory authorities. The suggestion in the materials is that Cantrail has been operating within the initial budget set by the trustee under the proposal.

8 As indicated, Cantrail is applying purport to s. 50.4(9) of the *Bankruptcy and Insolvency Act*. That reads and I will take out some of the language that is not necessary:

> The insolvent person may, before the expiration of a 30-day period mentioned in subsection (8), apply to the Court for an extension of that period and the Court may grant such extensions not exceeding 45 days for any individual extension and not exceeding in the aggregate five months after the expiration of the 30-day period mentioned in subsection (8), if satisfied on each application that:
>
> (a) the insolvent person has acted and is acting in good faith and with due diligence;
>
> (b) the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and
>
> (c) no creditor would be materially prejudiced if the extension being applied for were granted.

9 Volvo applies under s. 50.4(11), the section relating to termination of proposals. That section reads, and again I am taking out some unnecessary language:

> The Court may, on application by a creditor, declare terminated before it actually expires the 30-day period mentioned subsection (8) or any extension thereof granted under subsection (9) if the Court is satisfied that:
>
> (a) the insolvent person has not acted or is not acting in good faith and with due diligence,
>
> (b) the insolvent person will not likely be able to make a viable proposal before the expiry of the period in question,
>
> (c) the insolvent person will not likely be able to make a proposal before the expiry of the period in question that will be accepted by the creditors, or
>
> (d) the creditors as a whole would be materially prejudiced were the application under this subsection rejected.

Essentially, s. 50.4(11) is the mirror of s.50.4(9).

10 The test that Cantrail has to meet is essentially threefold. The first consideration is, are they acting in good faith? I would say on this point it was not argued nor does it appear to be disputed that they are. Secondly, would they likely make a viable proposal if the extension were granted. Thirdly, they must show no creditor would be materially prejudiced by the extension.

11 I am satisfied on reading the case law provided by counsel that in considering this type of application an objective standard must be applied. In other words, what would a reasonable person or creditor do in the circumstances. The case of *N.T.W. Management Group Ltd., Re*, [1993] O.J. No. 621 (Ont. Bktcy.), a decision of the Ontario Court of Justice, is authority for the proposition that the intent of the *Act* and these specific sections is rehabilitation, and that matters considered under these sections are to be judged on a rehabilitation basis rather than on a liquidation basis.

12 I am also satisfied that it would be important in considering the various applications before me to take a broad approach and look at a number of interested and potentially affected parties, including employees, unsecured creditors, as well as the secured creditor that is present before the Court.

13 Considering those factors and considering the remaining two steps of the test under s. 50.4(9), the second aspect of the test is would Cantrail likely be able to make a viable proposal. On this point Volvo says that it has lost faith in Cantrail and intends to vote against the proposal, any proposal, that would be generated.

14 If that was simply the test to be applied then one wonders why Parliament would have gone to the trouble, and creativity perhaps, of setting out proposals as an option in the *Bankruptcy and Insolvency Act*. Secured creditors or major creditors not uncommonly, in light of general security agreements and other type of security available, are in a position to claim to be over 50 percent of the indebtedness. Thus they will be the determining creditor or, I should say, are likely to be the determining creditor in any vote on any proposal.

15 If a creditor with over 50 percent of the indebtedness could take the position that it would vote no, prior to seeing any proposal, and thus terminate all efforts under the proposal provisions, one wonders why Parliament would not simply set up the legislation that way. One wonders what the point would be of the proposal sections in the *Bankruptcy and Insolvency Act* if that were the case.

16 If the test to be applied was simply one of majority rules then in my view Parliament would not have set the test as it did in s. 50.4(9). They would simply set a test that if 50 percent of the creditors object at any point the proposal would be over. That is not the test that has been set.

17 Here, as indicated, there are 81 creditors. There is no proposal as of yet. The trustee has set out in a lengthy affidavit and letter attached to it the possibility of a buyout of this operation, or a merger, and even the possibility of a refinancing. There is a possibility, though as of yet uncertain, that Volvo could be paid out in full. It is in my view somewhat disingenuous for the secured creditor to say that they would vote no to any proposal under any circumstances when on the facts here there is no evidence of bad faith and there is no determination at this stage as to what the proposal will actually be. It may be a proposal which gets them out of the picture completely by some form of payout — a proposal which if they voted against they would probably be viewed as irrational businesspeople.

18 In my view, the current attitude of the secured creditor is not determinative of this issue especially in light of the fact that the proposal has not yet been formulated.

19 I note the words in the legislation are "a viable proposal". According to the *Concise Oxford Dictionary* viable means

feasible. Viable also means practicable from an economic standpoint.

20 I am impressed thus far with the efforts of Cantrail and with the efforts of the trustee, Patty Wood, in trying to get this matter resolved. I am satisfied that the insolvent company, in my view, would likely be able to make a viable proposal, a proposal that is at least feasible, a proposal that would be practicable from an economic standpoint, if the extension being applied for were granted.

21 Under the third aspect of the test, I must be satisfied that no creditor would be materially prejudiced if extension being applied for were granted. That aspect of the test uses the term "materially prejudiced." There is a difference, in my view, between being prejudiced and being materially prejudiced. Again, consulting the *Concise Oxford Dictionary* materially means substantially or considerably. The creditor here must be substantially or considerably prejudiced if the extension being applied for is granted.

22 There is no doubt that Volvo has been prejudiced by the circumstances which have befallen Cantrail and befallen Volvo as a secured creditor. The *Act* in and of itself, and the possibility of a proposal, does create simple prejudice by staying the obligations of a person attempting to make a proposal during the period of time in which the proposal is being formulated. There is no evidence before me of anything other than normal or perhaps average prejudice to Volvo. There is no evidence of substantial prejudice or considerable prejudice. There is no evidence that in not being allowed to realize their security at this time that there is, for example reduced security or, for example, that there are buyers out there for these assets they wish to seize under their security who will not be around once the proposal has had its opportunity to succeed or fail, once it has been completely formulated and presented to creditors. There is no worse case scenario for Volvo if the proposal is allowed to run a reasonable course. In my view, there is no evidence on which Volvo can rely to show that it has been materially prejudiced.

23 That being said, I am satisfied that Cantrail has met the test of applying for an extension of time for filing a proposal and I am granting the extension for a further 45 days from the 3rd of March 2004.

24 It stands to reason from this analysis that the applications of Volvo are dismissed.

Application granted.

End of Document

TAB 10

2011 ONSC 7641
Ontario Superior Court of Justice

P.J. Wallbank Manufacturing Co., Re

2011 CarswellOnt 15300, 2011 ONSC 7641, [2011] O.J. No. 5922, 211 A.C.W.S. (3d) 17, 88 C.B.R. (5th) 281

In the Matter of the Proposal of P.J. Wallbank Manufacturing Co. Limited

D.M. Brown J.

Heard: December 21, 2011
Judgment: December 21, 2011
Docket: CV-11-0123-OTCL

Counsel: J. Fogarty, S.-A. Wilson for Applicant
G. Moffat for General Motors LLC
T. Slahta for TCE Capital Corporation

Subject: Insolvency; Estates and Trusts

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Bankruptcy and insolvency --- Proposal — Approval by court — Conditions — Interests of creditors

Bankrupt was manufacturer of springs and was key supplier to GM LLC (GM) — On December 12, 2011, bankrupt filed Notice of Intention (NOI) under Bankruptcy and Insolvency Act (BIA) — GM provided immediate funding to bankrupt pursuant to accommodation agreement — GM agreed to provide additional DIP financing pursuant to DIP credit facility (proposed facility) and interim financing charge (proposed charge) — Bankrupt brought motion under s. 50.6 of BIA for authorization to borrow under proposed facility and to grant proposed charge — Motion granted — Bankrupt likely would not be subject to NOI proceedings past end of February, 2012 — Although current management would continue to operate bankrupt, accommodation agreement placed significant restrictions on company's operations — Absent approval of proposed facility, bankrupt would close its doors — Report of proposal trustee supported proposed facility — Certain customers supported bankrupt's proposal efforts — As to creditors, GM supported motion at bar, and other creditors did not oppose it — Terms of proposed charge's priority minimized prejudice to other creditors — Given that immediate cessation of bankrupt's activities would result from failure to approve proposed facility and charge, benefit to all stakeholders significantly outweighed any prejudice — Proposed treatment of professional fees advanced by GM under accommodation agreement was consistent with s. 50.6(1) of BIA — GM confirmed that amounts advanced to date under accommodation agreement would not be subject to proposed charge.

Table of Authorities

Statutes considered:

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

s. 50.6 [en. 2005, c. 47, s. 36] — considered

s. 50.6(1) [en. 2005, c. 47, s. 36] — considered

s. 50.6(3) [en. 2005, c. 47, s. 36] — considered

s. 50.6(5) [en. 2007, c. 36, s. 18] — considered

MOTION by bankrupt corporation for authorization to borrow under DIP credit facility and to grant interim financing charge.

***D.M. Brown J.*:**

I. Overview of motion for approval of DIP financing

1 P.J. Wallbank Manufacturing Co. Limited, a manufacturer of springs and wireforms for automotive and other industrial customers, filed a Notice of Intention to Make a Proposal under the *Bankruptcy and Insolvency Act* on December 12, 2011. Doyle Salewski Inc. was appointed as Proposal Trustee. Wallbank moves under section 50.6 of the *BIA* for authorization to borrow under a DIP credit facility from General Motors LLC, as well as the granting of an Interim Financing Charge against its property in favour of GM.

2 This motion was brought on less than 24 hours notice. From the affidavits of service filed, I am satisfied that notice was given to interested parties in accordance with my directions of yesterday.

II. The Debtor and its creditors

3 Since 2008 Wallbank has experienced a downturn in its business linked, in part, to a slowdown in the automotive sector and, more recently, to the loss of a major customer this past summer.

4 Wallbank has several secured creditors. It owes Danbury Financial Services Inc. about $720,000.00 under a credit facility. Until September, 2011, TCE Capital Corporation factored Wallbank's accounts receivable, but stopped as a result of a default on that facility. Wallbank owes TCE approximately $700,000.00. Both Danbury and TCE have registered financing statements against Wallbank over all classes of collateral except "consumer goods". Wallbank owes P. & B. W. Holdings Inc., the trustee of a family trust, $724,500; the Trust has subordinated its interest in Wallbank's property to each of Danbury and TCE. Wallbank owes $74,180.53 to three remaining secured creditors: Xerox Canada Inc., Anthony Wallbank and

Edward Wallbank. All three have subordinated their security in favour of Danbury and TCE.

5 As of the date of the NOI Wallbank owed Canada Revenue Agency $132,467.28 for unpaid source deductions, as well as approximately $1.22 million to unsecured creditors.

III. The proposed DIP Facility

6 Danbury has terminated its credit facility with Wallbank, and TCE has ceased factoring the company's receivables. Neither firm is prepared to advance further funds to Wallbank.

7 Wallbank is a key supplier to GE for springs. GE has agreed to provide immediate funding to Wallbank pursuant to the terms of an Accommodation Agreement dated December 12, 2011 and a DIP Facility Term Sheet.

8 The Accommodation Agreement offers two types of interim financing. First, GE agreed to provide Initial Financing of up to $160,450.00 to cover professional fees and to cover Wallbank's post-filing operations until a DIP order was obtained. According to the affidavit from Mr. Anthony Wallbank, the company's President, to date GE has advanced $193,850 under this facility.

9 GM is also prepared to make available additional DIP Financing up to a maximum of $500,000.00, including the amounts advanced under the Initial Financing.[1] Such further advances are conditional on (i) an agreement between GM and Wallbank on a budget for the company's continued operations up until February 26, 2012 and (ii) obtaining an interim financing order consistent with the terms of the Accommodation Agreement. Under the proposed Interim Financing Charge, all advances made by GM under the Accommodation Agreement would be secured by (i) a first priority charge on Wallbank's inventory and postfiling accounts receivable and (ii) a lien on Wallbank's other pre-filing assets junior only to the liens of Danbury, TCE and Xerox, but senior to any other liens.

10 Wallbank seeks an order that the DIP Facility would be on the terms, and subject to the conditions, set forth in the Accommodation Agreement and the DIP Facility Term Sheet, subject to some amendments reflected in a revised draft order, including certain provisions TCE wished included in the order. The Accommodation Agreement contains several important terms concerning Wallbank's operations:

> (i) absent an event of default, GM agrees to refrain from re-sourcing the component parts made by Wallbank for up to 60 days;
>
> (ii) GM agrees to pay for post-filing orders on a "net 7 days prox" basis;
>
> (iii) Wallbank agrees to build an inventory of GM-ordered component parts in accordance with an inventory bank production plan to be agreed upon with GM;
>
> (iv) The parties have identified which tools used by Wallbank belong to GM and to other parties; and,
>
> (v) Wallbank agrees not to manufacture products for other Large or Medium Customers without GM's prior

consent and without those customers agreeing to abide by all or some of the terms of the Accommodation Agreement, including terms governing the time for the payment of receivables and the price of the products

11 Under the DIP Facility Term Sheet, the Facility will:

(i) have a term of up to 60 days, mirroring the No Resource Period agreed to by GM under the Accommodation Agreement;

(ii) bear interest at a rate of 13%, with interest payable monthly in arrears; and,

(iii) be repaid upon the sale of any property of Wallbank out of the ordinary course of business.

IV. Analysis

A. The statutory provisions

12 Section 50.6 of the *BIA* provides, in part, as follows:

50.6 (1) On application by a debtor in respect of whom a notice of intention was filed under section 50.4 or a proposal was filed under subsection 62(1) and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the debtor's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the debtor an amount approved by the court as being required by the debtor, having regard to the debtor's cash-flow statement referred to in paragraph 50(6)(*a*) or 50.4(2)(*a*), as the case may be. The security or charge may not secure an obligation that exists before the order is made.

. . .

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

. . .

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

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

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

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

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

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

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

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

B. Consideration of the various factors

B.1 Likely duration of NOI proceedings

13 The evidence indicates that Wallbank likely will not be subject to NOI proceedings past the end of February, 2012. It requires the DIP Facility to continue operating, and by its terms that facility has a maximum term of 60 days from the date of filing the NOI. The cash-flow statement filed by Wallbank projects that it will have drawn fully on the DIP Facility by the middle of next February.

B.2 Management of Wallbank's affairs

14 Although current management will continue to operate Wallbank, as described above the Accommodation Agreement places significant restrictions on the company's operations. Simply put, GM wants to use the next 45 days or so to build up an inventory of needed component parts and is insisting that any other customer who wishes to order product from Wallbank must do so on the credit and pricing terms set out in the Accommodation Agreement. Those terms require very prompt payment of receivables and an agreement to pay a higher price for Wallbank's products.

15 The materials do not disclose how many employees presently work at Wallbank. Some employees are members of the Canadian Auto Workers. The Proposal Trustee reports that a dispute currently exists whereby the CAW is not permitting Wallbank to ship product to Gates Corporation, a result of which could be a reduction by $40,000.00 in the opening accounts receivable forecast in the cash-flow statement.

B.3 Enhancement of prospects of a viable proposal

16 According to the Proposal Trustee Wallbank is developing a restructuring plan which would involve either (i) identifying a strategic partner, (ii) restructuring its debts, or (iii) an orderly liquidation of its assets.

17 Wallbank filed a cash-flow projection for the period ending February 26, 2012. The projection was vetted by a DIP advisor appointed by GM. The cash-flow supports Mr. Wallbank's statement that without the proposed DIP Facility the company will be unable to fund its ongoing business operations and restructuring efforts during the NOI proceedings. The Proposal Trustee concurs with that assessment:

> In the event that the DIP Loan is not approved by the Court, the Company may have no choice but to immediately cease operations, and the Company's ability to make a proposal to its creditors will be severely compromised.

18 The evidence is clear that absent approval of the DIP Facility, Wallbank will close its doors and turn off its lights.

B.4 Report of the Proposal Trustee

19 In its December 20, 2011 report the Proposal Trustee stated that it was satisfied that Wallbank is proceeding in good faith with its proposal, supported the need for interim financing, and concluded that "the benefits of granting such an Order far outweigh the prejudice to the Company, the creditors, employees and customers that these stakeholders would experience if the Order were not granted."

B.5 Nature and value of Wallbank's property

20 Although Wallbank filed evidence about its current indebtedness, it did not file any detailed historical evidence about balance sheet or profit/loss position. The current value of its assets is unclear; the evidence suggests that Wallbank has operated at a loss for at least the past two years.

B.6 Confidence of major creditors

21 According to the Proposal Trustee certain customers support Wallbank's proposal efforts: GM, Omex, Dayco, Magna Corporation, Stacktole, 3M, Bontaz and Admiral Tool.

22 As to creditors, GM, of course, supports Wallbank's motion. The Trust has indicated that it does not oppose the order, but without prejudice to its right to move to vary the order at some later date. In light of changes made to the proposed DIP Order as a result of negotiations amongst the parties, Danbury does not oppose the order sought. Xerox was served earlier today with the motion materials, but has not communicated any position to Wallbank's counsel.

23 TCE does not oppose the order sought, as revised, provided the order is made subject to three conditions:

> (i) The order would be without prejudice to TCE's asserted position with respect to its ownership of factored receivables;
>
> (ii) Wallbank, TCE and GM will agree on a process for the collection and remittance of accounts receivable; and,
>
> (iii) GM waives its rights of set-off relating to pre-November 30, 2011 accounts receivable purchased by TCE, save and except for Allowed Set-Offs as defined in section 2.4(B) of the Accommodation Agreement.

Both Wallbank and GM are amenable to those conditions. I accept those conditions and make them part of my order.

B.7 Prejudice to creditors as a result of the Interim Financing Charge

24 Although, like any charge, the Interim Financing Charge will impact all creditors' positions to some degree, the terms of the charge's priority have been negotiated to minimize the prejudice to Danbury and TEC. As well, given the immediate cessation of Wallbank's activities would result from the failure to approve the DIP Facility and Interim Financing Charge, on balance the benefit to all stakeholders of the proposed DIP Facility significantly outweighs any prejudice.

25 Sections 2.1 and 2.2 of the Accommodation Agreement contemplated that both components of the Initial Financing advanced by GM — professional fees and the funding of operations — would be secured by the Interim Financing Charge. Section 50.6(1) of the *BIA* provides that a charge "may not secure an obligation that exists before the order is made". Wallbank advised that all funds made available by GM for professional fees are unspent and remain in counsel's trust account. Wallbank intends to return those funds to GM which plans, in turn, to advance similar amounts to Wallbank in the event a DIP Order is made. GM confirmed that the amounts advanced to date under section 2.1(C) of the Accommodation Agreement would not be subject to the Interim Financing Charge, but would be secured by the security described in the opening language of section 2.1 of the Accommodation Agreement. In my view the proposed treatment of the funds relating to professional fees is consistent with the intent of section 50.6(1) of the *BIA* and I approve it.

B.8 Conclusion

26 For these reasons I am satisfied that it is appropriate to authorize Wallbank to enter into the DIP Facility agreement and to grant the proposed Interim Financing Charge. Accordingly, an order shall go in the form submitted by the applicant, which I have signed.

Motion granted.

Footnotes
[1] DIP Facility Term Sheet.

TAB 11

2013 ONSC 1794
Ontario Superior Court of Justice

OVG Inc., Re

2013 CarswellOnt 3289, 2013 ONSC 1794, 228 A.C.W.S. (3d) 26

In the Matter of the Bankruptcy of OVG Inc. of the Town of Renfrew in the Province of Ontario

Stanley J. Kershman J.

Heard: March 12, 2013
Judgment: March 25, 2013
Docket: Ottawa BK-33-1718184

Counsel: J. Fogarty, P. Masic, for Debtor
M. Rouleau, for Proposal Trustee
C. Peddle, for Royal Bank of Canada

Subject: Insolvency

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Bankruptcy and insolvency --- Proposal — Practice and procedure

Bankrupt was glazing and glass manufacturing company which filed notice of intention to make proposal ("NOI") on February 22, 2013 — Bankrupt brought motion for authorization to borrow under credit facility from W Inc., as well as granting of interim financing charge against its property in favour of W Inc. — Bankrupt further sought order to extend time to file its proposal to May 8, 2013 — Motion granted — Evidence established that if DIP financing was not approved, bankrupt would not be able to fund its ongoing business operations and restructuring efforts during NOI proceedings, and would close its doors — While bank would be prejudiced by advance of $100,000, prejudice would be minimal — It was appropriate to authorize bankrupt to entering into DIP facility with W Inc. to extent of first tranche of $100,000 and to grant proposed interim financing charge to extent of $100,000 — Closing fee of $25,000 was payable by $15,000 upon drawdown of first tranche of $100,000, and $10,000 if there was second tranche under primary facility and provided that second tranche drawdown was allowed by court — In event there would be drawdown of secondary facility of $250,000 as contemplated by letter, court approval would have to be obtained — Time to file proposal was extended based on information contained in proposal trustee's report and based on submissions.

Table of Authorities

Cases considered by *Stanley J. Kershman J.*:

Dessert & Passion inc. (Faillite) c. Banque Nationale du Canada (2009), 58 C.B.R. (5th) 224, 2009 QCCS 4669, 2009 CarswellQue 10378, [2009] R.J.Q. 2822 (C.S. Que.) — followed

P.J. Wallbank Manufacturing Co., Re (2011), 2011 CarswellOnt 15300, 2011 ONSC 7641, 88 C.B.R. (5th) 281 (Ont. S.C.J.) — considered

Statutes considered:

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

s. 50.6 [en. 2005, c. 47, s. 36] — considered

s. 50.6(1) [en. 2005, c. 47, s. 36] — considered

s. 50.6(3) [en. 2005, c. 47, s. 36] — considered

s. 50.6(5) [en. 2007, c. 36, s. 18] — considered

MOTION by bankrupt for authorization to borrow under credit facility, granting of interim financing charge against its property, and order to extend time to file proposal.

***Stanley J. Kershman J.*:**

Introduction

1 OVG Inc., ("Company" or "OVG") is a glazing and glass manufacturing company that was established in 1978. The Company filed a Notice of Intention to Make a Proposal ("NOI") under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA") on February 22, 2013. Doyle Salewski Inc. ("DSI") was appointed as the proposal trustee. OVG moves under section 50.6 of the BIA for authorization to borrow under a credit facility from Waygar Capital Inc. ("Waygar") as well as the granting of an Interim Financing Charge ("IFC") against its property in favour of Waygar.

2 It also seeks an order to extend the time to file its Proposal to May 8, 2013.

3 The motion was brought on short notice. Based on the affidavit of service filed, the Court is satisfied that notice was given to the interested parties.

Debtor and its Creditors

4 The Company was established 1978 and is located in Renfrew, Ontario and employs approximately 60 people.

5 According to the affidavit of Shawn McHale, president of OVG Inc., the Company has struggled to maintain workflow while financing 10% construction lien holdbacks on larger projects.

6 In addition, the Company has suffered significant losses on 2 projects in the fiscal years 2011 and 2012, further constraining cash flow. These constraints in cash flow have caused the Company difficulty in maintaining sufficient levels of materials to complete work in process.

7 OVG has one secured creditor namely the Royal Bank of Canada ("RBC") which is owed in the range of between $3,200,000.00 and $3,400,000.00. The Bank opposes the granting of a DIP lending facility. It does not oppose the extension of time for filing for the proposal.

8 Based on the creditor list prepared by DSI, secured creditors are owed in excess of $3,400,000.00. CRA is owed approximately $55,000.00 for source deductions. In addition, CRA is owed other monies for HST of approximately $250,000.00. The claims of unsecured creditors, while not totaled on the list of creditors, are approximately $6,800,000.00.

9 The Company has prepared cash flow statements for the period of February 25, 2013 to May 24, 2013, in conjunction with Welch and Co. Business Advisors.

The Proposed DIP Facility

10 The RBC is no longer providing credit to OVG. The Company's account was transferred to the Special Loans Division on May 1, 2012. On May 24, 2012 the Bank entered into a letter agreement wherein it changed the rate of interest on the operating and demand loans to RBC Prime + 4.5%. On September 21, 2012 the Bank retained the services of Ernst and Young Inc. to assist in the analysis of the viability of the Company.

11 In his affidavit, Peter Gordon of the Bank states that he met and spoke with representatives of the Company numerous times to discuss its financial difficulties. According to the Bank, financial reporting provided by the Company shows that it is losing substantial amounts of money and is projected to lose even more money in the future.

12 On February 12, 2013 demand letters and Notices of Intent to Enforce Security were sent by email to counsel for the Company and the guarantors. As of that date, the Company was indebted to RBC in the amount of $3,454,155.81.

13 The Bank claims that based on the information provided by Ernst and Young Inc., that there will be a substantial

shortfall to the Bank after collection of the accounts receivable and sale of the assets. The Court notes that the document of the estimate of realizable assets provided by Ernst and Young Inc. in the motion of record did not include the accompanying notes and assumptions mentioned therein.

14 The Bank does not believe that the Company can be viably restructured.

The Proposed DIP Facility

15 By a letter dated March 11, 2013 prepared by Waygar to OVG and signed by OVG, there is an offer of DIP financing. The Court notes that the letter specifically states that it is not a commitment letter. It has not been signed by Waygar. The Court believes that it has not been signed by Waygar due to the short timeframes involved. The letter includes a primary lending facility of $250,000.00 including $100,000.00 to "fund payroll this Thursday March 14, 2013."

16 The letter also provides for a secondary lending facility of $250,000.00 as necessary to finance additional working capital requirements.

17 The interest rate for the primary facility is 18%. The standby rate for the secondary facility is 9%, which increases to 18% once it is drawn down. There is a closing fee of $25,000 payable when the first funds are drawn down.

18 Furthermore, two deposits are required to be paid by the Company to Waygar. The first is for $12,500.00 and is chargeable against the lender's field examination, financial analysis and appraisal expenses.

19 The second deposit is for $12,500.00 which will be required to apply against legal and closing expenses.

20 At the hearing of the motion, Company counsel indicated that $12,500.00 worth of the deposit was already in hand. This would mean that out of the initial $100,000.00 advance, $25,000.00 would be held back for the closing fee and $12,500.00 would be held back for the deposit described above. This would mean that there would be $62,500.00 available to the Company ($100,000.00 - $25,000.00 - $12,500.00),

21 The Court is aware that the March 11, 2013 letter is not a commitment letter but it is satisfied that on the basis of the oral representations made by Mr. Fogarty at the motion, that Waygar is committed to the DIP Facility.

22 As to the primary DIP amount, it is set up for two tranches, one for $100,000.00 and the second for $150,000.00. The Court notes that the purpose for the money set out in the letter is for payroll. In reality, based on the information provided at the hearing, $42,000.00 is for payroll and the balance is for purchase of equipment. The Court has advised of a case in Ontario dealing with DIP financing: *P.J. Wallbank Manufacturing Co., Re*, 2011 ONSC 7641 (Ont. S.C.J.).

23 The case has been reviewed by the Court and the Court bases its analysis in part on the *Wallbank* case.

Analysis

Statutory provisions

24 Section 50.6 of the BIA, in part, provides as follows:

> 50.6 (1) On application by a debtor in respect of whom a notice of intention was filed under section 50.4 or a proposal was filed under subsection 62(1) and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the debtor's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the debtor an amount approved by the court as being required by the debtor, having regard to the debtor's cash-flow statement referred to in paragraph 50(6)(a) or 50.4(2)(a), as the case may be. The security or charge may not secure an obligation that exists before the order is made.
>
> (...)
>
> **Priority**
>
> (3) The court may order that the security or charge rank in priority over t he claim of any secured creditor of the debtor.
>
> (...)
>
> **Factors to be considered**
>
> (5) In deciding whether to make an order, the court is to consider, among other things,
>
> (a) the period during which the debtor is expected to be subject to proceedings under this Act;
>
> (b) how the debtor's business and financial affairs are to be managed during the proceedings;
>
> (c) whether the debtor's management has the confidence of its major creditors;
>
> (d) whether the loan would enhance the prospects of a viable proposal being made in respect of the debtor;
>
> (e) the nature and value of the debtor's property;
>
> (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
>
> (g) the trustee's report referred to in paragraph 50(6)(b) or 50.4(2)(b), as the case may be.

Consideration of the Various Factors

1) Likely Duration of the NOI Proceedings

25 The evidence does not show when the Proposal will be filed. The Court has been asked for an extension of the Proposal to May 8, 2013. The Company requires the DIP facility to continue operating.

2) Management of OVG's Affairs

26 The current management will continue to operate OVG.

27 There are 60 employees at OVG in Renfrew, Ontario which is an economically depressed area.

3) Report of the Proposal Trustee

28 In its March 8, 2013 report, the Proposal Trustee stated that it was satisfied that OVG is proceeding in good faith with its proposal, and supported the need for DIP financing.

4) Would the Loan Enhance the Prospects of a Viable Proposal

29 According to the Proposal Trustee, OVG is developing a restructuring plan which may either involve:

1) identifying a strategic partner,

2) restructuring its debts, or

3) an orderly liquidation of its assets.

30 OVG has filed cash flow projections for the period ending May 24, 2013. The cash flow projections support Mr. McHale's statement that without the proposed DIP financing, the Company will not be able to fund its ongoing business operations and restructuring efforts during the NOI proceedings. The Proposal Trustee concurs with this assessment saying as follows:

> In the event that the DIP loan is not approved by the Court, the Proposal Trustee is of the view that this may result in a material adverse change and furthermore, that the Company may be required to cease operations which will severely compromise the Company's ability to complete its proposal to its Creditors.

31 The evidence is clear that if the DIP financing is not approved, OVG will close its doors.

4) Nature and Value of OVG's Property

32 While OVG filed evidence about its current indebtedness, it did not file any detailed historical evidence about its balance sheet or profit and loss position. The current value of its assets is unclear. The evidence suggests that OVG has been operating at a loss for at least 2011-2012.

5) Confidence of Major Creditors

33 The only major creditor in attendance at the motion was the Bank who opposed the DIP financing. There is no evidence that any other creditors either opposed or approved of the DIP financing request. The Court notes that only 4 or 5 creditors were advised of the motion.

6) Prejudice to Creditors as a Result of the Interim Financing Charge

34 Like any DIP financing, the Interim Financing Charge will impact all of the creditors' positions to some degree and will potentially reduce the amount recoverable by the RBC. In the event that OVG's business would close because of the failure to approve the DIP financing and the Interim Financing Charge, on balance, the benefit to stake holders of the proposed DIP facility significantly outweighs any prejudice to the Bank.

35 While the Bank would be prejudiced by the advance of $100,000.00, the Court considers the prejudice to be minimal.

Conclusion

36 Having considered all of the factors involved with the DIP financing, the Court is satisfied that it is appropriate to authorize OVG to enter into the DIP Facility with Waygar Capital Inc. to the extent of the first tranche of $100,000.00 and to grant the proposed Interim Financing Charge to the extent of $100,000.00.

37 This Court orders that the closing fee of $25,000.00 should be payable as follows:

1) $15,000.00 upon the drawdown of the first tranche of $100,000.00;

2) $10,000.00 if there is a second tranche under the primary facility and provided that the second tranche drawdown is allowed by the Court.

38 The authority for dividing the payment of the closing fee is the case of *Dessert & Passion inc. (Faillite) c. Banque Nationale du Canada*, 2009 QCCS 4669, 58 C.B.R. (5th) 224 (C.S. Que.).

39 In addition, in the event that there would be a drawdown of the secondary facility of $250,000.00 as contemplated by the March 11, 2013 letter, Court approval would have to be obtained.

40 The time to file the Proposal is extended to May 8, 2013 based on the information contained in the Proposal Trustee's report and based on the submissions made at the motion.

41 The following documents will be sealed as they contain information prepared by Ernst and Young Inc. that may be prejudicial to the Company if it becomes public record.

1) Affidavit of Peter Gordon Sworn, paras 18-21;

2) Exhibit P of the Affidavit of Peter Gordon Sworn, March 5, 2013;

3) Respondent's Factum dated March 8, 2013, paras 10-12.

42 I will remain seized of this matter.

43 The matter will be brought back on next week on a date, time and place to be advised.

44 Motion materials for the motion next week are to be served on all of the parties set out in the notice of motion brought by the Company.

45 Order accordingly.

Motion granted.

TAB 12

Most Negative Treatment: Distinguished
Most Recent Distinguished: Canada (Procureur général) c. Contrevenant No. 10 | 2015 CAF 155, 2015 CarswellNat 2920, 123 W.C.B. (2d) 413, [2015] A.C.F. No. 873 | (F.C.A., Jun 30, 2015)

2002 SCC 41, 2002 CSC 41
Supreme Court of Canada

Sierra Club of Canada v. Canada (Minister of Finance)

2002 CarswellNat 822, 2002 CarswellNat 823, 2002 SCC 41, 2002 CSC 41, [2002] 2 S.C.R. 522, [2002] S.C.J. No. 42, 113 A.C.W.S. (3d) 36, 18 C.P.R. (4th) 1, 20 C.P.C. (5th) 1, 211 D.L.R. (4th) 193, 223 F.T.R. 137 (note), 287 N.R. 203, 40 Admin. L.R. (3d) 1, 44 C.E.L.R. (N.S.) 161, 93 C.R.R. (2d) 219, J.E. 2002-803, REJB 2002-30902

Atomic Energy of Canada Limited, Appellant v. Sierra Club of Canada, Respondent and The Minister of Finance of Canada, the Minister of Foreign Affairs of Canada, the Minister of International Trade of Canada and the Attorney General of Canada, Respondents

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

Heard: November 6, 2001
Judgment: April 26, 2002
Docket: 28020

Proceedings: reversing (2000), 2000 CarswellNat 970, (sub nom. Atomic Energy of Canada Ltd. v. Sierra Club of Canada) 187 D.L.R. (4th) 231, 256 N.R. 1, 24 Admin. L.R. (3d) 1, [2000] 4 F.C. 426, 182 F.T.R. 284 (note), 2000 CarswellNat 3271, [2000] F.C.J. No. 732 (Fed. C.A.); affirming (1999), 1999 CarswellNat 2187, [2000] 2 F.C. 400, 1999 CarswellNat 3038, 179 F.T.R. 283, [1999] F.C.J. No. 1633 (Fed. T.D.)

Counsel: *J. Brett Ledger* and *Peter Chapin*, for appellant
Timothy J. Howard and *Franklin S. Gertler*, for respondent Sierra Club of Canada
Graham Garton, Q.C., and *J. Sanderson Graham*, for respondents Minister of Finance of Canada, Minister of Foreign Affairs of Canada, Minister of International Trade of Canada, and Attorney General of Canada

Subject: Intellectual Property; Property; Civil Practice and Procedure; Evidence; Environmental

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Evidence --- Documentary evidence — Privilege as to documents — Miscellaneous documents

Confidentiality order was necessary in this case because disclosure of confidential documents would impose serious risk

on important commercial interest of Crown corporation and there were no reasonable alternative measures to granting of order — Confidentiality order would have substantial salutary effects on Crown corporation's right to fair trial and on freedom of expression — Deleterious effects of confidentiality order on open court principle and freedom of expression would be minimal — Salutary effects of order outweighed deleterious effects — Canadian Environmental Assessment Act, S.C. 1992, c. 37, s. 5(1)(b) — Federal Court Rules, 1998, SOR/98-106, R. 151, 312.

Practice --- Discovery — Discovery of documents — Privileged document — Miscellaneous privileges

Confidentiality order was necessary in this case because disclosure of confidential documents would impose serious risk on important commercial interest of Crown corporation and there were no reasonable alternative measures to granting of order — Confidentiality order would have substantial salutary effects on Crown corporation's right to fair trial and on freedom of expression — Deleterious effects of confidentiality order on open court principle and freedom of expression would be minimal — Salutary effects of order outweighed deleterious effects — Canadian Environmental Assessment Act, S.C. 1992, c. 37, s. 5(1)(b) — Federal Court Rules, 1998, SOR/98-106, R. 151, 312.

Practice --- Discovery — Examination for discovery — Range of examination — Privilege — Miscellaneous privileges

Confidentiality order was necessary in this case because disclosure of confidential documents would impose serious risk on important commercial interest of Crown corporation and there were no reasonable alternative measures to granting of order — Confidentiality order would have substantial salutary effects on Crown corporation's right to fair trial and on freedom of expression — Deleterious effects of confidentiality order on open court principle and freedom of expression would be minimal — Salutary effects of order outweighed deleterious effects — Canadian Environmental Assessment Act, S.C. 1992, c. 37, s. 5(1)(b) — Federal Court Rules, 1998, SOR/98-106, R. 151, 312.

Preuve --- Preuve documentaire — Confidentialité en ce qui concerne les documents — Documents divers

Ordonnance de confidentialité était nécessaire parce que la divulgation des documents confidentiels menacerait gravement l'intérêt commercial important de la société d'État et parce qu'il n'y avait aucune autre option raisonnable que celle d'accorder l'ordonnance — Ordonnance de confidentialité aurait des effets bénéfiques considérables sur le droit de la société d'État à un procès équitable et à la liberté d'expression — Ordonnance de confidentialité n'aurait que des effets préjudiciables minimes sur le principe de la publicité des débats et sur la liberté d'expression — Effets bénéfiques de l'ordonnance l'emportaient sur ses effets préjudiciables — Loi canadienne sur l'évaluation environnementale, L.C. 1992, c. 37, art. 5(1)b) — Règles de la Cour fédérale, 1998, DORS/98-106, r. 151, 312.

Procédure --- Communication de la preuve — Communication des documents — Documents confidentiels — Divers types de confidentialité

Ordonnance de confidentialité était nécessaire parce que la divulgation des documents confidentiels menacerait gravement l'intérêt commercial important de la société d'État et parce qu'il n'y avait aucune autre option raisonnable que celle d'accorder l'ordonnance — Ordonnance de confidentialité aurait des effets bénéfiques considérables sur le droit de la société d'État à un procès équitable et à la liberté d'expression — Ordonnance de confidentialité n'aurait que des effets préjudiciables minimes sur le principe de la publicité des débats et sur la liberté d'expression — Effets bénéfiques de l'ordonnance l'emportaient sur ses effets préjudiciables — Loi canadienne sur l'évaluation environnementale, L.C. 1992, c. 37, art. 5(1)b) — Règles de la Cour fédérale, 1998, DORS/98-106, r. 151, 312.

Procédure --- Communication de la preuve — Interrogatoire préalable — Étendue de l'interrogatoire — Confidentialité — Divers types de confidentialité

Ordonnance de confidentialité était nécessaire parce que la divulgation des documents confidentiels menacerait gravement l'intérêt commercial important de la société d'État et parce qu'il n'y avait aucune autre option raisonnable que celle d'accorder l'ordonnance — Ordonnance de confidentialité aurait des effets bénéfiques considérables sur le droit de la société d'État à un procès équitable et à la liberté d'expression — Ordonnance de confidentialité n'aurait que des effets préjudiciables minimes sur le principe de la publicité des débats et sur la liberté d'expression — Effets bénéfiques de l'ordonnance l'emportaient sur ses effets préjudiciables — Loi canadienne sur l'évaluation environnementale, L.C. 1992, c. 37, art. 5(1)b) — Règles de la Cour fédérale, 1998, DORS/98-106, r. 151, 312.

The federal government provided a Crown corporation with a $1.5 billion loan for the construction and sale of two

CANDU nuclear reactors to China. An environmental organization sought judicial review of that decision, maintaining that the authorization of financial assistance triggered s. 5(1)(b) of the *Canadian Environmental Assessment Act*. The Crown corporation was an intervenor with the rights of a party in the application for judicial review. The Crown corporation filed an affidavit by a senior manager referring to and summarizing confidential documents. Before cross-examining the senior manager, the environmental organization applied for production of the documents. After receiving authorization from the Chinese authorities to disclose the documents on the condition that they be protected by a confidentiality order, the Crown corporation sought to introduce the documents under R. 312 of the *Federal Court Rules, 1998* and requested a confidentiality order. The confidentiality order would make the documents available only to the parties and the court but would not restrict public access to the proceedings.

The trial judge refused to grant the order and ordered the Crown corporation to file the documents in their current form, or in an edited version if it chose to do so. The Crown corporation appealed under R. 151 of the *Federal Court Rules, 1998* and the environmental organization cross-appealed under R. 312. The majority of the Federal Court of Appeal dismissed the appeal and the cross-appeal. The confidentiality order would have been granted by the dissenting judge. The Crown corporation appealed.

Held: The appeal was allowed.

Publication bans and confidentiality orders, in the context of judicial proceedings, are similar. The analytical approach to the exercise of discretion under R. 151 should echo the underlying principles set out in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 (S.C.C.). A confidentiality order under R. 151 should be granted in only two circumstances, when an order is needed to prevent serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk, and when the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which includes public interest in open and accessible court proceedings.

The alternatives to the confidentiality order suggested by the Trial Division and Court of Appeal were problematic. Expunging the documents would be a virtually unworkable and ineffective solution. Providing summaries was not a reasonable alternative measure to having the underlying documents available to the parties. The confidentiality order was necessary in that disclosure of the documents would impose a serious risk on an important commercial interest of the Crown corporation, and there were no reasonable alternative measures to granting the order.

The confidentiality order would have substantial salutary effects on the Crown corporation's right to a fair trial and on freedom of expression. The deleterious effects of the confidentiality order on the open court principle and freedom of expression would be minimal. If the order was not granted and in the course of the judicial review application the Crown corporation was not required to mount a defence under the *Canadian Environmental Assessment Act*, it was possible that the Crown corporation would suffer the harm of having disclosed confidential information in breach of its obligations with no corresponding benefit to the right of the public to freedom of expression. The salutary effects of the order outweighed the deleterious effects.

Le gouvernement fédéral a fait un prêt de l'ordre de 1,5 milliards de dollar en rapport avec la construction et la vente par une société d'État de deux réacteurs nucléaires CANDU à la Chine. Un organisme environnemental a sollicité le contrôle judiciaire de cette décision, soutenant que cette autorisation d'aide financière avait déclenché l'application de l'art. 5(1)b) de la *Loi canadienne sur l'évaluation environnementale*. La société d'État était intervenante au débat et elle avait reçu les droits de partie dans la demande de contrôle judiciaire. Elle a déposé l'affidavit d'un cadre supérieur dans lequel ce dernier faisait référence à certains documents confidentiels et en faisait le résumé. L'organisme environnemental a demandé la production des documents avant de procéder au contre-interrogatoire du cadre supérieur. Après avoir obtenu l'autorisation des autorités chinoises de communiquer les documents à la condition qu'ils soient protégés par une ordonnance de confidentialité, la société d'État a cherché à les introduire en invoquant la r. 312 des *Règles de la Cour fédérale, 1998*, et elle a aussi demandé une ordonnance de confidentialité. Selon les termes de l'ordonnance de confidentialité, les documents seraient uniquement mis à la disposition des parties et du tribunal, mais l'accès du public aux débats ne serait pas interdit.

Le juge de première instance a refusé l'ordonnance de confidentialité et a ordonné à la société d'État de déposer les documents sous leur forme actuelle ou sous une forme révisée, à son gré. La société d'État a interjeté appel en vertu de la r. 151 des *Règles de la Cour fédérale, 1998*, et l'organisme environnemental a formé un appel incident en vertu de la r. 312. Les juges majoritaires de la Cour d'appel ont rejeté le pourvoi et le pourvoi incident. Le juge dissident aurait accordé l'ordonnance de confidentialité. La société d'État a interjeté appel.

Arrêt: Le pourvoi a été accueilli.

Il y a de grandes ressemblances entre l'ordonnance de non-publication et l'ordonnance de confidentialité dans le contexte des procédures judiciaires. L'analyse de l'exercice du pouvoir discrétionnaire sous le régime de la r. 151 devrait refléter les principes sous-jacents énoncés dans l'arrêt *Dagenais c. Société Radio-Canada*, [1994] 3 R.C.S. 835. Une ordonnance de confidentialité rendue en vertu de la r. 151 ne devrait l'être que lorsque: 1) une telle ordonnance est nécessaire pour écarter un risque sérieux pour un intérêt important, y compris un intérêt commercial, dans le cadre d'un litige, en l'absence d'autres solutions raisonnables pour écarter ce risque; et 2) les effets bénéfiques de l'ordonnance de confidentialité, y compris les effets sur les droits des justiciables civils à un procès équitable, l'emportent sur ses effets préjudiciables, y compris les effets sur le droit à la liberté d'expression, lequel droit comprend l'intérêt du public à l'accès aux débats judiciaires.

Les solutions proposées par la Division de première instance et par la Cour d'appel comportaient toutes deux des problèmes. Épurer les documents serait virtuellement impraticable et inefficace. Fournir des résumés des documents ne constituait pas une « autre option raisonnable » à la communication aux parties des documents de base. L'ordonnance de confidentialité était nécessaire parce que la communication des documents menacerait gravement un intérêt commercial important de la société d'État et parce qu'il n'existait aucune autre option raisonnable que celle d'accorder l'ordonnance.

L'ordonnance de confidentialité aurait d'importants effets bénéfiques sur le droit de la société d'État à un procès équitable et à la liberté d'expression. Elle n'aurait que des effets préjudiciables minimes sur le principe de la publicité des débats et sur la liberté d'expression. Advenant que l'ordonnance ne soit pas accordée et que, dans le cadre de la demande de contrôle judiciaire, la société d'État n'ait pas l'obligation de présenter une défense en vertu de la *Loi canadienne sur l'évaluation environnementale*, il se pouvait que la société d'État subisse un préjudice du fait d'avoir communiqué cette information confidentielle en violation de ses obligations, sans avoir pu profiter d'un avantage similaire à celui du droit du public à la liberté d'expression. Les effets bénéfiques de l'ordonnance l'emportaient sur ses effets préjudiciables.

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Cases considered by *Iacobucci J.*:

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AB Hassle v. Canada (Minister of National Health & Welfare), 2000 CarswellNat 356, 5 C.P.R. (4th) 149, 253 N.R. 284, [2000] 3 F.C. 360, 2000 CarswellNat 3254 (Fed. C.A.) — considered

Canadian Broadcasting Corp. v. New Brunswick (Attorney General), 2 C.R. (5th) 1, 110 C.C.C. (3d) 193, [1996] 3 S.C.R. 480, 139 D.L.R. (4th) 385, 182 N.B.R. (2d) 81, 463 A.P.R. 81, 39 C.R.R. (2d) 189, 203 N.R. 169, 1996 CarswellNB 462, 1996 CarswellNB 463, 2 B.H.R.C. 210 (S.C.C.) — followed

Dagenais v. Canadian Broadcasting Corp., 34 C.R. (4th) 269, 20 O.R. (3d) 816 (note), [1994] 3 S.C.R. 835, 120 D.L.R. (4th) 12, 175 N.R. 1, 94 C.C.C. (3d) 289, 76 O.A.C. 81, 25 C.R.R. (2d) 1, 1994 CarswellOnt 112, 1994 CarswellOnt 1168 (S.C.C.) — followed

Edmonton Journal v. Alberta (Attorney General) (1989), [1990] 1 W.W.R. 577, [1989] 2 S.C.R. 1326, 64 D.L.R. (4th) 577, 102 N.R. 321, 71 Alta. L.R. (2d) 273, 103 A.R. 321, 41 C.P.C. (2d) 109, 45 C.R.R. 1, 1989 CarswellAlta 198, 1989 CarswellAlta 623 (S.C.C.) — followed

Eli Lilly & Co. v. Novopharm Ltd., 56 C.P.R. (3d) 437, 82 F.T.R. 147, 1994 CarswellNat 537 (Fed. T.D.) — referred to

Ethyl Canada Inc. v. Canada (Attorney General), 1998 CarswellOnt 380, 17 C.P.C. (4th) 278 (Ont. Gen. Div.) — considered

Irwin Toy Ltd. c. Québec (Procureur général), 94 N.R. 167, (sub nom. *Irwin Toy Ltd. v. Quebec (Attorney General)*) [1989] 1 S.C.R. 927, 58 D.L.R. (4th) 577, 24 Q.A.C. 2, 25 C.P.R. (3d) 417, 39 C.R.R. 193, 1989 CarswellQue 115F, 1989 CarswellQue 115 (S.C.C.) — followed

M. (A.) v. Ryan, 143 D.L.R. (4th) 1, 207 N.R. 81, 4 C.R. (5th) 220, 29 B.C.L.R. (3d) 133, [1997] 4 W.W.R. 1, 85 B.C.A.C. 81, 138 W.A.C. 81, 34 C.C.L.T. (2d) 1, [1997] 1 S.C.R. 157, 42 C.R.R. (2d) 37, 8 C.P.C. (4th) 1, 1997 CarswellBC 99, 1997 CarswellBC 100 (S.C.C.) — considered

N. (F.), Re, 2000 SCC 35, 2000 CarswellNfld 213, 2000 CarswellNfld 214, 146 C.C.C. (3d) 1, 188 D.L.R. (4th) 1, 35 C.R. (5th) 1, [2000] 1 S.C.R. 880, 191 Nfld. & P.E.I.R. 181, 577 A.P.R. 181 (S.C.C.) — considered

R. v. E. (O.N.), 2001 SCC 77, 2001 CarswellBC 2479, 2001 CarswellBC 2480, 158 C.C.C. (3d) 478, 205 D.L.R. (4th) 542, 47 C.R. (5th) 89, 279 N.R. 187, 97 B.C.L.R. (3d) 1, [2002] 3 W.W.R. 205, 160 B.C.A.C. 161, 261 W.A.C. 161 (S.C.C.) — referred to

R. v. Keegstra, 1 C.R. (4th) 129, [1990] 3 S.C.R. 697, 77 Alta. L.R. (2d) 193, 117 N.R. 1, [1991] 2 W.W.R. 1, 114 A.R. 81, 61 C.C.C. (3d) 1, 3 C.R.R. (2d) 193, 1990 CarswellAlta 192, 1990 CarswellAlta 661 (S.C.C.) — followed

R. v. Mentuck, 2001 SCC 76, 2001 CarswellMan 535, 2001 CarswellMan 536, 158 C.C.C. (3d) 449, 205 D.L.R. (4th) 512, 47 C.R. (5th) 63, 277 N.R. 160, [2002] 2 W.W.R. 409 (S.C.C.) — followed

R. v. Oakes, [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200, 65 N.R. 87, 14 O.A.C. 335, 24 C.C.C. (3d) 321, 50 C.R. (3d) 1, 19 C.R.R. 308, 53 O.R. (2d) 719, 1986 CarswellOnt 95, 1986 CarswellOnt 1001 (S.C.C.) — referred to

Statutes considered:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

Generally — referred to

s. 1 — referred to

s. 2(b) — referred to

s. 11(d) — referred to

Canadian Environmental Assessment Act, S.C. 1992, c. 37

Generally — considered

s. 5(1)(b) — referred to

s. 8 — referred to

s. 54 — referred to

s. 54(2)(b) — referred to

Criminal Code, R.S.C. 1985, c. C-46
s. 486(1) — referred to

Rules considered:

Federal Court Rules, 1998, SOR/98-106
R. 151 — considered

R. 312 — referred to

APPEAL from judgment reported at 2000 CarswellNat 970, 2000 CarswellNat 3271, [2000] F.C.J. No. 732, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 187 D.L.R. (4th) 231, 256 N.R. 1, 24 Admin. L.R. (3d) 1, [2000] 4 F.C. 426, 182 F.T.R. 284 (note) (Fed. C.A.), dismissing appeal from judgment reported at 1999 CarswellNat 2187, [2000] 2 F.C. 400, 1999 CarswellNat 3038, 179 F.T.R. 283 (Fed. T.D.), granting application in part.

POURVOI à l'encontre de l'arrêt publié à 2000 CarswellNat 970, 2000 CarswellNat 3271, [2000] F.C.J. No. 732, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 187 D.L.R. (4th) 231, 256 N.R. 1, 24 Admin. L.R. (3d) 1, [2000] 4 F.C. 426, 182 F.T.R. 284 (note) (C.A. Féd.), qui a rejeté le pourvoi à l'encontre du jugement publié à 1999 CarswellNat 2187, [2000] 2 F.C. 400, 1999 CarswellNat 3038, 179 F.T.R. 283 (C.F. (1re inst.)), qui avait accueilli en partie la demande.

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

I. Introduction

1 In our country, courts are the institutions generally chosen to resolve legal disputes as best they can through the application of legal principles to the facts of the case involved. One of the underlying principles of the judicial process is public openness, both in the proceedings of the dispute, and in the material that is relevant to its resolution. However, some material can be made the subject of a confidentiality order. This appeal raises the important issues of when, and under what circumstances, a confidentiality order should be granted.

2 For the following reasons, I would issue the confidentiality order sought and, accordingly, would allow the appeal.

II. Facts

3 The appellant, Atomic Energy of Canada Ltd. ("AECL"), is a Crown corporation that owns and markets CANDU nuclear technology, and is an intervener with the rights of a party in the application for judicial review by the respondent, the Sierra Club of Canada ("Sierra Club"). Sierra Club is an environmental organization seeking judicial review of the federal government's decision to provide financial assistance in the form of a $1.5 billion guaranteed loan relating to the construction and sale of two CANDU nuclear reactors to China by the appellant. The reactors are currently under construction in China, where the appellant is the main contractor and project manager.

4 The respondent maintains that the authorization of financial assistance by the government triggered s. 5(1)(b) of the *Canadian Environmental Assessment Act*, S.C. 1992, c. 37 ("CEAA"), which requires that an environmental assessment be undertaken before a federal authority grants financial assistance to a project. Failure to undertake such an assessment compels cancellation of the financial arrangements.

5 The appellant and the respondent Ministers argue that the CEAA does not apply to the loan transaction, and that if it does, the statutory defences available under ss. 8 and 54 apply. Section 8 describes the circumstances where Crown corporations are required to conduct environmental assessments. Section 54(2)(b) recognizes the validity of an environmental assessment carried out by a foreign authority provided that it is consistent with the provisions of the CEAA.

6 In the course of the application by Sierra Club to set aside the funding arrangements, the appellant filed an affidavit of Dr. Simon Pang, a senior manager of the appellant. In the affidavit, Dr. Pang referred to and summarized certain documents (the "Confidential Documents"). The Confidential Documents are also referred to in an affidavit prepared by Dr. Feng, one of AECL's experts. Prior to cross-examining Dr. Pang on his affidavit, Sierra Club made an application for the production of the Confidential Documents, arguing that it could not test Dr. Pang's evidence without access to the underlying documents. The appellant resisted production on various grounds, including the fact that the documents were the property of the Chinese authorities and that it did not have authority to disclose them. After receiving authorization by the Chinese authorities to disclose the documents on the condition that they be protected by a confidentiality order, the appellant sought to introduce the Confidential Documents under R. 312 of the *Federal Court Rules, 1998*, SOR/98-106, and requested a confidentiality order in respect of the documents.

7 Under the terms of the order requested, the Confidential Documents would only be made available to the parties and the court; however, there would be no restriction on public access to the proceedings. In essence, what is being sought is an order preventing the dissemination of the Confidential Documents to the public.

8 The Confidential Documents comprise two Environmental Impact Reports on Siting and Construction Design (the "EIRs"), a Preliminary Safety Analysis Report (the "PSAR"), and the supplementary affidavit of Dr. Pang, which summarizes the contents of the EIRs and the PSAR. If admitted, the EIRs and the PSAR would be attached as exhibits to the supplementary affidavit of Dr. Pang. The EIRs were prepared by the Chinese authorities in the Chinese language, and the PSAR was prepared by the appellant with assistance from the Chinese participants in the project. The documents contain a mass of technical information and comprise thousands of pages. They describe the ongoing environmental assessment of the construction site by the Chinese authorities under Chinese law.

9 As noted, the appellant argues that it cannot introduce the Confidential Documents into evidence without a confidentiality order; otherwise, it would be in breach of its obligations to the Chinese authorities. The respondent's position is that its right to cross-examine Dr. Pang and Dr. Feng on their affidavits would be effectively rendered nugatory in the absence of the supporting documents to which the affidavits referred. Sierra Club proposes to take the position that the

affidavits should therefore be afforded very little weight by the judge hearing the application for judicial review.

10 The Federal Court of Canada, Trial Division, refused to grant the confidentiality order and the majority of the Federal Court of Appeal dismissed the appeal. In his dissenting opinion, Robertson J.A. would have granted the confidentiality order.

III. Relevant Statutory Provisions

11 *Federal Court Rules, 1998*, SOR/98-106

> 151.(1) On motion, the Court may order that material to be filed shall be treated as confidential.
>
> (2) Before making an order under subsection (1), the Court must be satisfied that the material should be treated as confidential, notwithstanding the public interest in open and accessible court proceedings.

IV. Judgments below

A. Federal Court of Canada, Trial Division, [2000] 2 F.C. 400

12 Pelletier J. first considered whether leave should be granted pursuant to R. 312 to introduce the supplementary affidavit of Dr. Pang to which the Confidential Documents were filed as exhibits. In his view, the underlying question was that of relevance, and he concluded that the documents were relevant to the issue of the appropriate remedy. Thus, in the absence of prejudice to the respondent, the affidavit should be permitted to be served and filed. He noted that the respondents would be prejudiced by delay, but since both parties had brought interlocutory motions which had contributed to the delay, the desirability of having the entire record before the court outweighed the prejudice arising from the delay associated with the introduction of the documents.

13 On the issue of confidentiality, Pelletier J. concluded that he must be satisfied that the need for confidentiality was greater than the public interest in open court proceedings, and observed that the argument for open proceedings in this case was significant given the public interest in Canada's role as a vendor of nuclear technology. As well, he noted that a confidentiality order was an exception to the rule of open access to the courts, and that such an order should be granted only where absolutely necessary.

14 Pelletier J. applied the same test as that used in patent litigation for the issue of a protective order, which is essentially a confidentiality order. The granting of such an order requires the appellant to show a subjective belief that the information is confidential and that its interests would be harmed by disclosure. In addition, if the order is challenged, then the person claiming the benefit of the order must demonstrate objectively that the order is required. This objective element requires the party to show that the information has been treated as confidential, and that it is reasonable to believe that its proprietary, commercial and scientific interests could be harmed by the disclosure of the information.

15 Concluding that both the subjective part and both elements of the objective part of the test had been satisfied, he nevertheless stated: "However, I am also of the view that in public law cases, the objective test has, or should have, a third

component which is whether the public interest in disclosure exceeds the risk of harm to a party arising from disclosure" (para. 23).

16 A very significant factor, in his view, was the fact that mandatory production of documents was not in issue here. The fact that the application involved a voluntary tendering of documents to advance the appellant's own cause as opposed to mandatory production weighed against granting the confidentiality order.

17 In weighing the public interest in disclosure against the risk of harm to AECL arising from disclosure, Pelletier J. noted that the documents the appellant wished to put before the court were prepared by others for other purposes, and recognized that the appellant was bound to protect the confidentiality of the information. At this stage, he again considered the issue of materiality. If the documents were shown to be very material to a critical issue, "the requirements of justice militate in favour of a confidentiality order. If the documents are marginally relevant, then the voluntary nature of the production argues against a confidentiality order" (para. 29). He then decided that the documents were material to a question of the appropriate remedy, a significant issue in the event that the appellant failed on the main issue.

18 Pelletier J. also considered the context of the case and held that since the issue of Canada's role as a vendor of nuclear technology was one of significant public interest, the burden of justifying a confidentiality order was very onerous. He found that AECL could expunge the sensitive material from the documents, or put the evidence before the court in some other form, and thus maintain its full right of defence while preserving the open access to court proceedings.

19 Pelletier J. observed that his order was being made without having perused the Confidential Documents because they had not been put before him. Although he noted the line of cases which holds that a judge ought not to deal with the issue of a confidentiality order without reviewing the documents themselves, in his view, given their voluminous nature and technical content as well as his lack of information as to what information was already in the public domain, he found that an examination of these documents would not have been useful.

20 Pelletier J. ordered that the appellant could file the documents in current form, or in an edited version if it chose to do so. He also granted leave to file material dealing with the Chinese regulatory process in general and as applied to this project, provided it did so within 60 days.

B. Federal Court of Appeal, [2000] 4 F.C. 426

(1) Evans J.A. (Sharlow J.A. concurring)

21 At the Federal Court of Appeal, AECL appealed the ruling under R. 151 of the *Federal Court Rules, 1998*, and Sierra Club cross-appealed the ruling under R. 312.

22 With respect to R. 312, Evans J.A. held that the documents were clearly relevant to a defence under s. 54(2)(b), which the appellant proposed to raise if s. 5(1)(b) of the CEAA was held to apply, and were also potentially relevant to the exercise of the court's discretion to refuse a remedy even if the Ministers were in breach of the CEAA. Evans J.A. agreed with Pelletier J. that the benefit to the appellant and the court of being granted leave to file the documents outweighed any

prejudice to the respondent owing to delay and thus concluded that the motions judge was correct in granting leave under R. 312.

23 On the issue of the confidentiality order, Evans J.A. considered R. 151, and all the factors that the motions judge had weighed, including the commercial sensitivity of the documents, the fact that the appellant had received them in confidence from the Chinese authorities, and the appellant's argument that without the documents it could not mount a full answer and defence to the application. These factors had to be weighed against the principle of open access to court documents. Evans J.A. agreed with Pelletier J. that the weight to be attached to the public interest in open proceedings varied with context and held that, where a case raises issues of public significance, the principle of openness of judicial process carries greater weight as a factor in the balancing process. Evans J.A. noted the public interest in the subject matter of the litigation, as well as the considerable media attention it had attracted.

24 In support of his conclusion that the weight assigned to the principle of openness may vary with context, Evans J.A. relied upon the decisions in *AB Hassle v. Canada (Minister of National Health & Welfare)*, [2000] 3 F.C. 360 (Fed. C.A.), where the court took into consideration the relatively small public interest at stake, and *Ethyl Canada Inc. v. Canada (Attorney General)* (1998), 17 C.P.C. (4th) 278 (Ont. Gen. Div.), at p. 283, where the court ordered disclosure after determining that the case was a significant constitutional case where it was important for the public to understand the issues at stake. Evans J.A. observed that openness and public participation in the assessment process are fundamental to the CEAA, and concluded that the motions judge could not be said to have given the principle of openness undue weight even though confidentiality was claimed for a relatively small number of highly technical documents.

25 Evans J.A. held that the motions judge had placed undue emphasis on the fact that the introduction of the documents was voluntary; however, it did not follow that his decision on the confidentiality order must therefore be set aside. Evans J.A. was of the view that this error did not affect the ultimate conclusion for three reasons. First, like the motions judge, he attached great weight to the principle of openness. Secondly, he held that the inclusion in the affidavits of a summary of the reports could go a long way to compensate for the absence of the originals, should the appellant choose not to put them in without a confidentiality order. Finally, if AECL submitted the documents in an expunged fashion, the claim for confidentiality would rest upon a relatively unimportant factor, i.e., the appellant's claim that it would suffer a loss of business if it breached its undertaking with the Chinese authorities.

26 Evans J.A. rejected the argument that the motions judge had erred in deciding the motion without reference to the actual documents, stating that it was not necessary for him to inspect them, given that summaries were available and that the documents were highly technical and incompletely translated. Thus, the appeal and cross-appeal were both dismissed.

(2) Robertson J.A. (dissenting)

27 Robertson J.A. disagreed with the majority for three reasons. First, in his view, the level of public interest in the case, the degree of media coverage, and the identities of the parties should not be taken into consideration in assessing an application for a confidentiality order. Instead, he held that it was the nature of the evidence for which the order is sought that must be examined.

28 In addition, he found that without a confidentiality order, the appellant had to choose between two unacceptable options: either suffering irreparable financial harm if the confidential information was introduced into evidence or being

denied the right to a fair trial because it could not mount a full defence if the evidence was not introduced.

29 Finally, he stated that the analytical framework employed by the majority in reaching its decision was fundamentally flawed as it was based largely on the subjective views of the motions judge. He rejected the contextual approach to the question of whether a confidentiality order should issue, emphasizing the need for an objective framework to combat the perception that justice is a relative concept, and to promote consistency and certainty in the law.

30 To establish this more objective framework for regulating the issuance of confidentiality orders pertaining to commercial and scientific information, he turned to the legal rationale underlying the commitment to the principle of open justice, referring to *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326 (S.C.C.). There, the Supreme Court of Canada held that open proceedings foster the search for the truth, and reflect the importance of public scrutiny of the courts.

31 Robertson J.A. stated that, although the principle of open justice is a reflection of the basic democratic value of accountability in the exercise of judicial power, in his view, the principle that justice itself must be secured is paramount. He concluded that justice as an overarching principle means that exceptions occasionally must be made to rules or principles.

32 He observed that, in the area of commercial law, when the information sought to be protected concerns "trade secrets," this information will not be disclosed during a trial if to do so would destroy the owner's proprietary rights and expose him or her to irreparable harm in the form of financial loss. Although the case before him did not involve a trade secret, he nevertheless held that the same treatment could be extended to commercial or scientific information which was acquired on a confidential basis and attached the following criteria as conditions precedent to the issuance of a confidentiality order (at para. 13):

> (1) the information is of a confidential nature as opposed to facts which one would like to keep confidential; (2) the information for which confidentiality is sought is not already in the public domain; (3) on a balance of probabilities the party seeking the confidentiality order would suffer irreparable harm if the information were made public; (4) the information is relevant to the legal issues raised in the case; (5) correlatively, the information is "necessary" to the resolution of those issues; (6) the granting of a confidentiality order does not unduly prejudice the opposing party; and (7) the public interest in open court proceedings does not override the private interests of the party seeking the confidentiality order. The onus in establishing that criteria one to six are met is on the party seeking the confidentiality order. Under the seventh criterion, it is for the opposing party to show that a *prima facie* right to a protective order has been overtaken by the need to preserve the openness of the court proceedings. In addressing these criteria one must bear in mind two of the threads woven into the fabric of the principle of open justice: the search for truth and the preservation of the rule of law. As stated at the outset, I do not believe that the perceived degree of public importance of a case is a relevant consideration.

33 In applying these criteria to the circumstances of the case, Robertson J.A. concluded that the confidentiality order should be granted. In his view, the public interest in open court proceedings did not override the interests of AECL in maintaining the confidentiality of these highly technical documents.

34 Robertson J.A. also considered the public interest in the need to ensure that site-plans for nuclear installations were not, for example, posted on a web-site. He concluded that a confidentiality order would not undermine the two primary

objectives underlying the principle of open justice: truth and the rule of law. As such, he would have allowed the appeal and dismissed the cross-appeal.

V. Issues

35

A. What is the proper analytical approach to be applied to the exercise of judicial discretion where a litigant seeks a confidentiality order under R. 151 of the *Federal Court Rules, 1998*?

B. Should the confidentiality order be granted in this case?

VI. Analysis

A. The Analytical Approach to the Granting of a Confidentiality Order

(1) The General Framework: Herein the Dagenais Principles

36 The link between openness in judicial proceedings and freedom of expression has been firmly established by this Court. In *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480 (S.C.C.) [hereinafter *New Brunswick*], at para. 23, La Forest J. expressed the relationship as follows:

> The principle of open courts is inextricably tied to the rights guaranteed by s. 2(b). Openness permits public access to information about the courts, which in turn permits the public to discuss and put forward opinions and criticisms of court practices and proceedings. While the freedom to express ideas and opinions about the operation of the courts is clearly within the ambit of the freedom guaranteed by s. 2(b), so too is the right of members of the public to obtain information about the courts in the first place.

Under the order sought, public access and public scrutiny of the Confidential Documents would be restricted; this would clearly infringe the public's freedom of expression guarantee.

37 A discussion of the general approach to be taken in the exercise of judicial discretion to grant a confidentiality order should begin with the principles set out by this Court in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 (S.C.C.). Although that case dealt with the common law jurisdiction of the court to order a publication ban in the criminal law context, there are strong similarities between publication bans and confidentiality orders in the context of judicial proceedings. In both cases a restriction on freedom of expression is sought in order to preserve or promote an interest engaged by those proceedings. As such, the fundamental question for a court to consider in an application for a publication ban or a confidentiality order is whether, in the circumstances, the right to freedom of expression should be compromised.

38 Although in each case freedom of expression will be engaged in a different context, the *Dagenais* framework utilizes overarching *Canadian Charter of Rights and Freedoms* principles in order to balance freedom of expression with other rights and interests, and thus can be adapted and applied to various circumstances. As a result, the analytical approach to the

exercise of discretion under R. 151 should echo the underlying principles laid out in *Dagenais*, *supra*, although it must be tailored to the specific rights and interests engaged in this case.

39 *Dagenais*, *supra*, dealt with an application by four accused persons under the court's common law jurisdiction requesting an order prohibiting the broadcast of a television programme dealing with the physical and sexual abuse of young boys at religious institutions. The applicants argued that because the factual circumstances of the programme were very similar to the facts at issue in their trials, the ban was necessary to preserve the accuseds' right to a fair trial.

40 Lamer C.J. found that the common law discretion to order a publication ban must be exercised within the boundaries set by the principles of the *Charter*. Since publication bans necessarily curtail the freedom of expression of third parties, he adapted the pre-*Charter* common law rule such that it balanced the right to freedom of expression with the right to a fair trial of the accused in a way which reflected the substance of the test from *R. v. Oakes*, [1986] 1 S.C.R. 103 (S.C.C.). At p. 878 of *Dagenais*, Lamer C.J. set out his reformulated test:

> A publication ban should only be ordered when:
>
> (a) Such a ban is *necessary* in order to prevent a real and substantial risk to the fairness of the trial, because reasonably available alternative measures will not prevent the risk; and
>
> (b) The salutary effects of the publication ban outweigh the deleterious effects to the free expression of those affected by the ban. [Emphasis in original.]

41 In *New Brunswick*, *supra*, this Court modified the *Dagenais* test in the context of the related issue of how the discretionary power under s. 486(1) of the *Criminal Code* to exclude the public from a trial should be exercised. That case dealt with an appeal from the trial judge's order excluding the public from the portion of a sentencing proceeding for sexual assault and sexual interference dealing with the specific acts committed by the accused on the basis that it would avoid "undue hardship" to both the victims and the accused.

42 La Forest J. found that s. 486(1) was a restriction on the s. 2(b) right to freedom of expression in that it provided a "discretionary bar on public and media access to the courts": *New Brunswick*, *supra*, at para. 33; however, he found this infringement to be justified under s. 1 provided that the discretion was exercised in accordance with the *Charter*. Thus, the approach taken by La Forest J. at para. 69 to the exercise of discretion under s. 486(1) of the *Criminal Code*, closely mirrors the *Dagenais* common law test:

> (a) the judge must consider the available options and consider whether there are any other reasonable and effective alternatives available;
>
> (b) the judge must consider whether the order is limited as much as possible; and
>
> (c) the judge must weigh the importance of the objectives of the particular order and its probable effects against the importance of openness and the particular expression that will be limited in order to ensure that the positive and negative effects of the order are proportionate.

In applying this test to the facts of the case, La Forest J. found that the evidence of the potential undue hardship consisted

mainly in the Crown's submission that the evidence was of a "delicate nature" and that this was insufficient to override the infringement on freedom of expression.

43 This Court has recently revisited the granting of a publication ban under the court's common law jurisdiction in *R. v. Mentuck*, 2001 SCC 76 (S.C.C.), and its companion case *R. v. E. (O.N.)*, 2001 SCC 77 (S.C.C.). In *Mentuck*, the Crown moved for a publication ban to protect the identity of undercover police officers and operational methods employed by the officers in their investigation of the accused. The accused opposed the motion as an infringement of his right to a fair and public hearing under s. 11(d) of the *Charter*. The order was also opposed by two intervening newspapers as an infringement of their right to freedom of expression.

44 The Court noted that, while *Dagenais* dealt with the balancing of freedom of expression on the one hand, and the right to a fair trial of the accused on the other, in the case before it, both the right of the accused to a fair and public hearing, and freedom of expression weighed in favour of denying the publication ban. These rights were balanced against interests relating to the proper administration of justice, in particular, protecting the safety of police officers and preserving the efficacy of undercover police operations.

45 In spite of this distinction, the Court noted that underlying the approach taken in both *Dagenais* and *New Brunswick* was the goal of ensuring that the judicial discretion to order publication bans is subject to no lower a standard of compliance with the *Charter* than legislative enactment. This goal is furthered by incorporating the essence of s. 1 of the *Charter* and the *Oakes* test into the publication ban test. Since this same goal applied in the case before it, the Court adopted a similar approach to that taken in *Dagenais*, but broadened the *Dagenais* test (which dealt specifically with the right of an accused to a fair trial) such that it could guide the exercise of judicial discretion where a publication ban is requested in order to preserve *any* important aspect of the proper administration of justice. At para. 32, the Court reformulated the test as follows:

> A publication ban should only be ordered when:
>
> (a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and
>
> (b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.

46 The Court emphasized that under the first branch of the test, three important elements were subsumed under the "necessity" branch. First, the risk in question must be a serious risk well-grounded in the evidence. Second, the phrase "proper administration of justice" must be carefully interpreted so as not to allow the concealment of an excessive amount of information. Third, the test requires the judge ordering the ban to consider not only whether reasonable alternatives are available, but also to restrict the ban as far as possible without sacrificing the prevention of the risk.

47 At para. 31, the Court also made the important observation that the proper administration of justice will not necessarily involve *Charter* rights, and that the ability to invoke the *Charter* is not a necessary condition for a publication ban to be granted:

> The [common law publication ban] rule can accommodate orders that must occasionally be made in the interests of the

> administration of justice, which encompass more than fair trial rights. As the test is intended to "reflect . . . the substance of the *Oakes* test", *we cannot require that Charter rights be the only legitimate objective of such orders any more than we require that government action or legislation in violation of the Charter be justified exclusively by the pursuit of another Charter right.* [Emphasis added.]

The Court also anticipated that, in appropriate circumstances, the *Dagenais* framework could be expanded even further in order to address requests for publication bans where interests other than the administration of justice were involved.

48 *Mentuck* is illustrative of the flexibility of the *Dagenais* approach. Since its basic purpose is to ensure that the judicial discretion to deny public access to the courts is exercised in accordance with *Charter* principles, in my view, the *Dagenais* model can and should be adapted to the situation in the case at bar where the central issue is whether judicial discretion should be exercised so as to exclude confidential information from a public proceeding. As in *Dagenais*, *New Brunswick* and *Mentuck*, granting the confidentiality order will have a negative effect on the *Charter* right to freedom of expression, as well as the principle of open and accessible court proceedings, and, as in those cases, courts must ensure that the discretion to grant the order is exercised in accordance with *Charter* principles. However, in order to adapt the test to the context of this case, it is first necessary to determine the particular rights and interests engaged by this application.

(2) The Rights and Interests of the Parties

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

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

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

52 In opposition to the confidentiality order lies the fundamental principle of open and accessible court proceedings. This principle is inextricably tied to freedom of expression enshrined in s. 2(b) of the *Charter*: *New Brunswick*, *supra*, at para. 23.

The importance of public and media access to the courts cannot be understated, as this access is the method by which the judicial process is scrutinized and criticized. Because it is essential to the administration of justice that justice is done and is *seen* to be done, such public scrutiny is fundamental. The open court principle has been described as "the very soul of justice," guaranteeing that justice is administered in a non-arbitrary manner: *New Brunswick*, *supra*, at para. 22.

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

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

> A confidentiality order under R. 151 should only be granted when:
>
> (a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and
>
> (b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

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

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

56 In addition to the above requirement, courts must be cautious in determining what constitutes an "important commercial interest." It must be remembered that a confidentiality order involves an infringement on freedom of expression. Although the balancing of the commercial interest with freedom of expression takes place under the second branch of the test, courts must be alive to the fundamental importance of the open court rule. See generally Muldoon J. in *Eli Lilly & Co. v. Novopharm Ltd.* (1994), 56 C.P.R. (3d) 437 (Fed. T.D.), at p. 439.

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

B. Application of the Test to this Appeal

(1) Necessity

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

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

60 Pelletier J. noted that the order sought in this case was similar in nature to an application for a protective order which arises in the context of patent litigation. Such an order requires the applicant to demonstrate that the information in question has been treated at all relevant times as confidential and that on a balance of probabilities its proprietary, commercial and scientific interests could reasonably be harmed by the disclosure of the information: *AB Hassle v. Canada (Minister of National Health & Welfare)* (1998), 83 C.P.R. (3d) 428 (Fed. T.D.), at p. 434. To this I would add the requirement proposed by Robertson J.A. that the information in question must be of a "confidential nature" in that it has been" accumulated with a reasonable expectation of it being kept confidential" (para. 14) as opposed to "facts which a litigant would like to keep confidential by having the courtroom doors closed" (para. 14).

61 Pelletier J. found as a fact that the *AB Hassle* test had been satisfied in that the information had clearly been treated as confidential both by the appellant and by the Chinese authorities, and that, on a balance of probabilities, disclosure of the information could harm the appellant's commercial interests (para. 23). As well, Robertson J.A. found that the information in question was clearly of a confidential nature as it was commercial information, consistently treated and regarded as confidential, that would be of interest to AECL's competitors (para. 16). Thus, the order is sought to prevent a serious risk to an important commercial interest.

62 The first branch of the test also requires the consideration of alternative measures to the confidentiality order, as well as an examination of the scope of the order to ensure that it is not overly broad. Both courts below found that the information contained in the Confidential Documents was relevant to potential defences available to the appellant under the CEAA and this finding was not appealed at this Court. Further, I agree with the Court of Appeal's assertion (para. 99) that, given the importance of the documents to the right to make full answer and defence, the appellant is, practically speaking, compelled to produce the documents. Given that the information is necessary to the appellant's case, it remains only to determine whether there are reasonably alternative means by which the necessary information can be adduced without disclosing the confidential information.

63 Two alternatives to the confidentiality order were put forward by the courts below. The motions judge suggested that the Confidential Documents could be expunged of their commercially sensitive contents, and edited versions of the documents could be filed. As well, the majority of the Court of Appeal, in addition to accepting the possibility of

expungement, was of the opinion that the summaries of the Confidential Documents included in the affidavits could go a long way to compensate for the absence of the originals. If either of these options is a reasonable alternative to submitting the Confidential Documents under a confidentiality order, then the order is not necessary, and the application does not pass the first branch of the test.

64 There are two possible options with respect to expungement, and, in my view, there are problems with both of these. The first option would be for AECL to expunge the confidential information without disclosing the expunged material to the parties and the court. However, in this situation the filed material would still differ from the material used by the affiants. It must not be forgotten that this motion arose as a result of Sierra Club's position that the summaries contained in the affidavits should be accorded little or no weight without the presence of the underlying documents. Even if the relevant information and the confidential information were mutually exclusive, which would allow for the disclosure of all the information relied on in the affidavits, this relevancy determination could not be tested on cross-examination because the expunged material would not be available. Thus, even in the best case scenario, where only irrelevant information needed to be expunged, the parties would be put in essentially the same position as that which initially generated this appeal in the sense that at least some of the material relied on to prepare the affidavits in question would not be available to Sierra Club.

65 Further, I agree with Robertson J.A. that this best case scenario, where the relevant and the confidential information do not overlap, is an untested assumption (para. 28). Although the documents themselves were not put before the courts on this motion, given that they comprise thousands of pages of detailed information, this assumption is at best optimistic. The expungement alternative would be further complicated by the fact that the Chinese authorities require prior approval for any request by AECL to disclose information.

66 The second option is that the expunged material be made available to the Court and the parties under a more narrowly drawn confidentiality order. Although this option would allow for slightly broader public access than the current confidentiality request, in my view, this minor restriction to the current confidentiality request is not a viable alternative given the difficulties associated with expungement in these circumstances. The test asks whether there are *reasonably* alternative measures; it does not require the adoption of the absolutely least restrictive option. With respect, in my view, expungement of the Confidential Documents would be a virtually unworkable and ineffective solution that is not reasonable in the circumstances.

67 A second alternative to a confidentiality order was Evans J.A.'s suggestion that the summaries of the Confidential Documents included in the affidavits" may well go a long way to compensate for the absence of the originals" (para. 103). However, he appeared to take this fact into account merely as a factor to be considered when balancing the various interests at stake. I would agree that at this threshold stage to rely on the summaries alone, in light of the intention of Sierra Club to argue that they should be accorded little or no weight, does not appear to be a "reasonably alternative measure" to having the underlying documents available to the parties.

68 With the above considerations in mind, I find the confidentiality order necessary in that disclosure of the Confidential Documents would impose a serious risk on an important commercial interest of the appellant, and that there are no reasonably alternative measures to granting the order.

(2) The Proportionality Stage

69 As stated above, at this stage, the salutary effects of the confidentiality order, including the effects on the appellant's right to a fair trial, must be weighed against the deleterious effects of the confidentiality order, including the effects on the right to free expression, which, in turn, is connected to the principle of open and accessible court proceedings. This balancing will ultimately determine whether the confidentiality order ought to be granted.

(a) Salutary Effects of the Confidentiality Order

70 As discussed above, the primary interest that would be promoted by the confidentiality order is the public interest in the right of a civil litigant to present its case or, more generally, the fair trial right. Because the fair trial right is being invoked in this case in order to protect commercial, not liberty, interests of the appellant, the right to a fair trial in this context is not a *Charter* right; however, a fair trial for all litigants has been recognized as a fundamental principle of justice: *Ryan, supra,* at para. 84. It bears repeating that there are circumstances where, in the absence of an affected *Charter* right, the proper administration of justice calls for a confidentiality order: *Mentuck, supra,* at para. 31. In this case, the salutary effects that such an order would have on the administration of justice relate to the ability of the appellant to present its case, as encompassed by the broader fair trial right.

71 The Confidential Documents have been found to be relevant to defences that will be available to the appellant in the event that the CEAA is found to apply to the impugned transaction and, as discussed above, the appellant cannot disclose the documents without putting its commercial interests at serious risk of harm. As such, there is a very real risk that, without the confidentiality order, the ability of the appellant to mount a successful defence will be seriously curtailed. I conclude, therefore, that the confidentiality order would have significant salutary effects on the appellant's right to a fair trial.

72 Aside from the salutary effects on the fair trial interest, the confidentiality order would also have a beneficial impact on other important rights and interests. First, as I discuss in more detail below, the confidentiality order would allow all parties and the court access to the Confidential Documents, and permit cross-examination based on their contents. By facilitating access to relevant documents in a judicial proceeding, the order sought would assist in the search for truth, a core value underlying freedom of expression.

73 Second, I agree with the observation of Robertson J.A. that, as the Confidential Documents contain detailed technical information pertaining to the construction and design of a nuclear installation, it may be in keeping with the public interest to prevent this information from entering the public domain (para. 44). Although the exact contents of the documents remain a mystery, it is apparent that they contain technical details of a nuclear installation, and there may well be a substantial public security interest in maintaining the confidentiality of such information.

(b) Deleterious Effects of the Confidentiality Order

74 Granting the confidentiality order would have a negative effect on the open court principle, as the public would be denied access to the contents of the Confidential Documents. As stated above, the principle of open courts is inextricably tied to the s. 2(b) *Charter* right to freedom of expression, and public scrutiny of the courts is a fundamental aspect of the administration of justice: *New Brunswick, supra,* at paras. 22-23. Although as a *general* principle, the importance of open courts cannot be overstated, it is necessary to examine, in the context of this case, the *particular* deleterious effects on freedom of expression that the confidentiality order would have.

75 Underlying freedom of expression are the core values of (1) seeking the truth and the common good, (2) promoting self-fulfilment of individuals by allowing them to develop thoughts and ideas as they see fit, and (3) ensuring that participation in the political process is open to all persons: *Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 S.C.R. 927 (S.C.C.), at p. 976, *R. v. Keegstra*, [1990] 3 S.C.R. 697 (S.C.C.), *per* Dickson C.J., at pp. 762-764. *Charter* jurisprudence has established that the closer the speech in question lies to these core values, the harder it will be to justify a s. 2(b) infringement of that speech under s. 1 of the *Charter*: *Keegstra*, *supra*, at pp. 760-761. Since the main goal in this case is to exercise judicial discretion in a way which conforms to *Charter* principles, a discussion of the deleterious effects of the confidentiality order on freedom of expression should include an assessment of the effects such an order would have on the three core values. The more detrimental the order would be to these values, the more difficult it will be to justify the confidentiality order. Similarly, minor effects of the order on the core values will make the confidentiality order easier to justify.

76 Seeking the truth is not only at the core of freedom of expression, but it has also been recognized as a fundamental purpose behind the open court rule, as the open examination of witnesses promotes an effective evidentiary process: *Edmonton Journal*, *supra*, *per* Wilson J., at pp. 1357-1358. Clearly, the confidentiality order, by denying public and media access to documents relied on in the proceedings, would impede the search for truth to some extent. Although the order would not exclude the public from the courtroom, the public and the media would be denied access to documents relevant to the evidentiary process.

77 However, as mentioned above, to some extent the search for truth may actually be *promoted* by the confidentiality order. This motion arises as a result of Sierra Club's argument that it must have access to the Confidential Documents in order to test the accuracy of Dr. Pang's evidence. If the order is denied, then the most likely scenario is that the appellant will not submit the documents, with the unfortunate result that evidence which may be relevant to the proceedings will not be available to Sierra Club or the court. As a result, Sierra Club will not be able to fully test the accuracy of Dr. Pang's evidence on cross-examination. In addition, the court will not have the benefit of this cross-examination or documentary evidence, and will be required to draw conclusions based on an incomplete evidentiary record. This would clearly impede the search for truth in this case.

78 As well, it is important to remember that the confidentiality order would restrict access to a relatively small number of highly technical documents. The nature of these documents is such that the general public would be unlikely to understand their contents, and thus they would contribute little to the public interest in the search for truth in this case. However, in the hands of the parties and their respective experts, the documents may be of great assistance in probing the truth of the Chinese environmental assessment process, which would, in turn, assist the court in reaching accurate factual conclusions. Given the nature of the documents, in my view, the important value of the search for truth which underlies both freedom of expression and open justice would be promoted to a greater extent by submitting the Confidential Documents under the order sought than it would by denying the order, and thereby preventing the parties and the court from relying on the documents in the course of the litigation.

79 In addition, under the terms of the order sought, the only restrictions on these documents relate to their public distribution. The Confidential Documents would be available to the court and the parties, and public access to the proceedings would not be impeded. As such, the order represents a fairly minimal intrusion into the open court rule, and thus would not have significant deleterious effects on this principle.

80 The second core value underlying freedom of speech, namely, the promotion of individual self-fulfilment by allowing open development of thoughts and ideas, focuses on individual expression, and thus does not closely relate to the open court principle which involves institutional expression. Although the confidentiality order would restrict individual access to

certain information which may be of interest to that individual, I find that this value would not be significantly affected by the confidentiality order.

81 The third core value, open participation in the political process, figures prominently in this appeal, as open justice is a fundamental aspect of a democratic society. This connection was pointed out by Cory J. in *Edmonton Journal*, *supra*, at p. 1339:

> It can be seen that freedom of expression is of fundamental importance to a democratic society. It is also essential to a democracy and crucial to the rule of law that the courts are seen to function openly. The press must be free to comment upon court proceedings to ensure that the courts are, in fact, seen by all to operate openly in the penetrating light of public scrutiny.

Although there is no doubt as to the importance of open judicial proceedings to a democratic society, there was disagreement in the courts below as to whether the weight to be assigned to the open court principle should vary depending on the nature of the proceeding.

82 On this issue, Robertson J.A. was of the view that the nature of the case and the level of media interest were irrelevant considerations. On the other hand, Evans J.A. held that the motions judge was correct in taking into account that this judicial review application was one of significant public and media interest. In my view, although the public nature of the case may be a factor which strengthens the importance of open justice in a particular case, the level of media interest should not be taken into account as an independent consideration.

83 Since cases involving public institutions will generally relate more closely to the core value of public participation in the political process, the public nature of a proceeding should be taken into consideration when assessing the merits of a confidentiality order. It is important to note that this core value will *always* be engaged where the open court principle is engaged owing to the importance of open justice to a democratic society. However, where the political process is also engaged by the *substance* of the proceedings, the connection between open proceedings and public participation in the political process will increase. As such, I agree with Evans J.A. in the court below, where he stated, at para. 87:

> While all litigation is important to the parties, and there is a public interest in ensuring the fair and appropriate adjudication of all litigation that comes before the courts, some cases raise issues that transcend the immediate interests of the parties and the general public interest in the due administration of justice, and have a much wider public interest significance.

84 This motion relates to an application for judicial review of a decision by the government to fund a nuclear energy project. Such an application is clearly of a public nature, as it relates to the distribution of public funds in relation to an issue of demonstrated public interest. Moreover, as pointed out by Evans J.A., openness and public participation are of fundamental importance under the CEAA. Indeed, by their very nature, environmental matters carry significant public import, and openness in judicial proceedings involving environmental issues will generally attract a high degree of protection. In this regard, I agree with Evans J.A. that the public interest is engaged here more than it would be if this were an action between private parties relating to purely private interests.

85 However, with respect, to the extent that Evans J.A. relied on media interest as an indicium of public interest, this was an error. In my view, it is important to distinguish *public* interest from *media* interest, and I agree with Robertson J.A. that

media exposure cannot be viewed as an impartial measure of public interest. It is the public *nature* of the proceedings which increases the need for openness, and this public nature is not necessarily reflected by the media desire to probe the facts of the case. I reiterate the caution given by Dickson C.J. in *Keegstra*, *supra*, at p. 760, where he stated that, while the speech in question must be examined in light of its relation to the core values," we must guard carefully against judging expression according to its popularity."

86 Although the public interest in open access to the judicial review application *as a whole* is substantial, in my view, it is also important to bear in mind the nature and scope of the information for which the order is sought in assigning weight to the public interest. With respect, the motions judge erred in failing to consider the narrow scope of the order when he considered the public interest in disclosure, and consequently attached excessive weight to this factor. In this connection, I respectfully disagree with the following conclusion of Evans J.A., at para. 97:

> Thus, having considered the nature of this litigation, and having assessed the extent of public interest in the openness of the proceedings in the case before him, the Motions Judge cannot be said in all the circumstances to have given this factor undue weight, even though confidentiality is claimed for only three documents among the small mountain of paper filed in this case, and their content is likely to be beyond the comprehension of all but those equipped with the necessary technical expertise.

Open justice is a fundamentally important principle, particularly when the substance of the proceedings is public in nature. However, this does not detract from the duty to attach weight to this principle in accordance with the specific limitations on openness that the confidentiality order would have. As Wilson J. observed in *Edmonton Journal*, *supra*, at pp. 1353-1354:

> One thing seems clear and that is that one should not balance one value at large and the conflicting value in its context. To do so could well be to pre-judge the issue by placing more weight on the value developed at large than is appropriate in the context of the case.

87 In my view, it is important that, although there is significant public interest in these proceedings, open access to the judicial review application would be only slightly impeded by the order sought. The narrow scope of the order coupled with the highly technical nature of the Confidential Documents significantly temper the deleterious effects the confidentiality order would have on the public interest in open courts.

88 In addressing the effects that the confidentiality order would have on freedom of expression, it should also be borne in mind that the appellant may not have to raise defences under the CEAA, in which case the Confidential Documents would be irrelevant to the proceedings, with the result that freedom of expression would be unaffected by the order. However, since the necessity of the Confidential Documents will not be determined for some time, in the absence of a confidentiality order, the appellant would be left with the choice of either submitting the documents in breach of its obligations or withholding the documents in the hopes that either it will not have to present a defence under the CEAA or that it will be able to mount a successful defence in the absence of these relevant documents. If it chooses the former option, and the defences under the CEAA are later found not to apply, then the appellant will have suffered the prejudice of having its confidential and sensitive information released into the public domain with no corresponding benefit to the public. Although this scenario is far from certain, the possibility of such an occurrence also weighs in favour of granting the order sought.

89 In coming to this conclusion, I note that if the appellant is not required to invoke the relevant defences under the CEAA, it is also true that the appellant's fair trial right will not be impeded, even if the confidentiality order is not granted. However, I do not take this into account as a factor which weighs in favour of denying the order because, if the order is

granted and the Confidential Documents are not required, there will be no deleterious effects on *either* the public interest in freedom of expression *or* the appellant's commercial interests or fair trial right. This neutral result is in contrast with the scenario discussed above where the order is denied and the possibility arises that the appellant's commercial interests will be prejudiced with no corresponding public benefit. As a result, the fact that the Confidential Documents may not be required is a factor which weighs in favour of granting the confidentiality order.

90 In summary, the core freedom of expression values of seeking the truth and promoting an open political process are most closely linked to the principle of open courts, and most affected by an order restricting that openness. However, in the context of this case, the confidentiality order would only marginally impede, and in some respects would even promote, the pursuit of these values. As such, the order would not have significant deleterious effects on freedom of expression.

VII. Conclusion

91 In balancing the various rights and interests engaged, I note that the confidentiality order would have substantial salutary effects on the appellant's right to a fair trial, and freedom of expression. On the other hand, the deleterious effects of the confidentiality order on the principle of open courts and freedom of expression would be minimal. In addition, if the order is not granted and in the course of the judicial review application the appellant is not required to mount a defence under the CEAA, there is a possibility that the appellant will have suffered the harm of having disclosed confidential information in breach of its obligations with no corresponding benefit to the right of the public to freedom of expression. As a result, I find that the salutary effects of the order outweigh its deleterious effects, and the order should be granted.

92 Consequently, I would allow the appeal with costs throughout, set aside the judgment of the Federal Court of Appeal, and grant the confidentiality order on the terms requested by the appellant under R. 151 of the *Federal Court Rules, 1998*.

Appeal allowed.

Pourvoi accueilli.

End of Document

TAB 13

2013 ONSC 7009
Ontario Superior Court of Justice [Commercial List]

Elleway Acquisitions Ltd. v. 4358376 Canada Inc.

2013 CarswellOnt 16849, 2013 ONSC 7009, 235 A.C.W.S. (3d) 602, 7 C.B.R. (6th) 25

In the Matter of an Application Pursuant to Section 243 of the Bankruptcy and Insolvency Act, R.S.C. 1985, c.B-3, as Amended, and Section 101 of the Courts of Justice Act, R.S.O. 1990, c.C.43, as Amended

Elleway Acquisitions Limited Applicant and 4358376 Canada Inc. (Operating as Itravel 2000.com), The Cruise Professionals Limited (Operating as the Cruise Professionals), and 7500106 Canada Inc. (Operating as Travelcash) Respondents

Morawetz J.

Heard: November 4, 2013
Judgment: November 4, 2013
Docket: CV-13-10320-00CL

Counsel: Jay Swartz, Natalie Renner for Applicant
John N. Birch for Respondents
David Bish, Lee Cassey for Grant Thornton, Proposed Receiver

Subject: Insolvency; Civil Practice and Procedure

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Bankruptcy and insolvency --- Receivers — Miscellaneous

Sale of Assets — On November 4, 2013, receiver was appointed over assets, property and undertaking of number of related companies — Receiver brought motion for order approving entry by receiver into three asset purchase agreements ("APAs") — APAs provided for sale of assets as going concern and retention of almost all employees — Motion granted — Court was satisfied that economic realities of business vulnerability and financial position of companies militated in favour of approval of issuance of orders — Approval of orders and consummation of sale transactions to purchasers pursuant to APAs was warranted as best way to provide recovery for senior secured lender of companies and with sole economic interest in assets — Sale process was fair and reasonable, and sale transactions was

only means of providing maximum realization of purchased assets under current circumstances — Fact that purchasers may have some relationship to companies did not preclude approval of orders provided that receiver verified that process was performed in good faith — Receiver was of view that market for purchased assets was sufficiently canvassed through sales and marketing processes and that purchase prices under APAs were fair and reasonable under current circumstances.

Table of Authorities

Statutes considered:

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

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

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

Courts of Justice Act, R.S.O. 1990, c. C.43
s. 100 — considered

MOTION by receiver for order approving entry by receiver into three asset purchase agreements.

***Morawetz J.*:**

1 At the conclusion of argument on November 4, 2013, the motion was granted with reasons to follow. These are the reasons.

2 On November 4, 2013, Grant Thornton Limited was appointed as Receiver (the "Receiver") of the assets, property and undertaking of each of 4358376 Canada Inc., (operating as itravel 2000.com ("itravel")), 7500106 Canada Inc., (operating as Travelcash ("Travelcash")), and The Cruise Professionals Limited, operating as The Cruise Professionals ("Cruise" and, together with itravel 2000 and Travelcash, "itravel Canada"). See reasons reported at 2013 ONSC 6866.

3 The Receiver seeks the following:

(i) an order:

(a) approving the entry by the Receiver into an asset purchase agreement (the "itravel APA") between the Receiver and 8635919 Canada Inc. (the "itravel Purchaser") dated on or about the date of the order, and attached as Confidential Appendix I of the First Report of the Receiver dated on or about the date of the order (the "Report");

(b) approving the transactions contemplated by the itravel APA;

(c) vesting in the itravel Purchaser all of the Receiver's right, title and interest in and to the "Purchased Assets" (as defined in the itravel APA) (collectively, the "itravel Assets"); and

(d) sealing the itravel APA until the completion of the sale transaction contemplated thereunder; and

(ii) an order:

(a) approving the entry by the Receiver into an asset purchase agreement (the "Cruise APA", and together with the itravel APA and the Travelcash APA, the "APAs") between the Receiver and 8635854 Canada Inc. (the "Cruise Purchaser"), and together with the itravel Purchaser and the Travelcash Purchaser, the "Purchasers") dated on or about the date of the order, and attached as Confidential Appendix 2 of the Report;

(b) approving the transactions contemplated by the Cruise APA; and

(c) vesting the Cruise Purchaser all of the Receiver's right, title and interest in and to the "Purchased Assets" (as defined in the Cruise APA) (the "Cruise Assets", and together with the itravel Assets and the Travelcash Assets, the "Purchased Assets"); and

(d) sealing the Cruise APA until the completion of the sales transaction contemplated thereunder; and

(iii) an order:

(a) approving the entry by the Receiver into an asset purchase agreement (the "Travelcash APA") between the Receiver and 1775305 Alberta Ltd. (the "Travelcash Purchaser") dated on or about the date of the order, and attached as Confidential Appendix 3 of the Report;

(b) approving the transactions contemplated by the Travelcash APA;

(c) vesting in the Travelcash Purchaser all of the Receiver's right, title and interest in and to the "Purchased Assets" (as defined in the Travelcash APA) (collectively, the "Travelcash Assets"); and

(d) sealing the Travelcash APA until the completion of the sale transaction contemplated thereunder.

4 The Receiver further requests a sealing order: (i) permanently sealing the valuation reports prepared by Ernst & Young LLP and FTI Consulting LLP, attached as Confidential Appendices 4 and 5 of the Report, respectively; and (ii) sealing the Proposed Receiver's supplemental report to the court dated on or about the date of the order (the "Supplemental Report"), for the duration requested and reasons set forth therein.

5 The motion was not opposed. It was specifically noted that Mr. Jonathan Carroll, former CEO of itravel, did not object to the relief sought.

6 The Receiver recommends issuance of the Orders for the factual and legal bases set forth herein and in its motion

record. The purchase and sale transactions contemplated under the APAs (collectively, the "Sale Transactions") are conditional upon the Orders being issued by this court.

General Background

7 Much of the factual background to this motion is set out in the endorsement which resulted in the appointment of the Receiver (2013 ONSC 6866), and is not repeated.

8 The Receiver has filed the Report to provide the court with the background, basis for, and its recommendation in respect of the relief requested. The Receiver has also filed the Supplemental Report (on a confidential basis) as further support for the relief requested herein.

9 In the summer of 2010, Barclays Bank PLC ("Barclays") approached Travelzest and stated that it no longer wished to act as the primary lender of Travelzest and its subsidiaries, as a result of certain covenant breaches under the Credit Agreement. This prompted Travelzest to consider and implement where possible, strategic restructuring arrangements, including the divestiture of assets and refinancing initiatives.

10 In September 2010, Travelzest publicly announced its intention to find a buyer for the Travelzest business.

Travelzest's Further Sales and Marketing Processes

11 In the fall of 2011, a competitor of itravel Canada contacted Travelzest and expressed an interest in acquiring the Travelzest portfolio. Negotiations ensued over a period of three months. However, the parties could not agree on a Purchase Price or terms, and negotiations ceased in December 2011.

12 In early 2012, an informal restructuring plan was developed, which included the sale of international companies.

13 The first management offer was received in April 2012. In addition, a sales process continued from May to October 2012, which involved 50 potential bidders within the industry. Counsel advised that 14 parties pursued the opportunity and four parties were provided with access to the data room. Four offers were ultimately made but none were deemed to be feasible, insofar as two were too low, one withdrew and the management offer was withdrawn after equity backers were lost.

14 In September 2012, a second management offer was received, which was subsequently amended in November 2012. The second management offer did not proceed.

15 In January 2013, discussions ended and the independent committee was disbanded.

16 In March and April 2013, three Canadian financial institutions were approached about a refinancing. However, no acceptable term sheet was obtained.

17 In May 2013, Travelzest entered into new discussions with a prior bidder from a previous sales process. Terms could not be reached.

18 In May 2013, a third management offer was received which was followed by a fourth management offer in July, both of which were rejected.

19 In July 2013, a press release confirmed that Barclays was not renewing its credit facilities with the result that the obligations became payable on July 12, 2013. However, Barclays agreed to support restructuring efforts until August 30, 2013.

20 In August 2013, a fifth management offer was made for the assets of itravel Canada, which included limited funding for liabilities. This offer was apparently below the consideration offered in the previous management offers. The value of the offer was also significantly lower than the Barclays' indebtedness and lower than the aggregate amount of the current offer from the Purchasers.

Barclays' Assignment of the Indebtedness to Elleway

21 On August 21, 2013, a consortium led by LDC Logistics Development Corporation ("LDC"), which included Elleway (collectively, the "Consortium") submitted an offer for Barclays debt and security, as opposed to the assets of Itravel Canada. On August 29, 2013, Elleway and Barclays finalized the assignment deal, which was concluded on September 1, 2013.

22 The consideration paid by Elleway was less than the amount owing to Barclays. Barclays determined, with the advice of KPMG London, that the sale of its debt and security, albeit at a significant discount, was the best available option at the time.

23 itravel Canada is insolvent. Elleway has agreed pursuant to the Working Capital Facility agreement to provide the necessary funding for itravel Canada up to and including the date for a court hearing to consider the within motion. However, if a sale is not approved, there is no funding commitment from Elleway.

Proposed Sale of Assets

24 The Receiver and the Purchasers have negotiated the APAs which provide for the going-concern purchase of substantially all of the itravel Canada's assets, subject to the terms and conditions therein. The purchase prices under the APAs for the Purchased Assets will be comprised of a reduction of a portion of the indebtedness owed by Elleway under the Credit Agreement and entire amount owed under the Working Capital Facility Agreement and related guarantees, and the assumption by the Purchasers of the Assumed Liabilities (as defined in each of the Purchase Agreements and which includes

all priority claims) and the assumption of any indebtedness issued under any receiver's certificates issued by the Receiver pursuant to a funding agreement between the Receiver and Elleway Properties Limited. The aggregate of the purchase prices under the APA is less the amount of the obligations owed by itravel Canada to Elleway under the Credit Agreement and Working Capital Facility Agreement and related guarantees.

25 Pursuant to the APAs, the Purchasers are to make offers to 95% of the employees of itravel Canada on substantially similar terms of such employees current employment. The Purchasers will also be assuming all obligations owed to the customers of itravel Canada.

26 In reviewing the valuation reports of FTI Consulting LLP and Ernst & Young LLP and considering the current financial position of itravel Canada, the Receiver came to the following conclusions:

(a) FTI Consulting LLP and Ernst & Young LLP concluded that under the circumstances, the itravel Canada companies' values are significantly less than the secured indebtedness owed under the Credit Agreement;

(b) Barclays, in consultation with its advisor, KPMG London, sold its debt and security for an amount lower than its par value;

(c) the book value of the itravel Canada's tangible assets are significantly less than the secured indebtedness; and

(d) Elleway has the principal financial interest in the assets of itravel Canada, subject to priority claims.

27 The Receiver is of the view that the Sale Transactions with the Purchasers are the best available option as it stabilizes itravel Canada's operations, provides for additional working capital, facilitates the employment of substantially all of the employees, continues the occupation of up to three leased premises, provides for new business to itravel Canada's existing suppliers and service providers, assumes the liability associated with pre-existing gift certificates and vouchers, allows for the uninterrupted service of customer's travel arrangements and preserves the goodwill and overall enterprise value of the Companies. In addition, the Receiver believes that the purchase prices under the APAs are fair and reasonable in the circumstances, and that any further marketing efforts to sell itravel Canada's assets may be unsuccessful and could further reduce their value and have a negative effect on operations.

28 The Receiver's request for approval of the Orders raises the following issues for this court.

A. What is the legal test for approval of the Orders?

B. Does the legal test for approval change in a so-called "quick flip" scenario?

C. Does partial payment of the purchase price through a reduction of the indebtedness owed to Elleway preclude approval of the Orders?

D. Does the Purchasers' relationship to itravel Canada preclude approval of the Orders?

E. Is a sealing of the APAs until the closing of the Sale Transactions contemplated thereunder and a permanent sealing of the FTI Consulting LLP and Ernst & Young LLP valuation and the Supplemental Report Warranted?

A. What is the Legal Test for Approval of the Orders?

29 Receivers have the powers set out in the order appointing them. Receivers are consistently granted the power to sell property of a debtor, which is, indeed, the case under the Appointment Order.

30 Under Section 100 of the *Courts of Justice Act (Ontario)*, this Court has the power to vest in any person an interest in real or personal property that the Court has authority to order be conveyed.

31 It is settled law that where a Court is asked to approve a sales process and transaction in a receivership context, the Court is to consider the following principles (collectively, the "*Soundair* Principles"):

a. whether the party made a sufficient effort to obtain the best price and to not act improvidently;

b. the interests of all parties;

c. the efficacy and integrity of the process by which the party obtained offers; and

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

Royal Bank of Canada v. Soundair Corp. (1991), 4 O.R. (3d) 1 (Ont. C.A.); *Skyepharma PLC v. Hyal Pharmaceutical Corp.* (1999), 12 C.B.R. (4th) 87 (Ont. S.C.J.) appeal quashed, (2000), 47 O.R. (3d) 234 (Ont. C.A.)).

32 In this case, I am satisfied that evidence has been presented in the Report, the Jenkins Affidavit and the Howell Affidavit, to demonstrate that each of the *Soundair* Principles has been satisfied, and that the economic realities of the business vulnerability and financial position of itravel Canada (including that the result would be no different in a further extension of the already extensive sales process) militate in favour of approval of the issuance of the Orders.

B. Does the Legal Test for Approval Change in a So-called "Quick Flip" Scenario?

33 Where court approval is being sought for a so-called "quick flip" or immediate sale (which involves, as is the case here, an already negotiated purchase agreement sought to be approved upon or immediately after the appointment of a receiver without any further marketing process), the court is still to consider the *Soundair* Principles but with specific consideration to the economic realities of the business and the specific transactions in question. In particular, courts have approved immediate sales where:

(a) an immediate sale is the only realistic way to provide maximum recovery for a creditor who stands in a clear priority of economic interest to all others; and

(b) delay of the transaction will erode the realization of the security of the creditor in sole economic interest.

Fund 321 Ltd. Partnership v. Samsys Technologies Inc. (2006), 21 C.B.R. (5th) 1 (Ont. S.C.J.); *Bank of Montreal v. Trent*

Rubber Corp. (2005), 13 C.B.R. (5th) 31 (Ont. S.C.J.).

34 In the case of *Re Tool-Plas*, I stated, in approving a "quick flip" sale that:

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

Tool-Plas Systems Inc., Re (2008), 48 C.B.R. (5th) 91 (Ont. S.C.J.).

35 Counsel submits that the parties would realistically be in no better position were an extended sales process undertaken, since the APAs are the culmination of an exhaustive marketing process that has already occurred, and there is no realistic indication that another such process (even if possible, which it is not, as itravel Canada lacks the resources to do so) would produce a more favourable outcome.

36 Counsel further submits that a "quick flip" transaction will be approved pursuant to the *Soundair* Principles, where, as in this case, there is evidence that the debtor has insufficient cash to engage in a further, extended marketing process, and there is no basis to expect that such a process will result in a better realization on the assets. Delaying the process puts in jeopardy the continued operation of itravel Canada.

37 I am satisfied that the approval of the Orders and the consummation of the Sale Transactions to the Purchasers pursuant to the APAs is warranted as the best way to provide recovery for Elleway, the senior secured lender of itravel Canada and with the sole economic interest in the assets. The sale process was fair and reasonable, and the Sale Transactions is the only means of providing the maximum realization of the Purchased Assets under the current circumstances.

C. Does Partial Payment of the Purchase Price Through a Reduction of the Indebtedness Owed to Elleway Preclude Approval of the Orders?

38 Partial payment of the purchase price by Elleway reducing a portion of the debt owed to it under the Credit Agreement and the entire amount owned under the Working Capital Facility Agreement does not preclude approval of the Orders. This mechanism is analogous to a credit bid by a secured lender, but with the Purchasers, instead of the secured lender, taking title to the purchased assets. As noted, the Receiver understands that following closing of the transactions contemplated under the APAs, that Elleway (or an affiliate thereof) will hold an indirect equity interest in the Purchasers. It is well-established in Canada insolvency law that a secured creditor is permitted to credit bid its debt in lieu of providing cash consideration.

Re White Birch Paper Holding Co. (2010), 72 C.B.R. (5th) 74 (Qc. C.A.); *Re Planet Organic Holding Corp.* (June 4, 2010), Toronto, Court File No. 10-86699-00CL, (S.C.J. [Commercial List]).

39 This court has previously approved sales involving credit bids in the receivership context. See *CCM Master Qualified Fund, Ltd., v. Blutip Power Technologies Ltd.* (April 26, 2012), Toronto, Court File No. CV-12-9622-00CL, (S.C.J. [Commercial List]).

40 It seems to me that, in these circumstances, no party is prejudiced by Elleway reducing a portion of the debt owed to it under the Credit Agreement and the entire amount owed under the Working Capital Facility Agreement as part of the Purchasers' payment of the purchase prices, as the Purchasers are assuming all claims secured by liens or encumbrances that rank in priority to Elleway's security. The reduction of the indebtedness owed to Elleway will be less than the total amount of indebtedness owed to Elleway under the Credit Agreement. As such, if cash was paid in lieu of a credit bid, such cash would all accrue to the benefit of Elleway.

41 Therefore, it seems to me the fact that a portion of the purchase price payable under the APAs is to be paid through a reduction in the indebtedness owed to Elleway does not preclude approval of the Orders.

D. Does the Purchasers' Relationship to itravel Canada preclude approval of the Orders?

42 Even if the Purchasers and itravel Canada were to be considered, out of an abundance of caution, related parties, given that LDC is an existing shareholder of Travelzest and part of the Consortium or otherwise, this does not itself preclude approval of the Orders.

43 Where a receiver seeks approval of a sale to a party related to the debtor, the receiver shall review and report on the activities of the debtor and the transparency of the process to provide sufficient detail to satisfy the court that the best result is being achieved. It is not sufficient for a receiver to accept information provided by the debtor where a related party is a purchaser; it must take steps to verify the information. See *Toronto Dominion Bank v. Canadian Starter Drives Inc.*, 2011 ONSC 8004 (Ont. S.C.J. [Commercial List]).

44 In addition, the 2009 amendments to the BIA relating to sales to related persons in a proposal proceedings (similar amendments were also made to the *Companies' Creditors Arrangement Act* (Canada)) are instructive. Section 65.13(5) of the BIA provides:

> If the proposed sale or disposition is to a person who is related to the insolvent person, the court may, after considering the factors referred to in subsection (4), grant the authorization only if it is satisfied that:
>
> (a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the insolvent person; and
>
> (b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

45 The above referenced jurisprudence and provisions of the BIA (Canada) demonstrate that a court will not preclude a sale to a party related to the debtor, but will subject the proposed sale to greater scrutiny to ensure a transparency and integrity in the marketing and sales process and require that the receiver verify information provided to it to ensure the

process was performed in good faith. In this case, the Receiver is of the view that the market for the Purchased Assets was sufficiently canvassed through the sales and marketing processes and that the purchase prices under the APAs are fair and reasonable under the current circumstances. I agree with and accept these submissions.

46 The Receiver requests that the APAs be sealed until the closing of the Sale Transactions contemplated thereunder. It is also requesting an order permanently sealing the valuation reports prepared by Ernst & Young LLP and FIT Consulting LLP and, attached as Confidential Appendices 4 and 5 of the Report, respectively.

47 The Supreme Court of Canada in *Sierra Club of Canada v. Canada (Minister of Finance)*, held that a sealing order should only be granted when:

> (a) an order is needed to prevent serious risk to an important interest because reasonable alternative measures will not prevent the risk; and
>
> (b) the salutary effects of the order outweigh its deleterious effects, including the effects on the right to free expression, which includes public interest in open and accessible court proceedings.

Sierra Club of Canada v. Canada (Minister of Finance), 2002 SCC 41, [2002] 2 S.C.R. 522, at para. 53; *Re Nortel Networks Corporation* (2009), 56 C.B.R. (5TH) 224, (Ont. S.C.J. [Commercial List]), at paras. 38-39.

48 In my view, the APAs subject to the sealing request contain highly sensitive commercial information of itravel Canada and their related businesses and operations, including, without limitation, the purchase price, lists of assets, and contracts. Courts have recognized that disclosure of this type of information in the context of a sale process could be harmful to stakeholders by undermining the integrity of the sale process. I am satisfied that the disclosure of the APAs prior to the closing of the Sale Transactions could pose a serious risk to the sale process in the event that the Sale Transactions do not close as it could jeopardize dealings with any future prospective purchasers or liquidators of itravel Canada's assets. There is no other reasonable alternative to preventing this information from becoming publicly available and the sealing request, which has been tailored to the closing of the Sale Transactions and the material terms of the APAs until the closing of the Sale Transactions, greatly outweighs the deleterious effects. For these same reasons, plus the additional reason that the valuations were provided to Travelzest on a confidential basis and only made available to Travelzest and the Receiver on the express condition that they remain confidential, the Receiver submits that the FTI Consulting LLP and Ernst & Young LLP valuations be subject to a permanent sealing order. Further, the Receiver submits that the information contained in the Supplemental Report also meets the foregoing test for the factual basis set forth in detail in the Supplemental Report (which has been filed on a confidential basis). I accept the Receiver's submissions regarding the permanent sealing order for the valuation materials. For these reasons, (i) the APA is to be sealed pending closing, and (ii) only the valuation material is to be permanently sealed.

Disposition

49 For the reasons set forth herein, the motion is granted. Orders have been signed to give effect to the foregoing.

Motion granted.

reserved.

Estate No.: 31-2008366
Court File No.: 31-2008366

IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED

AND IN THE MATTER OF THE NOTICES OF INTENTION TO MAKE A PROPOSAL OF ONE KENTON ALZHEIMER CENTER FOR EXCELLENCE (NON-PROFIT) INC.

Applicants

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

BOOK OF AUTHORITIES

(Returnable October 15, 2015)

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