Court of Appeal No.: C58425

COURT OF APPEAL FOR ONTARIO

IN THE MATTER OF AN APPLICATION UNDER Section 243 (1) 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.

B E T W E E N:

HOME TRUST COMPANY

Applicant

- and -

2122775 ONTARIO INC.

Appellant
(Respondent)

BRIEF OF AUTHORITIES OF THE APPELLANT, 2122775 ONTARIO INC.

March 4, 2014

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Court of Appeal No.: C58425

COURT OF APPEAL FOR ONTARIO

IN THE MATTER OF AN APPLICATION UNDER Section 243 (1) 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.

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4. *820099 Ontario Inc. v. Harold E. Ballard Ltd.* [1991] O.J. No. 480, 50 O.A.C. 254, (Divisional Court)

5. *N.G. v. Upper Canada College,* [2004] O.J. No. 1202 (Ont. C.A.)

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2006 CarswellAlta 735, 2006 ABCA 121, [2006] A.W.L.D. 2368, 23 C.B.R. (5th) 66, 391 A.R. 202, 377 W.A.C. 202

After Eight Interiors Inc. v. Glenwood Homes Inc.

After Eight Interiors Inc. and Gary Moore (Appellants / Respondents) and Glenwood Homes Inc. and Alger and Associates Inc. (Respondents / Applicants)

Alberta Court of Appeal [In Chambers]

A. Fruman J.A.

Heard: April 6, 2006
Judgment: April 6, 2006
Docket: Calgary Appeal 0601-0086-AC

Counsel: R.J. Gilborn, Q.C., M.G. Damm for Applicants

D.G. Kearl, C.L. Jackson (Student-at-Law) for Respondents

Subject: Civil Practice and Procedure; Insolvency

Bankruptcy and insolvency --- Practice and procedure in courts — Stay of proceedings

Bankruptcy proceedings were stayed in relation to creditors on number of occasions to permit G Inc. to present proposal — Stay might be extended to May 18 — Two transactions, worth approximately $1,000,000, were challenged by interim receiver as fraudulent preferences — Bankruptcy judge had set strict timetable for proceeding with challenges culminating in hearing scheduled for May 3-5 — Outcome of challenges would therefore be known before May 18 deadline, and could be taken into account in fashioning G Inc.'s proposal — Creditors A Inc. and M were parties to transactions being challenged — A Inc. and M raised preliminary objection before bankruptcy judge — Bankruptcy judge dismissed preliminary objection — Bankruptcy judge's reasons were reserved — A Inc. and M appealed judgment and other orders — Section 195 of Act imposes automatic stay of certain orders on filing of notice of appeal — Effect of s. 195 was to stay all proceedings to challenge fraudulent transactions until such time as appeal was heard — Interim receiver applied for lifting of stay — Application granted — It was difficult to evaluate merits of appeal in meaningful way as reasons for judgment had been reserved — This was not impediment to lifting stay because other consideration may predominate — G Inc.'s creditors would suffer irreparable harm if stay was not lifted — Balance of convenience favoured lifting stay and such order was in interests of justice — Stay of fraudulent preference proceeding was cancelled — A Inc. and M consented to lifting stay on other appealed orders and stays of those proceedings were also cancelled.

Cases considered by *A. Fruman J.A.*:

Dugas, Re (2003), (sub nom. *Dugas Estate (Bankrupt), Re*) 261 N.B.R. (2d) 99, (sub nom. *Dugas Estate (Bankrupt), Re*) 685 A.P.R. 99, 2003 CarswellNB 270, 43 C.B.R. (4th) 127 (N.B. C.A.) — considered

Kubota Canada Ltd. v. Case Credit Ltd. (2004), 4 C.B.R. (5th) 174, 34 Alta. L.R. (4th) 1, (sub nom. *DCD Industries (1995) Ltd. (Bankrupt), Re*) 346 A.R. 166, (sub nom. *DCD Industries (1995) Ltd. (Bankrupt), Re*) 320 W.A.C. 166, 2004 ABCA 41, 2004 CarswellAlta 230 (Alta. C.A.) — referred to

Metropolitan Stores (MTS) Ltd. v. Manitoba Food & Commercial Workers, Local 832 (1987), (sub nom. *Manitoba (Attorney General) v. Metropolitan Stores (M.T.S.) Ltd.*) 38 D.L.R. (4th) 321, 73 N.R. 341, 46 Man. R. (2d) 241, (sub nom. *Manitoba (Attorney General) v. Metropolitan Stores (M.T.S.) Ltd.*) 87 C.L.L.C. 14,015, 18 C.P.C. (2d) 273, (sub nom. *Manitoba (Attorney General) v. Metropolitan Stores (M.T.S.) Ltd.*) 25 Admin. L.R. 20, [1987] D.L.Q. 235, (sub nom. *Manitoba (Attorney General) v. Metropolitan Stores (M.T.S.) Ltd.*) [1987] 3 W.W.R. 1, 1987 CarswellMan 176, (sub nom. *Manitoba (Attorney General) v. Metropolitan Stores Ltd.*) [1987] 1 S.C.R. 110, 1987 CarswellMan 272 (S.C.C.) — referred to

RBI Plastique Inc. v. Sport Maska Inc. (2005), 2005 CarswellNB 739 (N.B. C.A.) — referred to

RJR-MacDonald Inc. v. Canada (Attorney General) (1994), 54 C.P.R. (3d) 114, (sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général)*) 164 N.R. 1, (sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général)*) 60 Q.A.C. 241, 111 D.L.R. (4th) 385, 1994 CarswellQue 120F, [1994] 1 S.C.R. 311, 1994 CarswellQue 120 (S.C.C.) — referred to

Toronto Dominion Bank v. Amex Bank of Canada (1996), 181 A.R. 279, 116 W.A.C. 279, 1996 CarswellAlta 297 (Alta. C.A. [In Chambers]) — considered

Whissell v. Marmot Concrete Equipment Ltd. (1996), 40 Alta. L.R. (3d) 231, 1996 CarswellAlta 382 (Alta. C.A.) — referred to

Yewdale v. Campbell, Saunders Ltd. (1994), (sub nom. *Yewdale (Bankrupt) v. Campbell, Saunders Ltd.*) 53 B.C.A.C. 235, 9 B.C.L.R. (3d) 253, [1995] 9 W.W.R. 477, 34 C.B.R. (3d) 74, (sub nom. *Yewdale (Bankrupt) v. Campbell, Saunders Ltd.*) 87 W.A.C. 235, 1994 CarswellBC 1187 (B.C. C.A.) — considered

APPLICATION by interim receiver for order lifting stay of proceedings.

***A. Fruman J.A.* (orally):**

1 The applicant, Alger & Associates Inc., is the interim receiver of Glenwood Homes Inc. Alger was appointed on December 7, 2005, under s. 47.1 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"). The bankruptcy proceedings have been stayed in relation to creditors on a number of occasions, to permit Glenwood to present a proposal. The current stay is in effect until May 5, 2006, and may be extended until May 18, 2006. Glenwood will be required to lodge a proposal before May 18, 2006, or it will be deemed to have made an assignment in bankruptcy.

2 Two Glenwood transactions, worth approximately $1,000,000 in total, are being challenged by Alger as fraudulent preferences. If these challenges are successful, the value of Glenwood's assets would be increased and the terms of its proposal to creditors could be sweetened. The bankruptcy judge has set a strict timetable for proceeding with the challenges, culminating in a hearing scheduled for May 3-5, 2006. The outcome of the challenges would therefore be known before the May 18, 2006 deadline, and could be taken into account in fashioning Glenwood's proposal to creditors.

3 The respondents in this application, After Eight Interiors Inc. and Gary Moore, are creditors of Glenwood and also are parties to the transactions being challenged. On March 10, 2006, they raised a preliminary objection before the bankruptcy judge, arguing that Alger did not have authority as interim receiver, or under s. 47.1 of the *BIA*, to challenge the transactions as fraudulent preferences. The judge dismissed the preliminary objection on March 21, 2006. Her reasons are reserved and have not yet been issued. On March 31, 2006, After Eight and Moore appealed her decision on the preliminary objection, and a second order, to this Court.

4 Section 195 of the *BIA* imposes an automatic stay of certain orders on filing a notice of appeal. In this case, the effect of s. 195 is to stay all proceedings to challenge the fraudulent transactions until such time as the appeal of the preliminary objection is heard. However, s. 195 permits a Court of Appeal judge to "vary or cancel the stay ... if it appears that the appeal is not prosecuted diligently, or for such other reason as the Court of Appeal or a judge thereof may deem proper." Alger now applies for an order lifting the stay.

5 The applicant seeking a cancellation of a s. 195 stay bears the burden of establishing compelling reasons supporting a cancellation: *Yewdale v. Campbell, Saunders Ltd.* (1994), 9 B.C.L.R. (3d) 253 (B.C. C.A.) at paras. 14-15; *Dugas, Re* (2003), 261 N.B.R. (2d) 99 (N.B. C.A.) at para. 14. In the normal course, some variation of the tripartite test outlined by the Supreme Court in *Metropolitan Stores (MTS) Ltd. v. Manitoba Food & Commercial Workers, Local 832*, [1987] 1 S.C.R. 110 (S.C.C.) and *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.) is applied on stay applications. This test would involve a consideration of whether there is a serious issue to be appealed, whether the applicants would suffer irreparable harm if the stay is not lifted and whether the applicants would suffer greater harm than the respondents if the stay is not lifted.

6 However, in *Toronto Dominion Bank v. Amex Bank of Canada* (1996), 181 A.R. 279 (Alta. C.A. [In Chambers]) at paras. 7-11, Hunt J.A. noted that, while all or part of the tripartite test may be relevant, the discretion granted by s. 195 is broader. Accordingly, a contextual approach is appropriate, meriting consideration of all the facts of the case. Consistent with this approach, courts considering applications to cancel a s. 195 stay have focused on relative prejudice to the parties and the interests of justice generally: *Yewdale*, *supra* at paras. 21-27; *Dugas, Re*, *supra* at paras. 14-15; *RBI Plastique Inc. v. Sport Maska Inc.*, [2005] N.B.J. No. 542 (N.B. C.A.) at para. 4; *Whissell v. Marmot Concrete Equipment Ltd.* (1996), 40 Alta. L.R. (3d) 231 (Alta. C.A.); *Kubota Canada Ltd. v. Case Credit Ltd.*, 2004 ABCA 41 (Alta. C.A.) at paras. 17-20.

7 In this case, it is difficult to evaluate the merits of the appeal in a meaningful way, as the reasons for judgment have been reserved. However, this is not an impediment to lifting the stay because other considerations may predominate.

8 Alger contends that Glenwood's creditors would suffer irreparable harm if the stay is not lifted and the determination of the fraudulent preference challenges does not proceed. Whether or not the transactions are set aside, a decision will have a significant and material impact on the terms of the proposal Glenwood must make to its creditors by May 18, 2006. With a stay in place, the challenges cannot be decided, a proposal cannot be made before the May 18, 2006 deadline, and Glenwood will be deemed to have made an assignment in bankruptcy. Creditors, and particularly unsecured creditors, will be prejudiced. While it is possible that the fraudulent preferences could be challenged in the bankruptcy proceedings, there is no guarantee that the trustee or an individual creditor would do so, and no assurance that unsecured creditors would share in the proceeds, should the challenges be successful.

9 After Eight and Moore note that a pronouncement on their preliminary objection concerning the interim receiver's jurisdiction to mount the challenges is of significant importance. They contend that lifting the stay and allowing a determination of the fraudulent preferences to proceed would render any appeal judgment on the preliminary objection nugatory. However, lifting the stay will not diminish the significance of a judgment. After Eight's and Moore's appeal would not be delayed or hampered, nor would an appeal judgment on that issue be hollow. If they are

successful on appeal, the bankruptcy judge's determination of the fraudulent preferences would be set aside. While After Eight and Moore would incur unnecessary costs defending the fraudulent preference challenges, these are quantifiable, monetary costs, and their recovery could be ordered. Moreover, there is actually a possibility of economy, as appeals from the dismissal of the preliminary objection and from the decision on the fraudulent preferences (should the decision be appealed), could be consolidated, heard at the same time and based on one set of appeal documents.

10 After Eight and Moore also suggest that, instead of proceeding with the challenges at this time, Glenwood could make a conditional proposal to creditors, setting out different allocations depending on whether the challenges are or are not successful. The difficulty is that the challenges are not an all or nothing proposition; all, part of, or none of either transaction could be set aside, making for a myriad of financial possibilities and introducing unnecessary complexity into the proposal. Additionally, creditors would be placed in a position of uncertainty because they might support the proposal if the transactions were set aside, but be willing to assign the company into bankruptcy if they were not. In this case, given the value of the transactions compared to the value of Glenwood's other assets, this would be prejudicial to creditors.

11 After Eight and Moore also assert that it is unfair to use Glenwood's assets to fund litigation that has not been approved by a majority of creditors, which is the way litigation would be handled in bankruptcy proceedings. However, the interim receivership process is court-supervised, and After Eight and Moore have already complained about this use of funds to the bankruptcy judge. They contested an interim payment of costs to the receiver on that basis, and have appealed the bankruptcy judge's order for an interim payment that includes costs incurred in connection with challenging the alleged fraudulent transactions. That issue will be dealt with in due course by the Court of Appeal and there is no immediate prejudice to After Eight and Moore.

12 I conclude that Glenwood's creditors would suffer irreparable harm if the stay is not lifted, the balance of convenience favours lifting the stay and such an order is in the interests of justice. Accordingly, I order that the stay of the fraudulent preference proceedings be cancelled. I note that After Eight and Moore consent to lifting the stay on the other orders they have appealed, namely the May 8, 2006 extension order and the payment out of $300,000, and the stays of those proceedings are also cancelled.

Application granted.

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1994 CarswellQue 120, [1994] 1 S.C.R. 311, 111 D.L.R. (4th) 385, 54 C.P.R. (3d) 114, (sub nom. RJR-MacDonald Inc. c. Canada (Procureur général)) 164 N.R. 1 , 60 Q.A.C. 241, 171 N.R. 402, 171 N.R. 402 (note), J.E. 94-423, 46 A.C.W.S. (3d) 40

1994 CarswellQue 120, [1994] 1 S.C.R. 311, 111 D.L.R. (4th) 385, 54 C.P.R. (3d) 114, (sub nom. RJR-MacDonald Inc. c. Canada (Procureur général)) 164 N.R. 1 , 60 Q.A.C. 241, 171 N.R. 402, 171 N.R. 402 (note), J.E. 94-423, 46 A.C.W.S. (3d) 40

RJR — MacDonald Inc. v. Canada

RJR — MacDonald Inc., Applicant v. The Attorney General of Canada, Respondent and The Attorney General of Quebec, Mis-en-cause and The Heart and Stroke Foundation of Canada, the Canadian Cancer Society, the Canadian Council on Smoking and Health, and Physicians for a Smoke-Free Canada, Interveners on the application for interlocutory relief

Imperial Tobacco Ltd., Applicant v. The Attorney General of Canada, Respondent and The Attorney General of Quebec, Mis-en-cause and The Heart and Stroke Foundation of Canada, the Canadian Cancer Society, the Canadian Council on Smoking and Health, and Physicians for a Smoke-Free Canada, Interveners on the application for interlocutory relief

Supreme Court of Canada

Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

Judgment: October 4, 1993
Judgment: March 3, 1994
Docket: 23460, 23490

Proceedings: Applications for Interlocutory Relief

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Subject: Constitutional; Intellectual Property; Civil Practice and Procedure; Public; Property

Injunctions --- Injunctions involving Crown — Miscellaneous injunctions.

Injunctions --- Availability of injunctions — Public interest.

1994 CarswellQue 120, [1994] 1 S.C.R. 311, 111 D.L.R. (4th) 385, 54 C.P.R. (3d) 114, (sub nom. RJR-MacDonald Inc. c. Canada (Procureur général)) 164 N.R. 1 , 60 Q.A.C. 241, 171 N.R. 402, 171 N.R. 402 (note), J.E. 94-423, 46 A.C.W.S. (3d) 40

Injunctions --- Availability of injunctions — Need to show irreparable injury.

Injunctions --- Availability of injunctions — Interim, interlocutory and permanent injunctions — Balance of convenience — Restraint of governmental acts.

Practice --- Practice on appeal — Appeal to Supreme Court of Canada — Stay pending appeal.

Jurisdiction of Supreme Court of Canada to stay implementation of regulations pending appeal — Distinction between suspension of and exemption from regulations irrelevant — Tobacco Products Control Act, S.C. 1988, c. 20 — Supreme Court Act, R.S.C. 1985, c. S-26, s. 65.1 — Can R. 27.

Applicants challenged the constitutional validity of the Tobacco Products Control Act, which regulated the advertisement of tobacco products and health warnings on those products. The Court of Appeal found the legislation to be constitutional. Before a decision on applicants' leave applications in the main action was made, applicants applied to the Supreme Court of Canada for a stay from compliance with the new packaging requirements pursuant to s. 65.1 of the Supreme Court Act, or, in the event that leave was granted, pursuant to R. 27. A preliminary issue of jurisdiction was raised. Held, the Court had jurisdiction to grant such relief but the applications for stays were dismissed. The phrase "other relief" in R. 27 was broad enough to permit the Court to defer enforcement of regulations that were not in existence when the appeal judgment was rendered, and could apply even though leave to appeal was not yet granted. S. 65.1 was to be interpreted as conferring the same broad powers as R. 27. The Court had to be able to intervene not only against the direct dictates of a judgment, but also against its effects. Even if the relief requested by applicants was for the suspension of the regulation rather than for an exemption from it, jurisdiction to grant such relief existed, as a distinction between such cases was only to be made after jurisdiction was otherwise established.

Application for stay of compliance with new tobacco packaging regulations — Tobacco Products Control Act, S.C. 1988, c. 20.

Applicants challenged the constitutional validity of the Act, which regulated the advertisement of tobacco products and health warnings on those products. The Court of Appeal found the legislation to be constitutional. Before a decision on applicants' leave applications in the main action was made, applicants applied to the Supreme Court of Canada for a stay from compliance with the new packaging requirements. Held, the applications for stays were dismissed. The same test was to be applied to applications for interlocutory injunctions and stays in both private law and Charter cases. The case clearly raised serious questions of law and the expenditures which the new regulations required would impose irreparable harm on applicants if the stay were denied and the main action were successful. However, in determining the balance of convenience, any economic hardship suffered by applicants could be avoided by passing it on to tobacco purchasers. Public interest had to be taken into account. Public interest consideration carried less weight in exemption cases than in suspension cases, the present case being of the latter type. The only possible public interest in continuing current packaging requirements was that the price of cigarettes for smokers would not increase. This increase would be slight and would carry little weight when balanced against the undeniable public interest in health protection from medical problems attributable to smoking.

Applicants challenged the constitutional validity of the Act, which regulated the advertisement of tobacco products and health warnings on those products. The Court of Appeal found the legislation to be constitutional. Before a decision on applicants' leave applications in the main action was made, applicants applied to the Supreme Court of Canada for a stay from compliance with the new packaging requirements. Held, the applications for stays were dismissed. The same test was to be applied to applications for interlocutory injunctions and stays in both private law and Charter cases. The case clearly raised serious questions of law. Where the government was the unsuccessful party in a constitutional claim, a plaintiff faced a much more difficult task in establishing constitutional liability and obtaining monetary redress. The expenditures which the new regulations required would therefore impose irreparable harm on

1994 CarswellQue 120, [1994] 1 S.C.R. 311, 111 D.L.R. (4th) 385, 54 C.P.R. (3d) 114, (sub nom. RJR-MacDonald Inc. c. Canada (Procureur général)) 164 N.R. 1 , 60 Q.A.C. 241, 171 N.R. 402, 171 N.R. 402 (note), J.E. 94-423, 46 A.C.W.S. (3d) 40

applicants if the stay were denied and the main action were successful. However, in determining the balance of convenience, any economic hardship suffered by applicants could be avoided by passing it on to tobacco purchasers. The only possible public interest in continuing current packaging requirements was that the price of cigarettes for smokers would not increase. This increase would be slight and would carry little weight when balanced against the undeniable public interest in health protection from medical problems attributable to smoking.

Applicants challenged the constitutional validity of the Act, which regulated the advertisement of tobacco products and health warnings on those products. The Court of Appeal found the legislation to be constitutional. Before a decision on applicants' leave applications in the main action was made, applicants applied to the Supreme Court of Canada for a stay from compliance with the new packaging requirements. Held, the applications for stays were dismissed. The same test was to be applied to applications for interlocutory injunctions and stays in both private law and Charter cases. The case clearly raised serious questions of law and the expenditures which the new regulations required would impose irreparable harm on applicants if the stay were denied and the main action were successful. However, in determining the balance of convenience, any economic hardship suffered by applicants could be avoided by passing it on to tobacco purchasers. The only possible public interest in continuing current packaging requirements was that the price of cigarettes for smokers would not increase. This increase would be slight and would carry little weight when balanced against the undeniable public interest in health protection from medical problems attributable to smoking.

Jurisdiction to stay implementation of regulations pending appeal — Distinction between suspension of and exemption from regulations irrelevant — Tobacco Products Control Act, S.C. 1988, c. 20 — Supreme Court Act, R.S.C. 1985, c. S-26, s. 65.1 — Can. R. 27.

Applicants challenged the constitutional validity of the Tobacco Products Control Act, which regulated the advertisement of tobacco products and health warnings on those products. The Court of Appeal found the legislation to be constitutional. Before a decision on applicants' leave applications in the main action was made, applicants applied to the Supreme Court of Canada for a stay from compliance with the new packaging requirements pursuant to s. 65.1 of the Supreme Court Act or, in the event that leave was granted, pursuant to R. 27. A preliminary issue of jurisdiction was raised. Held, the Court had jurisdiction to grant such relief but the applications for stays were dismissed. The phrase "other relief" in R. 27 was broad enough to permit the Court to defer enforcement of regulations that were not in existence when the appeal judgment was rendered, and could apply even though leave to appeal was not yet granted. S. 65.1 was to be interpreted as conferring the same broad powers as R. 27. The Court had to be able to intervene not only against the direct dictates of a judgment, but also against its effects. Even if the relief requested by applicants was for the suspension of the regulation rather than for an exemption from it, jurisdiction to grant such relief existed, as a distinction between such cases was only to be made after jurisdiction was otherwise established.

The judgment of the Court on the applications for interlocutory relief was delivered by *Sopinka and Cory JJ.*:

I. Factual Background

1 These applications for relief from compliance with certain *Tobacco Products Control Regulations, amendment* , SOR/93-389 as interlocutory relief are ancillary to a larger challenge to regulatory legislation which will soon be heard by this Court.

2 The *Tobacco Products Control Act* , R.S.C., 1985, c. 14 (4th Supp.), S.C. 1988, c. 20, came into force on January 1, 1989. The purpose of the Act is to regulate the advertisement of tobacco products and the health warnings which must be placed upon tobacco products.

3 The first part of the *Tobacco Products Control Act* , particularly ss. 4 to 8, prohibits the advertisement of tobacco products and any other form of activity designed to encourage their sale. Section 9 regulates the labelling of tobacco

1994 CarswellQue 120, [1994] 1 S.C.R. 311, 111 D.L.R. (4th) 385, 54 C.P.R. (3d) 114, (sub nom. RJR-MacDonald Inc. c. Canada (Procureur général)) 164 N.R. 1 , 60 Q.A.C. 241, 171 N.R. 402, 171 N.R. 402 (note), J.E. 94-423, 46 A.C.W.S. (3d) 40

products, and provides that health messages must be carried on all tobacco packages in accordance with the regulations passed pursuant to the Act.

4 Sections 11 to 16 of the Act deal with enforcement and provide for the designation of tobacco product inspectors who are granted search and seizure powers. Section 17 authorizes the Governor in Council to make regulations under the Act. Section 17(*f*) authorizes the Governor in Council to adopt regulations prescribing "the content, position, configuration, size and prominence" of the mandatory health messages. Section 18(1)(*b*) of the Act indicates that infringements may be prosecuted by indictment, and upon conviction provides for a penalty by way of a fine not to exceed $100,000, imprisonment for up to one year, or both.

5 Each of the applicants challenged the constitutional validity of the *Tobacco Products Control Act* on the grounds that it is *ultra vires* the Parliament of Canada and invalid as it violates s. 2(*b*) of the *Canadian Charter of Rights and Freedoms* . The two cases were heard together and decided on common evidence.

6 On July 26, 1991, Chabot J. of the Quebec Superior Court granted the applicants' motions, [1991] R.J.Q. 2260, 82 D.L.R. (4th) 449 , finding that the Act was *ultra vires* the Parliament of Canada and that it contravened the *Charter* . The respondent appealed to the Quebec Court of Appeal. Before the Court of Appeal rendered judgment, the applicants applied to this court for interlocutory relief in the form of an order that they would not have to comply with certain provisions of the Act for a period of 60 days following judgment in the Court of Appeal.

7 Up to that point, the applicants had complied with all provisions in the *Tobacco Products Control Act* . However, under the Act, the complete prohibition on all point of sale advertising was not due to come into force until December 31, 1992. The applicants estimated that it would take them approximately 60 days to dismantle all of their advertising displays in stores. They argued that, with the benefit of a Superior Court judgment declaring the Act unconstitutional, they should not be required to take any steps to dismantle their displays until such time as the Court of Appeal might eventually hold the legislation to be valid. On the motion the Court of Appeal held that the penalties for non-compliance with the ban on point of sale advertising could not be enforced against the applicants until such time as the Court of Appeal had released its decision on the merits. The court refused, however, to stay the enforcement of the provisions for a period of 60 days following a judgment validating the Act.

8 On January 15, 1993, the Court of Appeal for Quebec, [1993] R.J.Q. 375, 102 D.L.R. (4th) 289 , allowed the respondent's appeal, Brossard J.A. dissenting in part. The Court unanimously held that the Act was not *ultra vires* the government of Canada. The Court of Appeal accepted that the Act infringed s. 2(*b*) of the *Charter* but found, Brossard J.A. dissenting on this aspect, that it was justified under s. 1 of the *Charter* . Brossard J.A. agreed with the majority with respect to the requirement of unattributed package warnings (that is to say the warning was not to be attributed to the Federal Government) but found that the ban on advertising was not justified under s. 1 of the *Charter* . The applicants filed an application for leave to appeal the judgment of the Quebec Court of Appeal to this Court.

9 On August 11, 1993, the Governor in Council published amendments to the regulations dated July 21, 1993, under the Act: *Tobacco Products Control Regulations, amendment* , SOR/93-389. The amendments stipulate that larger, more prominent health warnings must be placed on all tobacco products packets, and that these warnings can no longer be attributed to Health and Welfare Canada. The packaging changes must be in effect within one year.

10 According to affidavits filed in support of the applicant's motion, compliance with the new regulations would require the tobacco industry to redesign all of its packaging and to purchase thousands of rotograve cylinders and embossing dies. These changes would take close to a year to effect, at a cost to the industry of about $30,000,000.

11 Before a decision on their leave applications in the main actions had been made, the applicants brought these motions for a stay pursuant to s. 65.1 of the *Supreme Court Act* , R.S.C., 1985, c. S-26 (ad. by S.C. 1990, c. 8, s. 40) or, in the event that leave was granted, pursuant to r. 27 of the *Rules of the Supreme Court of Canada* , SOR/83-74. The

1994 CarswellQue 120, [1994] 1 S.C.R. 311, 111 D.L.R. (4th) 385, 54 C.P.R. (3d) 114, (sub nom. RJR-MacDonald Inc. c. Canada (Procureur général)) 164 N.R. 1 , 60 Q.A.C. 241, 171 N.R. 402, 171 N.R. 402 (note), J.E. 94-423, 46 A.C.W.S. (3d) 40

applicants seek to stay "the judgment of the Quebec Court of Appeal delivered on January 15, 1993", but "only insofar as that judgment validates sections 3, 4, 5, 6, 7 and 10 of [the new regulations]". In effect, the applicants ask to be released from any obligation to comply with the new packaging requirements until the disposition of the main actions. The applicants further request that the stays be granted for a period of 12 months from the dismissal of the leave applications or from a decision of this Court confirming the validity of *Tobacco Products Control Act* .

12 The applicants contend that the stays requested are necessary to prevent their being required to incur considerable irrecoverable expenses as a result of the new regulations even though this Court may eventually find the enabling legislation to be constitutionally invalid.

13 The applicants' motions were heard by this Court on October 4. Leave to appeal the main actions was granted on October 14.

II. Relevant Statutory Provisions

Tobacco Products Control Act, R.S.C., 1985, c. 14 (4th Supp.), S.C. 1988, c. 20, s. 3:

14

> *3.* The purpose of this Act is to provide a legislative response to a national public health problem of substantial and pressing concern and, in particular,
>
> (*a*) to protect the health of Canadians in the light of conclusive evidence implicating tobacco use in the incidence of numerous debilitating and fatal diseases;
>
> (*b*) to protect young persons and others, to the extent that is reasonable in a free and democratic society, from inducements to use tobacco products and consequent dependence on them; and
>
> (*c*) to enhance public awareness of the hazards of tobacco use by ensuring the effective communication of pertinent information to consumers of tobacco products.

Supreme Court Act, R.S.C., 1985, c. S-26, s. 65.1 (ad. S.C. 1990, c. 8, s. 40):

15

> *65.1* The Court or a judge may, on the request of a party who has filed a notice of application for leave to appeal, order that proceedings be stayed with respect to the judgment from which leave to appeal is being sought, on such terms as to the Court or the judge seem just.

Rules of the Supreme Court of Canada, SOR/83-74, s. 27:

16

> 27. Any party against whom judgment has been given, or an order made, by the Court or any other court, may apply to the Court for a stay of execution or other relief against such a judgment or order, and the Court may give such relief upon such terms as may be just.

III. Courts Below

1994 CarswellQue 120, [1994] 1 S.C.R. 311, 111 D.L.R. (4th) 385, 54 C.P.R. (3d) 114, (sub nom. RJR-MacDonald Inc. c. Canada (Procureur général)) 164 N.R. 1 , 60 Q.A.C. 241, 171 N.R. 402, 171 N.R. 402 (note), J.E. 94-423, 46 A.C.W.S. (3d) 40

17 In order to place the applications for the stay in context it is necessary to review briefly the decisions of the courts below.

Superior Court, [1991] R.J.Q. 2260, 82 D.L.R. (4th) 449

18 Chabot J. concluded that the dominant characteristic of the *Tobacco Products Control Act* was the control of tobacco advertising and that the protection of public health was only an incidental objective of the Act. Chabot J. characterized the *Tobacco Products Control Act* as a law regulating advertising of a particular product, a matter within provincial legislative competence.

19 Chabot J. found that, with respect to s. 2(*b*) of the *Charter* , the activity prohibited by the Act was a protected activity, and that the notices required by the Regulations violated that *Charter* guarantee. He further held that the evidence demonstrated that the objective of reducing the level of consumption of tobacco products was of sufficient importance to warrant legislation restricting freedom of expression, and that the legislative objectives identified by Parliament to reduce tobacco use were a pressing and substantial concern in a free and democratic society.

20 However, in his view, the Act did not minimally impair freedom of expression, as it did not restrict itself to protecting young people from inducements to smoke, or limit itself to lifestyle advertising. Chabot J. found that the evidence submitted by the respondent in support of its contention that adver tising bans decrease consumption was unreliable and without probative value because it failed to demonstrate that any ban of tobacco advertising would be likely to bring about a reduction of tobacco consumption. Therefore, the respondent had not demonstrated that an advertising ban restricted freedom of expression as little as possible. Chabot J. further concluded that the evidence of a rational connection between the ban of Canadian advertising and the objective of reducing overall consumption of tobacco was deficient, if not non-existent. He held that the Act was a form of censorship and social engineering which was incompatible with a free and democratic society and could not be justified.

Court of Appeal (on the application for a stay)

21 In deciding whether or not to exercise its broad power under art. 523 of the *Code of Civil Procedure of Québec* to "make any order necessary to safeguard the rights of the parties", the Court of Appeal made the following observation on the nature of the relief requested:

> But what is at issue here (if the Act is found to be constitutionally valid) is the suspension of the legal effect of part of the Act and the legal duty to comply with it for 60 days, and the suspension, as well, of the power of the appropriate public authorities to enforce the Act. To suspend or delay the effect or the enforcement of a *valid* act of the legislature, particularly one purporting to relate to the protection of public health or safety is a serious matter. The courts should not lightly limit or delay the implementation or enforcement of *valid* legislation where the legislature has brought that legislation into effect. To do so would be to intrude into the legislative and the executive spheres. [Emphasis in original.]

The Court made a partial grant of the relief sought as follows:

> Since the letters of the Department of Health and Welfare and appellants' contestation both suggest the possibility that the applicants may be prosecuted under *Sec. 5* after December 31, 1992 whether or not judgment has been rendered on these appeals by that date, it seems reasonable to order the suspension of enforcement under *Sec. 5* of the Act until judgment has been rendered by this Court on the present appeals. There is, after all, a serious issue as to the validity of the Act, and it would be unfairly onerous to require the applicants to incur substantial expense in dismantling these point of sale displays until we have resolved that issue.

1994 CarswellQue 120, [1994] 1 S.C.R. 311, 111 D.L.R. (4th) 385, 54 C.P.R. (3d) 114, (sub nom. RJR-MacDonald Inc. c. Canada (Procureur général)) 164 N.R. 1 , 60 Q.A.C. 241, 171 N.R. 402, 171 N.R. 402 (note), J.E. 94-423, 46 A.C.W.S. (3d) 40

> We see no basis, however, for ordering a stay of the coming into effect of the Act for 60 days following our judgment on the appeals.
>
> . . . . .
>
> Indeed, given the public interest aspect of the Act, which purports to be concerned with the protection of public health, if the Act were found to be valid, there is excellent reason why its effect and enforcement should not be suspended (*A.G. of Manitoba v. Metropolitan Stores (MTS) Ltd.*, [1987] 1 S.C.R. 110 , 127, 135). [Emphasis in original.]

Court of Appeal (on the validity of the legislation), [1993] R.J.Q. 375, 102 D.L.R. (4th) 289

1. LeBel J.A. (for the majority)

22 LeBel J.A. characterized the *Tobacco Products Control Act* as legislation relating to public health. He also found that it was valid as legislation enacted for the peace, order and good government of Canada.

23 LeBel J.A. applied the criteria set out in *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401 , and concluded that the Act satisfied the "national concern" test and could properly rest on a purely theoretical, unproven link between tobacco advertising and the overall consumption of tobacco.

24 LeBel J.A. agreed with Brossard J.A. that the Act infringed freedom of expression pursuant to s. 2(*b*) of the *Charter* but found that it was justified under s. 1 of the *Charter* . LeBel J.A. concluded that Chabot J. erred in his findings of fact in failing to recognize that the rational connection and minimal impairment branches of the *Oakes* test have been attenuated by later decisions of the Supreme Court of Canada. He found that the s. 1 test was satisfied since there was a possibility that prohibiting tobacco advertising might lead to a reduction in tobacco consumption, based on the mere existence of a [Translation] "body of opinion" favourable to the adoption of a ban. Further he found that the Act appeared to be consistent with minimal impairment as it did not prohibit consumption, did not prohibit foreign advertising and did not preclude the possibility of obtaining information about tobacco products.

2. Brossard J.A. (dissenting in part)

25 Brossard J.A. agreed with LeBel J.A. that the *Tobacco Products Control Act* should be characterized as public health legislation and that the Act satisfied the "national concern" branch of the peace, order and good government power.

26 However, he did not think that the violation of s. 2(*b*) of the *Charter* could be justified. He reviewed the evidence and found that it did not demonstrate the existence of a connection or even the possibility of a connection between an advertising ban and the use of tobacco. It was his opinion that it must be shown on a balance of probabilities that it was at least possible that the goals sought would be achieved. He also disagreed that the Act met the minimal impairment requirement since in his view the Act's objectives could be met by restricting advertising without the need for a total prohibition.

IV. Jurisdiction

27 A preliminary question was raised as to this Court's jurisdiction to grant the relief requested by the applicants. Both the Attorney General of Canada and the interveners on the stay (several health organizations, i.e., the Heart and Stroke Foundation of Canada, the Canadian Cancer Society, the Canadian Council on Smoking and Health, and Physicians for a Smoke-Free Canada) argued that this Court lacks jurisdiction to order a stay of execution or of the

1994 CarswellQue 120, [1994] 1 S.C.R. 311, 111 D.L.R. (4th) 385, 54 C.P.R. (3d) 114, (sub nom. RJR-MacDonald Inc. c. Canada (Procureur général)) 164 N.R. 1 , 60 Q.A.C. 241, 171 N.R. 402, 171 N.R. 402 (note), J.E. 94-423, 46 A.C.W.S. (3d) 40

proceedings which would relieve the applicants of the obligation of complying with the new regulations. Several arguments were advanced in support of this position.

28 First, the Attorney General argued that neither the old nor the new regulations dealing with the health messages were in issue before the lower courts and, as such, the applicants' requests for a stay truly cloaks requests to have this Court exercise an original jurisdiction over the matter. Second, he contended that the judgment of the Quebec Court of Appeal is not subject to execution given that it only declared that the Act was *intra vires* s. 91 of the *Constitution Act, 1867* and justified under s. 1 of the *Charter* . Because the lower court decision amounts to a declaration, there is, therefore, no "proceeding" that can be stayed. Finally, the Attorney General characterized the applicants' requests as being requests for a suspension by anticipation of the 12-month delay in which the new regulations will become effective so that the applicants can continue to sell tobacco products for an extended period in packages containing the health warnings required by the present regulations. He claimed that this Court has no jurisdiction to suspend the operation of the new regulations.

29 The interveners supported and elaborated on these submissions. They also submitted that r. 27 could not apply because leave to appeal had not been granted. In any event, they argued that the words "or other relief" are not broad enough to permit this Court to defer enforcement of regulations that were not even in existence at the time the appeal judgment was rendered.

30 The powers of the Supreme Court of Canada to grant relief in this kind of proceeding are contained in s. 65.1 of the *Supreme Court Act* and r. 27 of the *Rules of the Supreme Court of Canada* .

Supreme Court Act

31

> *65.1* The Court or a judge may, on the request of a party who has filed a notice of application for leave to appeal, order that proceedings be stayed with respect to the judgment from which leave to appeal is being sought, on such terms as to the Court or the judge seem just.

Rules of the Supreme Court of Canada

32

> 27. Any party against whom judgment has been given, or an order made, by the Court or any other court, may apply to the Court for a stay of execution or other relief against such a judgment or order, and the Court may give such relief upon such terms as may be just.

33 Rule 27 and its predecessor have existed in substantially the same form since at least 1888 (see *Rules of the Supreme Court of Canada* , 1888, General Order No. 85(17)). Its broad language reflects the language of s. 97 of the Act whence the Court derives its rule-making power. Subsection (1)(*a*) of that section provides that the rules may be enacted:

> *97.* ...
>
> > (*a*) for regulating the procedure of and in the Court and the bringing of cases before it from courts appealed from or otherwise, and for the effectual execution and working of this Act and the attainment of the intention and objects thereof;

1994 CarswellQue 120, [1994] 1 S.C.R. 311, 111 D.L.R. (4th) 385, 54 C.P.R. (3d) 114, (sub nom. RJR-MacDonald Inc. c. Canada (Procureur général)) 164 N.R. 1 , 60 Q.A.C. 241, 171 N.R. 402, 171 N.R. 402 (note), J.E. 94-423, 46 A.C.W.S. (3d) 40

Although the point is now academic, leave to appeal having been granted, we would not read into the rule the limitations suggested by the interveners. Neither the words of the rule nor s. 97 contain such limitations. In our opinion, in interpreting the language of the rule, regard should be had to its purpose, which is best expressed in the terms of the empowering section: to facilitate the "bringing of cases" before the Court "for the effectual execution and working of this Act". To achieve its purpose the rule can neither be limited to cases in which leave to appeal has already been granted nor be interpreted narrowly to apply only to an order stopping or arresting execution of the Court's process by a third party or freezing the judicial proceeding which is the subject matter of the judgment in appeal. Examples of the former, traditionally described as stays of execution, are contained in the subsections of s. 65 of the Act which have been held to be limited to preventing the intervention of a third party such as a sheriff but not the enforcement of an order directed to a party. See *Keable v. Attorney General (Can.)*, [1978] 2 S.C.R. 135 . The stopping or freezing of all proceedings is traditionally referred to as a stay of proceedings. See *Battle Creek Toasted Corn Flake Co. v. Kellogg Toasted Corn Flake Co.* (1924), 55 O.L.R. 127 (C.A.) . Such relief can be granted pursuant to this Court's powers in r. 27 or s. 65.1 of the Act.

34 Moreover, we cannot agree that the adoption of s. 65.1 in 1992 (S.C. 1990, c. 8, s. 40) was intended to limit the Court's powers under r. 27. The purpose of that amendment was to enable a single judge to exercise the jurisdiction to grant stays in circumstances in which, before the amendment, a stay could be granted by the Court. Section 65.1 should, therefore, be interpreted to confer the same broad powers that are included in r. 27.

35 In light of the foregoing and bearing in mind in particular the language of s. 97 of the Act we cannot agree with the first two points raised by the Attorney General that this Court is unable to grant a stay as requested by the applicants. We are of the view that the Court is empowered, pursuant to both s. 65.1 and r. 27, not only to grant a stay of execution and of proceedings in the traditional sense, but also to make any order that preserves matters between the parties in a state that will prevent prejudice as far as possible pending resolution by the Court of the controversy, so as to enable the Court to render a meaningful and effective judgment. The Court must be able to intervene not only against the direct dictates of the judgment but also against its effects. This means that the Court must have jurisdiction to enjoin conduct on the part of a party in reliance on the judgment which, if carried out, would tend to negate or diminish the effect of the judgment of this Court. In this case, the new regulations constitute conduct under a law that has been declared constitutional by the lower courts.

36 This, in our opinion, is the view taken by this Court in *Labatt Breweries of Canada Ltd. v. Attorney General of Canada*, [1980] 1 S.C.R. 594 . The appellant Labatt, in circumstances similar to those in this case, sought to suspend enforcement of regulations which were attacked by it in an action for a declaration that the regulations were inapplicable to Labatt's product. The Federal Court of Appeal reversed a lower court finding in favour of Labatt. Labatt applied for a stay pending an appeal to this Court. Although the parties had apparently agreed to the terms of an order suspending further proceedings, Laskin C.J. dealt with the issue of jurisdiction, an issue that apparently was contested notwithstanding the agreement. The Chief Justice, speaking for the Court, determined that the Court was empowered to make an order suspending the enforcement of the impugned regulation by the Department of Consumer and Corporate Affairs. At page 600, Laskin C.J. responded as follows to arguments advanced on the traditional approach to the power to grant a stay:

> It was contended that the Rule relates to judgments or orders of this Court and not to judgments or orders of the Court appealed from. Its formulation appears to me to be inconsistent with such a limitation. Nor do I think that the position of the respondent that there is no judgment against the appellant to be stayed is a tenable one. Even if it be so, there is certainly an order against the appellant. *Moreover, I do not think that the words of Rule 126, authorizing this Court to grant relief against an adverse order, should be read so narrowly as to invite only intervention directly against the order and not against its effect while an appeal against it is pending in this Court.* I am of the opinion, therefore, that the appellant is entitled to apply for interlocutory relief against the operation of the order dismissing its declaratory action, and that this Court may grant relief on such terms as may be just. [Emphasis added.]

1994 CarswellQue 120, [1994] 1 S.C.R. 311, 111 D.L.R. (4th) 385, 54 C.P.R. (3d) 114, (sub nom. RJR-MacDonald Inc. c. Canada (Procureur général)) 164 N.R. 1 , 60 Q.A.C. 241, 171 N.R. 402, 171 N.R. 402 (note), J.E. 94-423, 46 A.C.W.S. (3d) 40

37 While the above passage appears to answer the submission of the respondents on this motion that *Labatt* was distinguishable because the Court acted on a consent order, the matter was put beyond doubt by the following additional statement of Laskin C.J. at p. 601:

> Although I am of the opinion that Rule 126 applies to support the making of an order of the kind here agreed to by counsel for the parties, I would not wish it to be taken that this Court is otherwise without power to prevent proceedings pending before it from being aborted by unilateral action by one of the parties pending final determination of an appeal.

Indeed, an examination of the factums filed by the parties to the motion in *Labatt* reveals that while it was agreed that the dispute would be resolved by an application for a declaration, it was not agreed that pending resolution of the dispute the enforcement of the regulations would be stayed.

38 In our view, this Court has jurisdiction to grant the relief requested by the applicants. This is the case even if the applicants' requests for relief are for "suspension" of the regulation rather than "exemption" from it. To hold otherwise would be inconsistent with this Court's finding in *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*, [1987] 1 S.C.R. 110 . In that case, the distinction between "suspension" and "exemption" cases is made only after jurisdiction has been otherwise established and the public interest is being weighed against the interests of the applicant seeking the stay of proceedings. While "suspension" is a power that, as is stressed below, must be exercised sparingly, this is achieved by applying the criteria in *Metropolitan Stores* strictly and not by a restrictive interpretation of this Court's jurisdiction. Therefore, the final argument of the Attorney General on the issue of jurisdiction also fails.

39 Finally, if jurisdiction under s. 65.1 of the Act and r. 27 were wanting, we would be prepared to find jurisdiction in s. 24(1) of the *Charter* . A *Charter* remedy should not be defeated due to a deficiency in the ancillary procedural powers of the Court to preserve the rights of the parties pending a final resolution of constitutional rights.

V. Grounds for Stay of Proceedings

40 The applicants rely upon the following grounds:

> 1. The challenged *Tobacco Products Control Regulations, amendment* were promulgated pursuant to ss. 9 and 17 of the *Tobacco Products Control Act* , S.C. 1988, c. 20.
>
> 2. The applicants have applied to this Court for leave to appeal a judgment of the Quebec Court of Appeal dated January 15, 1993. The Court of Appeal overturned a decision of the Quebec Superior Court declaring certain sections of the Act to be beyond the powers of the Parliament of Canada and an unjustifiable violation of the *Canadian Charter of Rights and Freedoms* .
>
> 3. The effect of the new regulations is such that the applicants will be obliged to incur substantial unrecoverable expenses in carrying out a complete redesign of all its packaging before this Court will have ruled on the constitutional validity of the enabling legislation and, if this Court restores the judgment of the Superior Court, will incur the same expenses a second time should they wish to restore their packages to the present design.
>
> 4. The tests for granting of a stay are met in this case:
>
> (i) There is a serious constitutional issue to be determined.
>
> (ii) Compliance with the new regulations will cause irreparable harm.

1994 CarswellQue 120, [1994] 1 S.C.R. 311, 111 D.L.R. (4th) 385, 54 C.P.R. (3d) 114, (sub nom. RJR-MacDonald Inc. c. Canada (Procureur général)) 164 N.R. 1 , 60 Q.A.C. 241, 171 N.R. 402, 171 N.R. 402 (note), J.E. 94-423, 46 A.C.W.S. (3d) 40

> (iii) The balance of convenience, taking into account the public interest, favours retaining the status quo until this court has disposed of the legal issues.

VI. Analysis

41 The primary issue to be decided on these motions is whether the applicants should be granted the interlocutory relief they seek. The applicants are only entitled to this relief if they can satisfy the test laid down in *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd., supra* . If not, the applicants will have to comply with the new regulations, at least until such time as a decision is rendered in the main actions.

A. Interlocutory Injunctions, Stays of Proceedings and the Charter

42 The applicants ask this Court to delay the legal effect of regulations which have already been enacted and to prevent public authorities from enforcing them. They further seek to be protected from enforcement of the regulations for a 12-month period even if the enabling legislation is eventually found to be constitutionally valid. The relief sought is significant and its effects far reaching. A careful balancing process must be undertaken.

43 On one hand, courts must be sensitive to and cautious of making rulings which deprive legislation enacted by elected officials of its effect.

44 On the other hand, the *Charter* charges the courts with the responsibility of safeguarding fundamental rights. For the courts to insist rigidly that all legislation be enforced to the letter until the moment that it is struck down as unconstitutional might in some instances be to condone the most blatant violation of *Charter* rights. Such a practice would undermine the spirit and purpose of the *Charter* and might encourage a government to prolong unduly final resolution of the dispute.

45 Are there, then, special considerations or tests which must be applied by the courts when *Charter* violations are alleged and the interim relief which is sought involves the execution and enforceability of legislation?

46 Generally, the same principles should be applied by a court whether the remedy sought is an injunction or a stay. In *Metropolitan Stores* , at p. 127, Beetz J. expressed the position in these words:

> A stay of proceedings and an interlocutory injunction are remedies of the same nature. In the absence of a different test prescribed by statute, they have sufficient characteristics in common to be governed by the same rules and the courts have rightly tended to apply to the granting of interlocutory stay the principles which they follow with respect to interlocutory injunctions.

47 We would add only that here the applicants are requesting both interlocutory (pending disposition of the appeal) and interim (for a period of one year following such disposition) relief. We will use the broader term "interlocutory relief" to describe the hybrid nature of the relief sought. The same principles apply to both forms of relief.

48 *Metropolitan Stores* adopted a three-stage test for courts to apply when considering an application for either a stay or an interlocutory injunction. First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits. It may be helpful to consider each aspect of the test and then apply it to the facts presented in these cases.

B. The Strength of the Plaintiff's Case

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49 Prior to the decision of the House of Lords in *American Cyanamid Co. v. Ethicon Ltd.*, [1975] A.C. 396 , an applicant for interlocutory relief was required to demonstrate a "strong *prima facie* case" on the merits in order to satisfy the first test. In *American Cyanamid* , however, Lord Diplock stated that an applicant need no longer demonstrate a strong *prima facie* case. Rather it would suffice if he or she could satisfy the court that "the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried". The *American Cyanamid* standard is now generally accepted by the Canadian courts, subject to the occasional reversion to a stricter standard: see Robert J. Sharpe, *Injunctions and Specific Performance* (2nd ed. 1992), at pp. 2-13 to 2-20.

50 In *Metropolitan Stores* , Beetz J. advanced several reasons why the *American Cyanamid* test rather than any more stringent review of the merits is appropriate in *Charter* cases. These included the difficulties involved in deciding complex factual and legal issues based upon the limited evidence available in an interlocutory proceeding, the impracticality of undertaking a s. 1 analysis at that stage, and the risk that a tentative determination on the merits would be made in the absence of complete pleadings or prior to the notification of any Attorneys General.

51 The respondent here raised the possibility that the current status of the main action required the applicants to demonstrate something more than "a serious question to be tried." The respondent relied upon the following *dicta* of this Court in *Laboratoire Pentagone Ltée v. Parke, Davis & Co.*, [1968] S.C.R. 269 , at p. 272:

> The burden upon the appellant is much greater than it would be if the injunction were interlocutory. In such a case the Court must consider the balance of convenience as between the parties, because the matter has not yet come to trial. In the present case we are being asked to suspend the operation of a judgment of the Court of Appeal, delivered after full consideration of the merits. It is not sufficient to justify such an order being made to urge that the impact of the injunction upon the appellant would be greater than the impact of its suspension upon the respondent.

To the same effect were the comments of Kelly J.A. in *Adrian Messenger Services v. The Jockey Club Ltd. (No. 2)* (1972), 2 O.R. 619 (C.A.) , at p. 620:

> Unlike the situation prevailing before trial, where the competing allegations of the parties are unresolved, on an application for an interim injunction pending an appeal from the dismissal of the action the defendant has a judgment of the Court in its favour. Even conceding the ever-present possibility of the reversal of that judgment on appeal, it will in my view be in a comparatively rare case that the Court will interfere to confer upon a plaintiff, even on an interim basis, the very right to which the trial Court has held he is not entitled.

And, most recently, of Philp J. in *Bear Island Foundation v. Ontario* (1989), 70 O.R. (2d) 574 (H.C.) , at p. 576:

> While I accept that the issue of title to these lands is a serious issue, it has been resolved by trial and by appeal. The reason for the Supreme Court of Canada granting leave is unknown and will not be known until they hear the appeal and render judgment. There is not before me at this time, therefore, a serious or substantial issue to be tried. It has already been tried and appealed. No attempt to stop harvesting was made by the present plaintiffs before trial, nor before the appeal before the Court of Appeal of Ontario. The issue is no longer an issue at trial.

52 According to the respondent, such statements suggest that once a decision has been rendered on the merits at trial, either the burden upon an applicant for interlocutory relief increases, or the applicant can no longer obtain such relief. While it might be possible to distinguish the above authorities on the basis that in the present case the trial judge agreed with the applicant's position, it is not necessary to do so. Whether or not these statements reflect the state of the law in private applications for interlocutory relief, which may well be open to question, they have no application in *Charter* cases.

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53 The *Charter* protects fundamental rights and freedoms. The importance of the interests which, the applicants allege, have been adversely affected require every court faced with an alleged *Charter* violation to review the matter carefully. This is so even when other courts have concluded that no *Charter* breach has occurred. Furthermore, the complex nature of most constitutional rights means that a motions court will rarely have the time to engage in the requisite extensive analysis of the merits of the applicant's claim. This is true of any application for interlocutory relief whether or not a trial has been conducted. It follows that we are in complete agreement with the conclusion of Beetz J. in *Metropolitan Stores* , at p. 128, that "the *American Cyanamid* 'serious question' formulation is sufficient in a constitutional case where, as indicated below in these reasons, the public interest is taken into consideration in the balance of convenience."

54 What then are the indicators of "a serious question to be tried"? There are no specific requirements which must be met in order to satisfy this test. The threshold is a low one. The judge on the application must make a preliminary assessment of the merits of the case. The decision of a lower court judge on the merits of the *Charter* claim is a relevant but not necessarily conclusive indication that the issues raised in an appeal are serious: see *Metropolitan Stores, supra* , at p. 150. Similarly, a decision by an appellate court to grant leave on the merits indicates that serious questions are raised, but a refusal of leave in a case which raises the same issues cannot automatically be taken as an indication of the lack of strength of the merits.

55 Once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if of the opinion that the plaintiff is unlikely to succeed at trial. A prolonged examination of the merits is generally neither necessary nor desirable.

56 Two exceptions apply to the general rule that a judge should not engage in an extensive review of the merits. The first arises when the result of the interlocutory motion will in effect amount to a final determination of the action. This will be the case either when the right which the applicant seeks to protect can only be exercised immediately or not at all, or when the result of the application will impose such hardship on one party as to remove any potential benefit from proceeding to trial. Indeed Lord Diplock modified the *American Cyanamid* principle in such a situation in N.W.L. Ltd. v. Woods, [1979] 1 W.L.R. 1294 , at p. 1307:

> Where, however, the grant or refusal of the interlocutory injunction will have the practical effect of putting an end to the action because the harm that will have been already caused to the losing party by its grant or its refusal is complete and of a kind for which money cannot constitute any worthwhile recompense, the degree of likelihood that the plaintiff would have succeeded in establishing his right to an injunction if the action had gone to trial is a factor to be brought into the balance by the judge in weighing the risks that injustice may result from his deciding the application one way rather than the other.

Cases in which the applicant seeks to restrain picketing may well fall within the scope of this exception. Several cases indicate that this exception is already applied to some extent in Canada.

57 In *Trieger v. Canadian Broadcasting Corp.* (1988), 54 D.L.R. (4th) 143 (Ont. H.C.) , the leader of the Green Party applied for an interlocutory mandatory injunction allowing him to participate in a party leaders' debate to be televised within a few days of the hearing. The applicant's only real interest was in being permitted to participate in the debate, not in any subsequent declaration of his rights. Campbell J. refused the application, stating at p. 152:

> This is not the sort of relief that should be granted on an interlocutory application of this kind. The legal issues involved are complex and I am not satisfied that the applicant has demonstrated there is a serious issue to be tried *in the sense of a case with enough legal merit* to justify the extraordinary intervention of this court in making the order sought without any trial at all. [Emphasis added.]

58 In *Tremblay v. Daigle*, [1989] 2 S.C.R. 530 , the appellant Daigle was appealing an interlocutory injunction

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granted by the Quebec Superior Court enjoining her from having an abortion. In view of the advanced state of the appellant's pregnancy, this Court went beyond the issue of whether or not the interlocutory injunction should be discharged and immediately rendered a decision on the merits of the case.

59 The circumstances in which this exception will apply are rare. When it does, a more extensive review of the merits of the case must be undertaken. Then when the second and third stages of the test are considered and applied the anticipated result on the merits should be borne in mind.

60 The second exception to the *American Cyanamid* prohibition on an extensive review of the merits arises when the question of constitutionality presents itself as a simple question of law alone. This was recognized by Beetz J. in *Metropolitan Stores* , at p. 133:

> There may be rare cases where the question of constitutionality will present itself as a simple question of law alone which can be finally settled by a motion judge. A theoretical example which comes to mind is one where Parliament or a legislature would purport to pass a law imposing the beliefs of a state religion. Such a law would violate s. 2(*a*) of the *Canadian Charter of Rights and Freedoms* , could not possibly be saved under s. 1 of the *Charter* and might perhaps be struck down right away; see *Attorney General of Quebec v. Quebec Association of Protestant School Boards*, [1984] 2 S.C.R. 66 , at p. 88. It is trite to say that these cases are exceptional.

A judge faced with an application which falls within the extremely narrow confines of this second exception need not consider the second or third tests since the existence of irreparable harm or the location of the balance of convenience are irrelevant inasmuch as the constitutional issue is finally determined and a stay is unnecessary.

61 The suggestion has been made in the private law context that a third exception to the *American Cyanamid* "serious question to be tried" standard should be recognized in cases where the factual record is largely settled prior to the application being made. Thus in *Dialadex Communications Inc. v. Crammond* (1987), 34 D.L.R. (4th) 392 (Ont. H.C.) , at p. 396, it was held that:

> Where the facts are not substantially in dispute, the plaintiffs must be able to establish a strong *prima facie* case and must show that they will suffer irreparable harm if the injunction is not granted. If there are facts in dispute, a lesser standard must be met. In that case, the plaintiffs must show that their case is not a frivolous one and there is a substantial question to be tried, and that, on the balance of convenience, an injunction should be granted.

To the extent that this exception exists at all, it should not be applied in *Charter* cases. Even if the facts upon which the *Charter* breach is alleged are not in dispute, all of the evidence upon which the s. 1 issue must be decided may not be before the motions court. Furthermore, at this stage an appellate court will not normally have the time to consider even a complete factual record properly. It follows that a motions court should not attempt to undertake the careful analysis required for a consideration of s. 1 in an interlocutory proceeding.

C. Irreparable Harm

62 Beetz J. determined in *Metropolitan Stores* , at p. 128, that "[t]he second test consists in deciding whether the litigant who seeks the interlocutory injunction would, unless the injunction is granted, suffer irreparable harm". The harm which might be suffered by the respondent, should the relief sought be granted, has been considered by some courts at this stage. We are of the opinion that this is more appropriately dealt with in the third part of the analysis. Any alleged harm to the public interest should also be considered at that stage.

63 At this stage the only issue to be decided is whether a refusal to grant relief could so adversely affect the applicants' own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application.

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64 "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. Examples of the former include instances where one party will be put out of business by the court's decision (*R.L. Crain Inc. v. Hendry* (1988), 48 D.L.R. (4th) 228 (Sask. Q.B.)); where one party will suffer permanent market loss or irrevocable damage to its business reputation (*American Cyanamid, supra*); or where a permanent loss of natural resources will be the result when a challenged activity is not enjoined (*MacMillan Bloedel Ltd. v. Mullin*, [1985] 3 W.W.R. 577 (B.C.C.A.)). The fact that one party may be impecunious does not automatically determine the application in favour of the other party who will not ultimately be able to collect damages, although it may be a relevant consideration (*Hubbard v. Pitt*, [1976] Q.B. 142 (C.A.)).

65 The assessment of irreparable harm in interlocutory applications involving *Charter* rights is a task which will often be more difficult than a comparable assessment in a private law application. One reason for this is that the notion of irreparable harm is closely tied to the remedy of damages, but damages are not the primary remedy in *Charter* cases.

66 This Court has on several occasions accepted the principle that damages may be awarded for a breach of *Charter* rights: (see, for example, *Mills v. The Queen*, [1986] 1 S.C.R. 863 , at pp. 883, 886, 943 and 971; *Nelles v. Ontario*, [1989] 2 S.C.R. 170 , at p. 196). However, no body of jurisprudence has yet developed in respect of the principles which might govern the award of damages under s. 24(1) of the *Charter* . In light of the uncertain state of the law regarding the award of damages for a *Charter* breach, it will in most cases be impossible for a judge on an interlocutory application to determine whether adequate compensation could ever be obtained at trial. Therefore, until the law in this area has developed further, it is appropriate to assume that the financial damage which will be suffered by an applicant following a refusal of relief, even though capable of quantification, constitutes irreparable harm.

D. The Balance of Inconvenience and Public Interest Considerations

67 The third test to be applied in an application for interlocutory relief was described by Beetz J. in *Metropolitan Stores* at p. 129 as: "a determination of which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits". In light of the relatively low threshold of the first test and the difficulties in applying the test of irreparable harm in *Charter* cases, many interlocutory proceedings will be determined at this stage.

68 The factors which must be considered in assessing the "balance of inconvenience" are numerous and will vary in each individual case. In *American Cyanamid* , Lord Diplock cautioned, at p. 408, that:

> [i]t would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. These will vary from case to case.

He added, at p. 409, that "there may be many other special factors to be taken into consideration in the particular circumstances of individual cases."

69 The decision in *Metropolitan Stores* , at p. 149, made clear that in all constitutional cases the public interest is a 'special factor' which must be considered in assessing where the balance of convenience lies and which must be "given the weight it should carry." This was the approach properly followed by Blair J. of the General Division of the Ontario Court in *Ainsley Financial Corp. v. Ontario Securities Commission* (1993), 14 O.R. (3d) 280 , at pp. 303-4:

> Interlocutory injunctions involving a challenge to the constitutional validity of legislation or to the authority of a law enforcement agency stand on a different footing than ordinary cases involving claims for such relief as between private litigants. The interests of the public, which the agency is created to protect, must be taken into

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account and weighed in the balance, along with the interests of the private litigants.

1. The Public Interest

70 Some general guidelines as to the methods to be used in assessing the balance of inconvenience were elaborated by Beetz J. in *Metropolitan Stores* . A few additional points may be made. It is the "polycentric" nature of the *Charter* which requires a consideration of the public interest in determining the balance of convenience: see Jamie Cassels, "An Inconvenient Balance: The Injunction as a Charter Remedy", in J. Berryman, ed., *Remedies: Issues and Perspectives* , 1991, 271, at pp. 301-5. However, the government does not have a monopoly on the public interest. As Cassels points out at p. 303:

> While it is of utmost importance to consider the public interest in the balance of convenience, the public interest in *Charter* litigation is not unequivocal or asymmetrical in the way suggested in *Metropolitan Stores* . The Attorney General is not the exclusive representative of a monolithic "public" in *Charter* disputes, nor does the applicant always represent only an individualized claim. Most often, the applicant can also claim to represent one vision of the "public interest". Similarly, the public interest may not always gravitate in favour of enforcement of existing legislation.

71 It is, we think, appropriate that it be open to both parties in an interlocutory *Charter* proceeding to rely upon considerations of the public interest. Each party is entitled to make the court aware of the damage it might suffer prior to a decision on the merits. In addition, either the applicant or the respondent may tip the scales of convenience in its favour by demonstrating to the court a compelling public interest in the granting or refusal of the relief sought. "Public interest" includes both the concerns of society generally and the particular interests of identifiable groups.

72 We would therefore reject an approach which excludes consideration of any harm not directly suffered by a party to the application. Such was the position taken by the trial judge in *Morgentaler v. Ackroyd* (1983), 150 D.L.R. (3d) 59 (Ont. H.C.) , per Linden J., at p. 66.

> The applicants rested their argument mainly on the irreparable loss to their potential women patients, who would be unable to secure abortions if the clinic is not allowed to perform them. Even if it were established that *these women* would suffer irreparable harm, such evidence would not indicate any irreparable harm to *these applicants* , which would warrant this court issuing an injunction at their behest. [Emphasis in original.]

73 When a private applicant alleges that the public interest is at risk that harm must be demonstrated. This is since private applicants are normally presumed to be pursuing their own interests rather than those of the public at large. In considering the balance of convenience and the public interest, it does not assist an applicant to claim that a given government authority does not represent the public interest. Rather, the applicant must convince the court of the public interest benefits which will flow from the granting of the relief sought.

74 Courts have addressed the issue of the harm to the public interest which can be relied upon by a public authority in different ways. On the one hand is the view expressed by the Federal Court of Appeal in *Attorney General of Canada v. Fishing Vessel Owners' Association of B.C.*, [1985] 1 F.C. 791 , which overturned the trial judge's issuance of an injunction restraining Fisheries Officers from implementing a fishing plan adopted under the *Fisheries Act* , R.S.C. 1970, c. F-14, for several reasons, including, at p. 795:

> (b) the Judge assumed that the grant of the injunction would not cause any damage to the appellants. This was wrong. When a public authority is prevented from exercising its statutory powers, it can be said, in a case like the present one, that the public interest, of which that authority is the guardian, suffers irreparable harm.

This dictum received the guarded approval of Beetz J. in *Metropolitan Stores* at p. 139. It was applied by the Trial

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Division of the Federal Court in *Esquimalt Anglers' Association v. Canada (Minister of Fisheries and Oceans)* (1988), 21 F.T.R. 304 .

75 A contrary view was expressed by McQuaid J.A. of the P.E.I. Court of Appeal in *Island Telephone Co., Re* (1987), 67 Nfld. & P.E.I.R. 158 , who, in granting a stay of an order of the Public Utilities Commission pending appeal, stated at p. 164:

> I can see no circumstances whatsoever under which the Commission itself could be inconvenienced by a stay pending appeal. As a regulatory body, it has no vested interest, as such, in the outcome of the appeal. In fact, it is not inconceivable that it should welcome any appeal which goes especially to its jurisdiction, for thereby it is provided with clear guidelines for the future, in situations where doubt may have therefore existed. The pub lic interest is equally well served, in the same sense, by any appeal....

76 In our view, the concept of inconvenience should be widely construed in *Charter* cases. In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant. This is partly a function of the nature of the public authority and partly a function of the action sought to be enjoined. The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility. Once these minimal requirements have been met, the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action.

77 A court should not, as a general rule, attempt to ascertain whether actual harm would result from the restraint sought. To do so would in effect require judicial inquiry into whether the government is governing well, since it implies the possibility that the government action does not have the effect of promoting the public interest and that the restraint of the action would therefore not harm the public interest. The *Charter* does not give the courts a licence to evaluate the effectiveness of government action, but only to restrain it where it encroaches upon fundamental rights.

78 Consideration of the public interest may also be influenced by other factors. In *Metropolitan Stores.*, it was observed that public interest considerations will weigh more heavily in a "suspension" case than in an "exemption" case. The reason for this is that the public interest is much less likely to be detrimentally affected when a discrete and limited number of applicants are exempted from the application of certain provisions of a law than when the application of certain provisions of a law is suspended entirely. See *Black v. Law Society of Alberta* (1983), 144 D.L.R. (3d) 439 ; *Vancouver General Hospital v. Stoffman* (1985), 23 D.L.R. (4th) 146 ; *Rio Hotel Ltd. v. Commission des licences et permis d'alcool*, [1986] 2 S.C.R. ix .

79 Similarly, even in suspension cases, a court may be able to provide some relief if it can sufficiently limit the scope of the applicant's request for relief so that the general public interest in the continued application of the law is not affected. Thus in *Ontario Jockey Club v. Smith* (1922), 22 O.W.N. 373 (H.C.) , the court restrained the enforcement of an impugned taxation statute against the applicant but ordered him to pay an amount equivalent to the tax into court pending the disposition of the main action.

2. The Status Quo

80 In the course of discussing the balance of convenience in *American Cyanamid* , Lord Diplock stated at p. 408 that when everything else is equal, "it is a counsel of prudence to ... preserve the status quo." This approach would seem to be of limited value in private law cases, and, although there may be exceptions, as a general rule it has no merit as such in the face of the alleged violation of fundamental rights. One of the functions of the *Charter* is to provide individuals with a tool to challenge the existing order of things or status quo. The issues have to be balanced in the manner described in these reasons.

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E. Summary

81 It may be helpful at this stage to review the factors to be considered on an application for interlocutory relief in a *Charter* case.

82 As indicated in *Metropolitan Stores* , the three-part *American Cyanamid* test should be applied to applications for interlocutory injunctions and as well for stays in both private law and *Charter* cases.

83 At the first stage, an applicant for interlocutory relief in a *Charter* case must demonstrate a serious question to be tried. Whether the test has been satisfied should be determined by a motions judge on the basis of common sense and an extremely limited review of the case on the merits. The fact that an appellate court has granted leave in the main action is, of course, a relevant and weighty consideration, as is any judgment on the merits which has been rendered, although neither is necessarily conclusive of the matter. A motions court should only go beyond a preliminary investigation of the merits when the result of the interlocutory motion will in effect amount to a final determination of the action, or when the constitutionality of a challenged statute can be determined as a pure question of law. Instances of this sort will be exceedingly rare. Unless the case on the merits is frivolous or vexatious, or the constitutionality of the statute is a pure question of law, a judge on a motion for relief must, as a general rule, consider the second and third stages of the *Metropolitan Stores* test.

84 At the second stage the applicant must convince the court that it will suffer irreparable harm if the relief is not granted. 'Irreparable' refers to the nature of the harm rather than its magnitude. In *Charter* cases, even quantifiable financial loss relied upon by an applicant may be considered irreparable harm so long as it is unclear that such loss could be recovered at the time of a decision on the merits.

85 The third branch of the test, requiring an assessment of the balance of inconvenience, will often determine the result in applications involving *Charter* rights. In addition to the damage each party alleges it will suffer, the interest of the public must be taken into account. The effect a decision on the application will have upon the public interest may be relied upon by either party. These public interest considerations will carry less weight in exemption cases than in suspension cases. When the nature and declared purpose of legislation is to promote the public interest, a motions court should not be concerned whether the legislation actually has such an effect. It must be assumed to do so. In order to overcome the assumed benefit to the public interest arising from the continued application of the legislation, the applicant who relies on the public interest must demonstrate that the suspension of the legislation would itself provide a public benefit.

86 We would add to this brief summary that, as a general rule, the same principles would apply when a government authority is the applicant in a motion for interlocutory relief. However, the issue of public interest, as an aspect of irreparable harm to the interests of the government, will be considered in the second stage. It will again be considered in the third stage when harm to the applicant is balanced with harm to the respondent including any harm to the public interest established by the latter.

VII. Application of the Principles to these Cases

A. A Serious Question to be Tried

87 The applicants contend that these cases raise several serious issues to be tried. Among these is the question of the application of the rational connection and the minimal impairment tests in order to justify the infringement upon freedom of expression occasioned by a blanket ban on tobacco advertising. On this issue, Chabot J. of the Quebec Superior Court and Brossard J.A. in dissent in the Court of Appeal held that the government had not satisfied these tests and that the ban could not be justified under s. 1 of the *Charter* . The majority of the Court of Appeal held that the ban was justified. The conflict in the reasons arises from different interpretations of the extent to which recent juri-

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sprudence has relaxed the onus fixed upon the state in *R. v. Oakes*, [1986] 1 S.C.R. 103 , to justify its action in public welfare initiatives. This Court has granted leave to hear the appeals on the merits. When faced with separate motions for interlocutory relief pertaining to these cases, the Quebec Court of Appeal stated that "[w]hatever the outcome of these appeals, they clearly raise serious constitutional issues." This observation of the Quebec Court of Appeal and the decision to grant leaves to appeal clearly indicate that these cases raise serious questions of law.

B. Irreparable Harm

88 The applicants allege that if they are not granted interlocutory relief they will be forced to spend very large sums of money immediately in order to comply with the regulations. In the event that their appeals are allowed by this Court, the applicants contend that they will not be able either to recover their costs from the government or to revert to their current packaging practices without again incurring the same expense.

89 Monetary loss of this nature will not usually amount to irreparable harm in private law cases. Where the government is the unsuccessful party in a constitutional claim, however, a plaintiff will face a much more difficult task in establishing constitutional liability and obtaining monetary redress. The expenditures which the new regulations require will therefore impose irreparable harm on the applicants if these motions are denied but the main actions are successful on appeal.

C. Balance of Inconvenience

90 Among the factors which must be considered in order to determine whether the granting or withholding of interlocutory relief would occasion greater inconvenience are the nature of the relief sought and of the harm which the parties contend they will suffer, the nature of the legislation which is under attack, and where the public interest lies.

91 The losses which the applicants would suffer should relief be denied are strictly financial in nature. The required expenditure is significant and would undoubtedly impose considerable economic hardship on the two companies. Nonetheless, as pointed out by the respondent, the applicants are large and very successful corporations, each with annual earnings well in excess of $50,000,000. They have a greater capacity to absorb any loss than would many smaller enterprises. Secondarily, assuming that the demand for cigarettes is not solely a function of price, the companies may also be able to pass on some of their losses to their customers in the form of price increases. Therefore, although the harm suffered may be irreparable, it will not affect the long-term viability of the applicants.

92 Second, the applicants are two companies who seek to be exempted from compliance with the latest regulations published under the *Tobacco Products Control Act* . On the face of the matter, this case appears to be an "exemption case" as that phrase was used by Beetz J. in *Metropolitan Stores* . However, since there are only three tobacco producing companies operating in Canada, the application really is in the nature of a "suspension case". The applicants admitted in argument that they were in effect seeking to suspend the application of the new regulations to all tobacco producing companies in Canada for a period of one year following the judgment of this Court on the merits. The result of these motions will therefore affect the whole of the Canadian tobacco producing industry. Further, the impugned provisions are broad in nature. Thus it is appropriate to classify these applications as suspension cases and therefore ones in which "the public interest normally carries greater weight in favour of compliance with existing legislation" (p. 147).

93 The weight accorded to public interest concerns is partly a function of the nature of legislation generally, and partly a function of the purposes of the specific piece of legislation under attack. As Beetz J. explained, at p. 135, in *Metropolitan Stores* :

> Whether or not they are ultimately held to be constitutional, the laws which litigants seek to suspend or from which they seek to be exempted by way of interlocutory injunctive relief have been enacted by demo cratical-

1994 CarswellQue 120, [1994] 1 S.C.R. 311, 111 D.L.R. (4th) 385, 54 C.P.R. (3d) 114, (sub nom. RJR-MacDonald Inc. c. Canada (Procureur général)) 164 N.R. 1 , 60 Q.A.C. 241, 171 N.R. 402, 171 N.R. 402 (note), J.E. 94-423, 46 A.C.W.S. (3d) 40

> ly-elected legislatures and are generally passed for the common good, for instance: ... *the protection of public health* .... It seems axiomatic that the granting of interlocutory injunctive relief in most suspension cases and, up to a point, as will be seen later, in quite a few exemption cases, is susceptible temporarily to frustrate the pursuit of the common good. [Emphasis added.]

94 The regulations under attack were adopted pursuant to s. 3 of the *Tobacco Products Control Act* which states:

> *3.* The purpose of this Act is to provide a legislative response to a national public health problem of substantial and pressing concern and, in particular,
>
> (*a*) to protect the health of Canadians in the light of conclusive evidence implicating tobacco use in the incidence of numerous debilitating and fatal diseases;
>
> (*b*) to protect young persons and others, to the extent that is reasonable in a free and democratic society, from inducements to use tobacco products and consequent dependence on them; and
>
> (*c*) to enhance public awareness of the hazards of tobacco use by ensuring the effective communication of pertinent information to consumers of tobacco products.

95 The Regulatory Impact Analysis Statement, in the *Canada Gazette* , Part II, Vol. 127, No. 16, p. 3284, at p. 3285, which accompanied the regulations stated:

> The increased number and revised format of the health messages reflect the strong consensus of the public health community that the serious health hazards of using these products be more fully and effectively communicated to consumers. Support for these changes has been manifested by hundreds of letters and a number of submissions by public health groups highly critical of the initial regulatory requirements under this legislation as well as a number of Departmental studies indicating their need.

96 These are clear indications that the government passed the regulations with the intention of protecting public health and thereby furthering the public good. Further, both parties agree that past studies have shown that health warnings on tobacco product packages do have some effects in terms of increasing public awareness of the dangers of smoking and in reducing the overall incidence of smoking in our society. The applicants, however, argued strenuously that the government has not shown and cannot show that the specific requirements imposed by the impugned regulations have any positive public benefits. We do not think that such an argument assists the applicants at this interlocutory stage.

97 When the government declares that it is passing legislation in order to protect and promote public health and it is shown that the restraints which it seeks to place upon an industry are of the same nature as those which in the past have had positive public benefits, it is not for a court on an interlocutory motion to assess the actual benefits which will result from the specific terms of the legislation. That is particularly so in this case, where this very matter is one of the main issues to be resolved in the appeal. Rather, it is for the applicants to offset these public interest considerations by demonstrating a more compelling public interest in suspending the application of the legislation.

98 The applicants in these cases made no attempt to argue any public interest in the continued application of current packaging requirements rather than the new requirements. The only possible public interest is that of smokers' not having the price of a package of cigarettes increase. Such an increase is not likely to be excessive and is purely economic in nature. Therefore, any public interest in maintaining the current price of tobacco products cannot carry much weight. This is particularly so when it is balanced against the undeniable importance of the public interest in health and in the pre vention of the widespread and serious medical problems directly attributable to smoking.

1994 CarswellQue 120, [1994] 1 S.C.R. 311, 111 D.L.R. (4th) 385, 54 C.P.R. (3d) 114, (sub nom. RJR-MacDonald Inc. c. Canada (Procureur général)) 164 N.R. 1 , 60 Q.A.C. 241, 171 N.R. 402, 171 N.R. 402 (note), J.E. 94-423, 46 A.C.W.S. (3d) 40

99 The balance of inconvenience weighs strongly in favour of the respondent and is not offset by the irreparable harm that the applicants may suffer if relief is denied. The public interest in health is of such compelling importance that the applications for a stay must be dismissed with costs to the successful party on the appeal.

Applications dismissed.

Solicitors of record:

Solicitors for the applicant RJR — MacDonald Inc.: *Mackenzie, Gervais* , Montreal.

Solicitors for the applicant Imperial Tobacco Inc.: *Ogilvy, Renault* , Montreal.

Solicitors for the respondent: *Côté & Ouellet* , Montreal.

Solicitors for the interveners on the application for interlocutory relief the Heart and Stroke Foundation of Canada, the Canadian Cancer Society, the Canadian Council on Smoking and Health, and Physicians for a Smoke-Free Canada: *McCarthy, Tétrault* , Toronto.

END OF DOCUMENT

Case Name:

BDC Venture Capital Inc. v. Natural Convergence Inc.

IN THE MATTER OF an Application under Section 101 of the Courts of Justice Act, R.S.O. 1990, c. c.43, as amended, and Section 47 of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, as amended
Between
BDC Venture Capital Inc., Applicant, (Respondent in Appeal),
and
Natural Convergence Inc., Respondent, (Respondent in Appeal)

[2009] O.J. No. 3611

2009 ONCA 637

266 O.A.C. 56

180 A.C.W.S. (3d) 80

Dockets: M37941, M37942 (C50876)

Ontario Court of Appeal
Toronto, Ontario

S.E. Lang J.A.
(In Chambers)

Heard: September 1, 2009.
Judgment: September 2, 2009.

(24 paras.)

Bankruptcy and insolvency law -- Proceedings -- Practice and procedure -- Stays -- Pending concurrent proceedings -- Motion by potential purchaser of assets of bankrupt to lift stay of order approving sale allowed -- Appellant from order failed to show it would suffer irreparable harm if stay lifted, as its claim to contractual right to use certain codes of insolvent company would survive sale -- Bankruptcy and Insolvency Act, ss. 187, 195.

Corporations, partnerships and associations law -- Corporations -- Sale of a business -- Motion by potential purchaser of assets of bankrupt to lift stay of order approving sale allowed -- Appellant from order failed to show it would suffer irreparable harm if stay lifted, as its claim to contractual right to use certain codes of insolvent company would survive sale.

Motion by Broadview Networks to lift the stay of an order permitting the interim receiver of Natural Convergence to sell its assets to Broadview. BluArc Communications had appealed from the order and an automatic stay resulted. Both BluArc and Broadview had been Natural's customers before it experienced financial problems. Broadview had been providing financial assistance to Natural to keep the business going and had worked out a deal under which it would purchase the company's assets. The deal involved a no-shop clause precluding Natural from seeking other buyers. None of Natural's secured creditors opposed the asset sale, despite the fact it would provide proceeds less than that needed to satisfy Natural's total indebtedness. Once the receiver was appointed, it applied for the court's directions with respect to the asset sale. The court approved the sale to Broadview. BluArc appealed, arguing its license with Natural to use certain source codes would be interfered with if the sale was permitted to go ahead. Broadview sought a declaration that BluArc lacked standing to bring its appeal.

HELD: Motion allowed. The stay of the order permitting the sale was lifted. The judge lacked jurisdiction to decide BluArc lacked standing to bring its appeal. To do so would be tantamount to quashing its appeal. Broadview did not establish it would suffer irreparable harm if the stay was not lifted. However, BluArc failed to show it would suffer irreparable harm if the stay was lifted. It would still have contractual recourse to obtain the source codes if the sale proceeded.

Statutes, Regulations and Rules Cited:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 47, s. 187(5), s. 195, s. 244

Courts of Justice Act, R.S.O. 1990, c. C.43, s. 101

Appeal From:

On appeal from the orders of Justice Stanley J. Kershman of the Superior Court of Justice dated July 31, 2009 and on a motion and cross-motion to impose or cancel a stay pending appeal.

Counsel:

Graham D. Smith and Jason Wadden, for the moving party, Broadview Networks Inc.

Matthew J. Halpin, for the responding party, BluArc Communications Inc.

Sam Babe, for the creditor, MMV Financial Inc.

Ian B. Houle, for the interim receiver, PriceWaterhouseCoopers Inc.

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1 **S.E. LANG J.A.**:-- The moving party, Broadview Networks Inc. (Broadview), seeks relief that will allow PriceWaterhouseCoopers (PwC), the interim receiver, to sell the assets of Natural

Convergence Inc. (NCI) to Broadview. The respondent, BluArc Communications Inc. (BluArc) opposes that relief.

2 In separate orders on July 31, 2009, the application judge appointed the receiver (the Receivership Order) and ordered the asset sale to Broadview (the Sale Order). BluArc appealed from these orders. On appeal, the Orders were stayed automatically pursuant to s. 195 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (BIA). Broadview moves to cancel the stay. MMV Financial Inc. (MMV), a secured creditor, supports Broadview's motion. PwC also filed materials and made submissions on this motion.

3 All parties agreed during argument that the appeal should be expedited. Accordingly, the appeal is expedited to be heard by this court on September 10, 2009. Forty-five minutes are allotted to the appellant BluArc and 40 minutes are allotted to the respondent Broadview. The parties agree they will be able to perfect the appeal in a timely manner because their facta for this motion can be readily adapted for the purposes of the appeal. However, no party to this motion filed the material that was before the application judge or the application judge's reasons for granting the Orders. These materials must be included in the appeal book. Subject to any other order, I also note that the September 10 date may, if appropriate, allow for a panel review of this decision.

4 I am advised that BluArc is seeking a variation of the Orders pursuant to s. 187(5) of the BIA and the parties are scheduled to appear before the application judge tomorrow, September 3, 2009. BluArc advises that it will deliver its material for that motion today.

5 Although BluArc appealed both the Receivership and Sale Orders, it became clear during argument that it did not object to PwC's appointment as receiver; it merely challenged PwC's right to proceed with the asset sale. Thus, the real issue is not about the appointment of the receiver but about whether the sale proceeds pending the appeal. Broadview primarily seeks cancellation of the automatic stay of all appealed proceedings pursuant to s. 195 of the BIA. This court has a broad discretion to vary or cancel the automatic stay if "the appeal is not being prosecuted diligently, or for such other reason as the [court] may deem proper".

6 While the moving party did not abandon its secondary "abuse of process" stay argument definitively, nor its argument for a stay of the appeal, neither did it pursue these issues in oral argument. In any event, I see no abuse of process arising from BluArc's stated intention to also bring a variation motion before the application judge. Accordingly, these reasons focus on whether the s. 195 automatic stay should be cancelled in the circumstances of this case.

7 In light of the need to deliver a decision on this motion expeditiously, these reasons refer only to facts essential to the disposition. However, a brief overview will provide some context.

8 NCI developed software that enabled its licensees, including Broadview and BluArc, to sell voice-over-internet-protocol telephone support services to customers. As early as March 2008, NCI was in financial straits and began attempting to market its business or to secure financing. As a way of providing financial assistance to NCI, Broadview purchased software licences from NCI in March 2009 for approximately $444,000.

9 With financial problems continuing, on July 16, 2009, Broadview offered to purchase NCI's assets. NCI agreed with the terms. The offer included a "no shop" provision that prohibited NCI from seeking other purchasers. The offer was also said to include a premium on the purchase price.

10 On July 22, 2009, BDC Capital Inc. (BDC), a secured creditor, served a Notice of Intention to Enforce Security on NCI pursuant to s. 244 of the BIA. On July 24, 2009, Broadview provided NCI with an unsecured loan to pay its remaining employees. The remaining employees were said to be necessary to maintain the software's source code.

11 Although PwC initially asked for approval of the sale to Broadview, it apparently delivered an amended notice later on July 31 that simply asked the court for directions regarding the sale. In its accompanying report to the application judge about Broadview's offer, PwC stated that it was "uncertain as to the level of interest" that other parties expressed in buying NCI's assets and that in the "absence of contacting" other interested parties, the receiver "cannot comment on the commercial reasonableness of the Agreement". PwC sought "the Court's direction with respect to the completion of the Agreement". The application judge granted both orders.

12 While I do not have the benefit of any of the materials filed before the application judge, or the application judge's reasons, the material before me indicates that all NCI's senior secured creditors, including BDC and MMV and Comerica, agreed to the asset sale, even though the proceeds of sale would be less than NCI's total indebtedness to those creditors. No one opposed the sale. While PwC's second report, filed in this court, suggests that BDC is now amenable to a more open sale process, BDC did not appear on this motion. MMV, the only secured creditor who did appear, continues to support the Sale Order made by the application judge.

13 In any event, Broadview argues that the stay should be cancelled because BluArc has no standing to challenge the Orders that it has appealed. Broadview describes BluArc as a "bitter bidder" and argues that the test for cancellation of the stay should be based on the following discussion in *Skyepharma PLC v. Hyal Pharmaceutical Corporation*, [2000] O.J. No. 467 (C.A.):

> [14] Although the issues considered in these cases are not identical to the case at bar, the reasoning applies to the issue raised on this appeal. If an unsuccessful prospective purchaser does not acquire an interest sufficient to warrant being added as a party to a motion to approve a sale, it follows that it does not have a right that is finally disposed of by an order made on that motion.
>
> [15] There are two main reasons why an unsuccessful prospective purchaser does not have a right or interest that is affected by a sale approval order. First, a prospective purchaser has no legal or proprietary right in the property being sold. Offers are submitted in a process in which there is no requirement that a particular offer be accepted. Orders appointing receivers commonly give the receiver a discretion as to which offers to accept and to recommend to the court for approval. The duties of the receiver and the court are to ensure that the sales are in the best interests of those with an interest in the proceeds of the sale. There is no right in a party who submits an offer to have the offer, even if the highest, accepted by either the receiver or the court: Crown Trust v. Rosenberg, supra [1986] O.J. No. 2600.
>
> [16] Moreover, the fundamental purpose of the sale approval motion is to consider the best interests of the parties with a direct interest in the proceeds of the sale, primarily the creditors. The unsuccessful would be purchaser has no interest in this issue. Indeed, the involvement of unsuccessful prospective purchasers

could seriously distract from this fundamental purpose by including in the motion other issues with the potential for delay and additional expense.

[17] In making these comments, I recognize that a court conducting a sale approval motion is required to consider the integrity of the process by which the offers have been obtained and to consider whether there has been unfairness in the working out of that process. *Crown Trust v. Rosenberg, supra*; *Royal Bank of Canada v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (C.A.). The examination of the sale process will in normal circumstances be focussed on the integrity of that process from the perspective of those for whose benefit it has been conducted. The inquiry into the integrity of the process may incidentally address the fairness of the process to prospective purchasers, but that in itself does not create a right or interest in a prospective purchaser that is affected by a sale approval order.

...

[19] In limited circumstances, a prospective purchaser may become entitled to participate in a sale approval motion. For that to happen, it must be shown that the prospective purchaser acquired a legal right or interest from the circumstances of a particular sale process and that the nature of the right or interest is such that it could be adversely affected by the approval order. A commercial interest is not sufficient.

[20] There is a sound policy reason for restricting, to the extent possible, the involvement of prospective purchasers in sale approval motions. There is often a measure of urgency to complete court approved sales. This case is a good example. When unsuccessful purchasers become involved, there is a potential for greater delay and additional uncertainty. This potential may, in some situations, create commercial leverage in the hands a disappointed would be purchaser which could be counterproductive to the best interests of those for whose benefit the sale is intended.

14 Similarly, in *Consumers Packaging Inc. (Re)* (2001), 150 O.A.C. 384 (C.A.) this court stated at para. 7:

Further, despite its protestations to the contrary, it is evident that Ardagh is a disappointed bidder that obtained its security interest in the assets of Consumers in order to participate in their restructuring and obtain a controlling equity position in the restructured entity. There is authority from this court that an unsuccessful bidder has no standing to appeal or to seek leave to appeal. As a general rule, unsuccessful bidders do not have standing to challenge a motion to approve a sale to another bidder (or to appeal from an order approving the sale) because the unsuccessful bidders "have no legal or proprietary right as technically they are not affected by the order": see the statement of Farley J., dealing with a receiver's motion to approve a sale, that is quoted with approval by O'Connor J.A. of this court in *Skyepharma plc v. Hyal Pharmaceutical Corp.* (2000), 47 O.R. (3d) 234 at 238 (C.A.).

15 On the basis of these authorities, Broadview asks me to conclude that BluArc is without standing to bring its appeal and that the appeal should be stayed and the s. 195 stay lifted. Both *Skyepharma* and *Consumers Packaging* were heard by a panel of this court and not by a single judge sitting in chambers. In my view, a single judge does not have the jurisdiction in the circumstances of this case to decide that an appellant lacks standing to bring an appeal and to stay the appeal. To do so would be tantamount to quashing the appeal. A motion to quash an appeal, which may result in the final disposition of the appeal, is heard by a panel of the court.

16 An analogous situation arose in *1730960 Ontario Ltd. (Re)*, August 6, 2009, unreported (Ont. C.A. [In Chambers]). Based on *Skyepharma*, Juriansz J.A. was not satisfied in that case that the "prospective purchaser [who moved to stay a sale order] has any standing to bring this appeal". Since "the appeal is destined to be quashed", he dismissed the motion on the basis there was "no serious issue to be decided on the appeal". Juriansz J.A. would also have dismissed the motion on the basis of the merits of the appeal, irreparable harm and the balance of convenience.

17 BluArc argues that the stay should not be lifted based on the relevant criteria referenced by Juriansz J.A. in *1730960 Ontario Ltd.* and discussed in *After Eight Interiors Inc. v. Glenwood Homes Inc.* (2006), 391 A.R. 202 (C.A.) at paras. 5-6, which provides for a variation of the test set out in *RJR-MacDonald Inc. v. Canada (A.G.),* [1994] 1 S.C.R. 311. The criteria include whether there is a serious issue to be appealed, whether the moving party would suffer irreparable harm if the stay is not lifted, and whether the moving party would suffer greater harm than the responding party if the stay is not lifted. At the same time, in view of the broad discretion provided in s. 195 of the BIA, *After Eight* adopts a contextual approach.

18 A consideration of these criteria necessarily includes consideration of whether the particular appellant can succeed on the appeal. Broadview has persuaded me that, whatever the merits of the underlying issues, it is highly unlikely that BluArc has the requisite standing. BluArc is neither a creditor nor a contingent creditor. At most, BluArc is a licensee of software. As such, it is entitled to the remedies set out in its licence. That licence requires NCI to provide the software's source code for the software to an Escrow Agent (the Agent) and for the Agent to provide the source code to BluArc in certain circumstances, which may well include the circumstances that have occurred in the past month. BluArc sought the source code from the Escrow Agent. The Agent declined to provide it on the basis of an e-mail from PwC that its consent was required to any such release. Apparently, BluArc has not sought PwC's consent, which may simply be because the Receivership Order is currently stayed. In any event, both in its material and in its submissions, Broadview has taken the position that it would not interfere with the Escrow Agent's obligation to comply with the licences because the licences are not part of the assets that Broadview has agreed to purchase.

19 It follows that at its highest, BluArc has a licence agreement with NCI that, if breached, will give BluArc a potential cause of action against NCI. In my view, such a potential cause of action would not appear to warrant BluArc being added as a party to a motion to approve a sale of NCI's assets.

20 In addition, on the material before me, BluArc's main interest in the sale appears to be that of a belated and disappointed potential purchaser. It does not appear to have a legal or proprietary right to either participate in the sale process or attack that process. In coming to this conclusion, I observe that the Sale Order proceeded with the consent of all secured creditors and without opposition from any entity entitled to notice of the application.

21 In view of BluArc's agreement to fund the costs of a continuing stay pending appeal, Broadview has not persuaded me that it will suffer irreparable harm if the stay remains in force for the next eight days. However, Broadview has persuaded me that it does not appear that BluArc will suffer any undue harm if the stay is lifted. Indeed, it appears that BluArc will continue to have its contractual recourse to obtain the source codes that it claims are its primary interest. In any event, if I am wrong, it may well be that BluArc will be able to "unscramble the egg" if a panel of the court so decides next Thursday.

22 For these reasons, I dismiss the responding party's cross-motion and grant the moving party's motion to cancel the stay under s. 195 of the BIA. This disposition, of course, does not preclude the application judge from proceeding with the scheduled variation motion tomorrow. As well, since these reasons provide only a preliminary view of the matter, it does not dispose of the underlying appeal scheduled to be heard in eight days.

23 For the purposes of the appearance in this court on September 10, 2009, counsel are directed to file the appeal book and appellant's factum by 4:30 pm on Friday, September 4, 2009 and the respondent's factum by noon on Tuesday, September 8, 2009.

24 Costs of this motion are awarded to Broadview fixed in the amount of $12,000, inclusive of disbursements and GST.

S.E. LANG J.A.

cp/e/qllxr/qljxr/qlmxl/qlmlt/qljyw

Indexed as:

820099 Ontario Inc. v. Harold E. Ballard Ltd.

IN THE MATTER OF Harold E. Ballard Limited
Between
820099 Ontario Inc. and William O.S. Ballard, Applicants (Respondents in Appeal), and
Harold E. Ballard Limited, John Donald Crump, Donald P. Giffin and Steve A. Stavro as Executors of the Estate of Harold E. Ballard, John Donald Crump, Donald P. Giffin and Steve A. Stavro as Trustees of the Harold E. Ballard Trust, John Donald Crump and Donald P. Giffin, Respondents (Appellants)

[1991] O.J. No. 480

50 O.A.C. 254

49 C.P.C. (2d) 239

26 A.C.W.S. (3d) 627

Action Nos. 164/91 and RE1305/90

Ontario Court of Justice - General Division
Divisional Court - Toronto, Ontario

Montgomery J.

Heard: April 3, 1991
Judgment: April 4, 1991

(9 pp.)

Practice -- Judgments and orders -- Stay pending appeal -- Shareholders -- Relief from oppression -- Prejudice.

Application by the appellants for a stay of an order until the appeal was heard. The order was made in an application by the respondents for relief from oppression. The court found that the transactions complained of were oppressive to the respondents and the appellants were ordered to provide financial statements to the respondents and the transactions complained of were declared null and void.

HELD: Application dismissed. The refusal of a stay would not seriously prejudice the applicants, but a stay would prejudice the respondents.

STATUTES, REGULATIONS AND RULES CITED:

Business Corporations Act, 1982, S.O. 1982, c. 4, s. 247.

Bryan Finlay, Q.C., for the Applicants.
James A. Hodgson and H.M. DesBrisay, for the Respondents.

MONTGOMERY J.:-- This is a motion brought by Harold E. Ballard Limited ("HEBL"), John Donald Crump ("Crump"), Donald P. Giffin ("Giffin") and Steve A. Stavro ("Stavro") as Executors of the Estate of Harold E. Ballard (the "Estate") and Trustees of the Harold E. Ballard Trust (the "Trust"), and Crump and Giffin in their personal capacities (collectively the "Appellants") for an order staying the judgment of Mr. Justice Farley, [1991] O.J. No. 266, made March 1, 1991 in an application under section 247 of the Business Corporations Act 1982, S.O. 1982, c. 4 (the "OBCA") by William O.S. Ballard ("William") and 820099 Ontario Inc. ("820099") (collectively the "Respondents").

William is the owner of 34 common shares in the capital of HEBL. 820090 is the holder of an option to purchase the shares of HEBL owned by William and his brother Harold Jr. By notice of application issued on June 1, 1990, William and 820099 complained that between December, 1988 and April, 1990, the directors of HEBL, Harold E. Ballard ("Harold Sr."), Crump and Giffin conducted the affairs of HEBL in a manner which was oppressive and which unfairly disregarded and was unfairly prejudicial to their interests contrary to s. 247 of the OBCA. In particular, William and 820099 complained about four major transactions which affected the capital structure of HEEL.

Mr. Justice Farley found that each of the transactions about which William and 820099 had complained was oppressive. He found that there was no justification for the company's purchase of real property from Harold Sr. He found that the purpose advanced for the MLGL share transaction did not withstand scrutiny and he saw no legitimate basis for the purchase for cancellation of Harold Jr.'s shares, which burdened the company with a substantial debt which it cannot service.

At p. 151 of his reasons, Farley J. said:

> I find that there has been an aggregation of matters of which William rightly complains. Individually they cannot be excused, collectively they are overwhelming. They demand rectification. I find that I must grant the applicants [William and 820099] relief of some nature to allow them to maintain as much as possible their original position.

Mr. Justice Farley therefore ordered the following relief:

(a) audited financial statements for 1988 and 1989 were to be supplied to William with unaudited financial for 1990 and further interims until an annual meeting

was held. In addition, William was to be advised forthwith of any material changes in HEBL's financial position, on a continuous basis up to and including the date of the annual meeting;

(b) HEBL was to hold forthwith an annual meeting to elect a slate of directors made up of one nominee from William, one from the Estate (which could not be Crump or Giffin) and one neutral person to be selected by the nominees or, if they could not agree on that person, the court was to appoint someone;

(c) the real estate, MLGL share transaction and the debt cancellation were declared null and void, and the 38 common shares issued as a result of them were to be cancelled;

(d) the purchase of Harold Jr.'s shares was allowed to stand, but to reduce the debt incurred to effect it, a valuation of the assets and shares of HEBL was to commence immediately. The new board was directed to determine how much capital HEBL had to raise to pay off its pressing debts. Common shares of HEBL were then to be offered to each of William and the Estate to raise this capital.

Since the reasons for judgment of Farley J. were given on March 1st, a notice of appeal has been filed and dates fixed for hearing the appeal in the Divisional Court on June 10, 11 and 12.

On February 11th, Justice Farley granted an injunction until final disposition of the appeal which provides that HEBL shall not issue any shares or share changes or amalgamation and shall not encumber shares except in normal commercial terms to a financial institution. On February 14th, Farley J. heard an application to vary the injunction to allow a contemplated transaction between Executors.

The bona fides of the appeal is accepted and not an issue among the parties. No affidavit material was filed by the applicant.

William became a director of HEBL in 1970 and continued until December 5, 1988 when he was removed without justification and replaced by Giffin. This facilitated the three transactions which Parley J. found to be a nullity created in secret without advising William. William is a 33% shareholder in HEBL if the Farley judgment is not upheld: if it is upheld, William is a 49% shareholder in HEBL.

The only harm to the applicant if a stay is denied is that legal and accounting expense will be incurred in unwinding the three transactions Farley J. held to be void and this money would be wasted if Farley is overruled. Also, it is said that valuation would be done needlessly.

There is affidavit material before me from William expressing concern about the continued conduct of the Executors of the Estate. While I accept Mr. Finlay's argument that reliance on newspaper articles is of little or no assistance to the Court, the letter of Mr. Ted Rogers is supportive of William's concerns. If a stay is granted and the present directors of HEBL are left in place, there is reason for William to be apprehensive about changes in the board of directors of MLGL. It is clear that William still has not been kept appraised of what the Executors are doing.

In my view, a stay will create prejudice to William in not getting financial information. To date, he has not received the information ordered by Farley J. Farley J. found the oppressions overwhelming that he set up an independent board. How can such a caretaker board hurt the applicant pending appeal?

Farley J. said that Crump and Giffin could attend meetings of the caretaker board.

The principles governing the grant of a stay of judgment pending appeal were set out by Mr. Justice Middleton in Battle Creek Toasted Corn Flake Co. Ltd. v. Kellogg Toasted Corn Flake Co. (1924), 55 O.L.R. 127 (C.A.), a case dealing with an appeal to the Privy Council from a decision granting the plaintiffs an injunction restraining the defendants from selling corn flakes in Ontario. In dismissing the request for a stay of judgment pending appeal, His Lordship stated that the principles governing a grant of a stay of execution were similar to those governing the grant of an interim injunction. At page 132, His Lordship said:

> There is a wide distinction between cases in which the refusal of a stay will render an appeal nugatory, and cases in which one of the parties must suffer inconvenience and possibly some substantial pecuniary loss. I am inclined to think that it will be found that the refusal of a stay under certain circumstances does not arise from absence of jurisdiction so much as from the view taken that the case is one in which it would be improper to exercise the latent power. In all cases in which the stay will impose little suffering upon the respondent, and this can be compensated by payment of actual damages which admit of easy and substantially accurate computation and in which on the other hand grievous loss and irremediable harm will be done the appellant if the stay is refused, the operation of the judgment ought to be stayed. The principle then is the same as that applied in the case of an application for an interim injunction - the balance of convenience, with an added factor of the greatest weight, the actual adjudication that has taken place, and which must be regarded as prima facie right.

And further at 133:

> Sir W. Page Wood, S.J., in Walford v. Walford (1868), L.R. 3 Ch. 812, 814, says: "The usual course is to stay proceedings pending an appeal only when the proceedings would cause irreparable injury to the appellant. Mere inconvenience and annoyance is not enough to induce the Court to take away from the successful party the benefit of his decree."

And at 135:

> On the other hand, to refuse a stay may mean serious loss to the defendants if they in the end succeed. I cannot see my way to intervene. The defendants must suffer the loss incident to the fact that they are now in the position of unsuccessful litigants. When business firms litigate business matters, loss to one or both litigants is inevitable. The mere fact that there is litigation prevents expenditure in business development; for this there is no remedy. When a decision is reversed for error, in many cases the erroneous judgment has done much harm that cannot be compensated; and, while I fully recognise the obligation of the courts to do the utmost to devise some way of avoiding, so far as possible, this evil consequence, I can see no justification for casting the burden and risk on the litigant who is so far successful. This motion was argued upon the footing indicated, a claim to a stay as of right on the one side and a denial of any right on the other. If the de-

> fendants can now devise and submit any scheme by which the plaintiffs can be adequately protected, I am ready to hear counsel further.

Mr. Finlay relies on the decisions of the court in International Corona Resources Ltd. and Lac Minerals Ltd. (1987), 21 C.P.C. (2d) 260.

The facts there are distinguishable. To refuse a stay could have put hundreds out of work in an operating mine. Our case involves simply a holding company. I find the case of no application.

I am not satisfied that refusal of a stay would seriously prejudice the applicant. I am satisfied that the granting of a stay would prejudice the respondent, William Ballard. Leaving the present directors of HEBL in place will still keep William in the dark about HEBL's financial status. It also leaves the door open to the present directors to remove the independent directors on the board of MLGL.

It has been agreed between the parties that the court may stay cancellation of the 38 shares of HEBL pending the appel but as a term the Estate cannot vote those shares without leave of the Court. Subject to this item and any others the parties may agree upon to be incorporated in the formal order, this application is dismissed with costs to the respondents.

MONTGOMERY J.

Case Name:

N.G. v. Upper Canada College

Between
N.G., plaintiff (responding party), and
Upper Canada College, defendant (responding party)

[2004] O.J. No. 1202

70 O.R. (3d) 312

50 C.P.C. (5th) 218

131 A.C.W.S. (3d) 33

Docket Nos. M31085 and M31088

Ontario Court of Appeal
Toronto, Ontario

Sharpe J.A.
(In chambers)

Heard: March 19, 2004.
Judgment: March 22, 2004.

(22 paras.)

Practice -- Discovery -- Production of documents by non-parties -- When ordered -- Stay of proceedings pending appeal -- Considerations.

Application by the Attorney General for the stay of an order that required the production, in a civil action, of a videotaped statement given by NG to the police in criminal proceedings. NG and others made allegations of sexual assault against Brown. Brown was a teacher formerly employed by the defendant Upper Canada College. The allegations resulted in criminal charges against Brown and this civil action against the College. NG gave the police the videotaped statement that was the subject of this application. It formed part of the Crown brief regarding the charges against Brown. The videotape was produced to Brown as part of the Crown's disclosure. NG consented to its production. Production was ordered by a master. This decision was upheld subject to certain safeguards. The

criminal trial was scheduled to commence in September 2004. The civil action was scheduled to begin in April 2004.

HELD: Application dismissed. No serious questions existed to be tried regarding the jurisdiction of the master to make this order against a non-party and the application of the litigation privilege. There was no merit to the grounds of appeal raised by the Attorney General. The Attorney General also failed to show irreparable harm would result from the production. The risk that witnesses in the criminal case would become tainted was met by the strict confidentiality requirements that were imposed. The application only dealt with the production of the videotape and not its use at trial, which was up to the trial judge. The balance of convenience favoured denying the stay. Granting the stay could affect the timing of the hearing of the civil action and could prejudice NG.

Statutes, Regulations and Rules Cited:

Ontario Rules of Civil Procedure, Rule 30.10.

Counsel:

Luba Kowal and Crystal O'Donnell, for the appellant (non-party), the Attorney General for Ontario.
David Outerbridge, for the respondent, Upper Canada College.
Elizabeth Grace, for the respondent, N.G.

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1 **SHARPE J.A.**:-- The Attorney General for Ontario moves for a stay of an order requiring the production in a civil action of a videotape statement given by the plaintiff to the police for use in criminal proceedings.

2 The stay motion arises in the following context. The plaintiff and others have made allegations of sexual assault against Douglas Brown, a teacher formerly employed by the defendant school. Those allegations have led to criminal charges against Brown and this civil action in which the plaintiff claims damages against the defendant Upper Canada College, alleging negligence, breach of fiduciary duty, vicarious liability and occupier's liability.

3 Shortly after Brown's arrest in August 2001, the plaintiff gave the police a videotaped statement that is the subject of this motion. The videotape formed part of the Crown brief prepared with respect to the criminal charges against Brown. The videotape has been produced to Brown in the criminal proceedings as part of the Crown disclosure. The Crown initially agreed to produce the videotape, but changed its position when a new Crown counsel took over the file. The plaintiff consents to the production of the videotape in this action.

4 The defendant moved for production of the videotape as a document in the possession of a non-party to a civil action pursuant to rule 30.10. Master Albert found that it would be unfair to require the defendant to proceed to trial without the videotape and that the public interest in preserving the integrity of the criminal proceedings could be met by imposing confidentiality safeguards as conditions of the production order. On appeal to a single judge of the Divisional Court, Lang J. agreed with both findings, but added to the confidentiality safeguards. The result is that the videotape must be produced, but on the following conditions:

1. Only counsel for the parties to the civil action may receive copies of the videotape and transcript;
2. Counsel may show the videotape to their clients (including insurers) and may discuss the contents with them, but counsel shall ensure that no copies are made for anyone;
3. Counsel and the parties are to take all reasonable steps to ensure that potential witnesses in the criminal trial are not exposed to the contents of the videotape, subject to any ruling the trial judge may make with respect to admissibility and the imposition of any safeguards appropriate to that context.

5 The Attorney General has applied for leave to appeal to this court from the judgment of the Divisional Court.

6 The criminal trial, originally scheduled to begin in February 2004 is now scheduled to proceed in September 2004. The civil action is scheduled to begin on April 13, 2004, although the defendant has indicated that it will argue that the confidentiality conditions are unduly restrictive and that the trial should be adjourned to ensure that it can make full use of the videotape. The plaintiff is most anxious to have the civil trial proceed at the earliest possible date.

7 The Attorney General raises three grounds in its application for leave to appeal:

1. That the master has no jurisdiction to order production of documents generated in criminal proceedings for use in collateral civil proceedings as such jurisdiction is reserved exclusively to judges of the Superior Court.
2. That production of documents generated in criminal proceedings for use in collateral civil proceedings may only be ordered pursuant to the screening mechanism established in P.(D.) v. Wagg (2002), 61 O.R. (3d) 746 (Div. Ct.) and that the Divisional Court erred in holding that the master was entitled to order production pursuant to rule 30.10.
3. That the videotape is subject to litigation privilege.

8 The Attorney General argues that these grounds of appeal constitute a serious question to be tried, that production of the videotape would give rise to irreparable harm, and that the balance of convenience favours granting the stay.

Analysis

1. Serious Question To Be Tried.

i. Jurisdiction of the Master

9 The Attorney General relies on the following passage from paras 48-50 of Wagg for the proposition that only a Superior Court judge can order production from a Crown brief in an on-going criminal proceeding for the purposes of a collateral civil action:

> The notion of the court reserving control over documentation contained in the Crown Brief is consistent with, and supports, the court's general jurisdiction to

> control its own process in order to protect the public interest and ensure the proper administration of justice ....
>
> A superior court has original and plenary jurisdiction in all civil and criminal matters including inherent jurisdiction to control and regulate its process and to prevent this from being abused or obstructed ....
>
> I am therefore satisfied that the court has the authority to make the ruling and give the directions respecting the process that I propose.

10 This statement must be read in context. Wagg dealt with a request for production of a Crown brief that was in the possession of one of the parties as a result of Crown disclosure. Under the Rules of Civil Procedure, there was no procedural mechanism to put the Crown on notice and to afford the Crown an opportunity to be heard on the issue. I agree with the respondent U.C.C.'s submission that the quoted statements do not deal with exclusivity of jurisdiction, but rather with the question of jurisdiction to create the screening mechanism. As the present case involves production from the Crown as a non-party, rule 30.10 applies and provides the required mechanism. Masters have jurisdiction to deal with rule 30.10 motions and statutory courts have by necessary implication the power to control their own process and the procedural tools to ensure the effective and efficient disposition of matters falling within their competence: R. v. Felderhof, [2003] O.J. No. 4819 (C.A.) at para. 41; R. v. 974649 Ontario Ltd., [2001] 3 S.C.R. 575 at para. 38. Under rule 30.10, masters routinely weigh and balance the public interest concerns of non-parties, including government agencies. Masters also routinely make procedural orders arising under the rules that arguably have a more significant impact upon criminal proceedings than the order sought here: for example, ordering accused persons to be examined for discovery as non-parties and staying civil proceedings pending the completion of related criminal proceedings. In my view, the master and the Divisional Court correctly dismissed the Attorney General's submission that the master lacked jurisdiction and I see no merit in this ground of appeal.

11 Even if the Attorney General is correct and the master did not have jurisdiction to entertain the motion, the matter has now been carefully reviewed by a Superior Court judge who, indeed, did modify the confidentiality conditions on the production order. No arguable point has been advanced to suggest that the Divisional Court erred in its assessment of the public interest. In these circumstances, it seems to me highly unlikely that leave to appeal would be granted.

ii. Application of Rule 30.10

12 It would appear that to a significant extent, this point overlaps with the argument relating to the jurisdiction of the master. Putting the jurisdiction argument to one side, I see nothing in rule 30.10 that is inconsistent or incompatible with the screening mechanism contemplated by Wagg. In my view, Lang J. correctly concluded that in the context of a request for production of material from a Crown brief, the fairness test under rule 30.10 "encompasses balancing consideration of the needs of the moving party for access to the particular material against the interests of a third party, the interests of the public in protecting the material from disclosure, and any other relevant interests." The reasons of both the master and the Divisional Court, as well as the conditions they imposed upon production, demonstrate that they both fully considered the public interest arguments identified in Wagg under the regime of rule 30.10. Accordingly, I conclude that this ground of appeal does not meet the "serious issue to be tried" test.

iii. Litigation Privilege

13 In my view, the Divisional Court correctly concluded that litigation privilege does not apply in the circumstances of this case. The Attorney General does not suggest that the videotape is protected by solicitor-client privilege. Litigation privilege may attach to some materials prepared by the police for the purpose of a criminal trial, but I fail to see any basis for its application in the circumstances of this case. The purpose of litigation privilege, as distinct from solicitor-client privilege, is to protect work product in the adversarial litigation process: see Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer) (2002), 62 O.R. (3d) 167 (C.A.). It follows that production to the opposite party in the litigation effectively ends the privilege. The videotape has already been produced to the accused in the criminal proceedings and hence in that litigation, privilege no longer attaches to the videotape. Litigation privilege, unlike solicitor-client privilege, does not survive the litigation in which it arose, although legislation may extend broader protection to material prepared for the purposes of litigation: Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer).

14 At this stage, any interest the Attorney General may assert to refuse production does not arise from litigation privilege but rather under the heading of the public interest identified in Wagg. As I have already stated, those concerns were fully and fairly considered by the master and the Divisional Court.

Serious Question to be Tried - Conclusion

15 While I am mindful that the threshold is low, I consider it so unlikely that leave to appeal will be granted in this case that I am prepared to conclude that the Attorney General has failed to satisfy this first branch of the test for a stay. I see no merit in the only substantive ground of appeal (privilege) and the remaining two grounds of appeal are entirely procedural in nature. The Attorney General's submissions with respect to the jurisdiction of the master and the application of rule 30.10 are not strong. Moreover, the Attorney General has had the benefit of a comprehensive review by a Superior Court judge and no arguable point has been advanced to suggest that the Divisional Court erred in its assessment of that issue. In these circumstances, the leave to appeal application appears to me to be doomed to almost certain failure.

2. Irreparable Harm

16 The Attorney General contends that it will suffer irreparable harm if the civil trial proceeds with the videotape in the hands of the defendant, as there is a risk that witnesses in criminal proceedings could become "tainted" if they were to learn what the plaintiff told the police in the videotape. I find this submission to be without merit. First, the risk of "tainting" witnesses is met by the strict confidentiality conditions imposed by the master and the Divisional Court. Second, this motion deals only with production of the videotape, not its use at trial, and so the fears raised by the Attorney General are entirely speculative. If and when the defendant seeks to make use of the videotape during the trial, it would be open to the trial judge to impose conditions to shield the videotape from eyes that should not see it, if indeed that is required. Third, even if we were to focus on the use of the videotape at trial, any risk of tainting from the videotape seems to me to be remote, if not non-existent. If there is a risk of tainting, it surely stems from the fact that the plaintiff will testify, not from production of the videotape. The videotape may enter the trial if the plaintiff is

cross-examined on any inconsistent statements, but any added tainting that would flow from revealing such contradictions seems to me to be very remote.

17 If there was any merit to the Attorney General's argument that the videotape is protected by privilege, it would be arguable that requiring production before the determination of the criminal proceeding could give rise to irreparable harm. However, as I view the privilege claim to be without merit, I find no irreparable harm on that count.

3. Balance of Convenience

18 In my view, the balance of convenience strongly favours denying the stay. There have been concurrent findings by the master and by the Divisional Court that it would be unfair to require the defendant to proceed to trial without production of the videotape. The likely effect of a stay will be to force the trial court to decide whether to proceed without production of the videotape, or adjourn the trial until after the Attorney General's proposed appeal has run its course or until after the completion of the criminal trial. If the civil trial proceeds before the criminal trial, the defendant will suffer prejudice. If the defendant is granted an adjournment of the civil trial because the videotape has not been produced, the plaintiff will suffer the prejudice of delay. In my view, the harm that would be suffered by the parties in the civil action clearly outweighs any harm that might be suffered by the Attorney General and its interest in a fair criminal trial by reason of the production of the videotape. The rights of the parties to fair and expeditious justice should prevail.

19 The Attorney General submits that denial of the stay may render its appeal moot. Given my assessment of the merits of the proposed appeal, I do not regard that possibility as having any weight on the balance of convenience.

20 I hardly need to add that if I am wrong in my assessment of the merits of the proposed appeal, and three of my colleagues conclude that the Attorney General does raise points deserving the consideration of this court, they clearly have the discretion to grant leave to appeal even where the appeal has become moot.

Conclusion

21 Accordingly, the motion for a stay is dismissed. The respondents are entitled to their costs of the motion fixed at $2,500 to each party, inclusive of GST and disbursements.

22 As an addendum, I note that Exhibit 3 to the supplementary affidavit of Thomas Ward contains a copy of the information in the criminal proceedings revealing the names of the complainants, that affidavit shall be sealed and the plaintiff is directed to file for the public record another copy of the affidavit with those names deleted.

SHARPE J.A.

cp/ci/e/nc/qw/qlgkw

Case Name:

Matco Capital Ltd. v. Interex Oilfield Services Ltd.

IN THE MATTER OF an application under sections 46 and 47(1) of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, as amended
Between
Matco Capital Limited, Plaintiff, and Interex Oilfield Services Ltd., Cam-Star Resources (1990) Ltd. and Roblyn Oilfield Maintenance Ltd. (the "Interex Group"), Defendants
And between
Midfield Supply Ltd., Spartan Controls Ltd., Startec Refrigeration Services Ltd., Cox Crane Service Ltd., Lampman Electric Ltd., A.M.E. Mechanical Ltd., Bergen Consulting, Millenia Resource Consulting, NIWA Crane Ltd., Lynco Construction Ltd., Border Insulators Inc., 779208 Alberta Ltd., Sabine C02 Logistics Inc., Bowridge Manufacturing, Appellants, and The Interex Group by its Receiver-Manager Hardie & Kelly Inc. (The "Receiver"), Respondent

[2007] A.J. No. 1107

2007 ABCA 317

162 A.C.W.S. (3d) 12

Docket: 0701-0273-AC

Registry: Calgary

Alberta Court of Appeal
Calgary, Alberta

M.S. Paperny J.A.

Heard: October 10, 2007.
Judgment: October 12, 2007.

(12 paras.)

Insolvency law -- Practice -- Application by lienholders for stay of execution pending appeal of orders approving the sale of various assets of the Interex Group dismissed -- Potential harm to entire estate from granting a stay far outweighed any benefit to the lienholders.

Civil procedure -- Appeals -- Stay of proceedings pending appeal -- Balance of convenience -- Application by lienholders for stay of execution pending appeal of orders approving the sale of various assets of the Interex Group dismissed -- Potential harm to entire estate from granting a stay far outweighed any benefit to the lienholders.

Application by the appellants, a group of lienholders, for a stay of execution pending appeal of orders approving the sale of various assets of the Interex Group. A receiver was appointed for the Interex Group and the court approved a process for the sale of its assets. The lienholders had notice of those orders and of the sale process, which included a deadline for the submission of sealed bids. The lienholders submitted that as interested and affected stakeholders, they were entitled to disclosure of the purchase prices of each proposed sale before making submissions on the approval application. The chambers judge declined to disclose the purchase prices to the lienholders and granted the four orders approving the sales and the liquidation.

HELD: Application dismissed. In assessing the balance of convenience, the impact of a stay on the sale process and on the stakeholders as a whole had to be considered. The real prospect that the sales would not proceed and that the market would be negatively affected, with no assurance that there would be any other comparable offer forthcoming from the lienholders or elsewhere, tipped the balance of convenience in favour of the respondents. The potential harm to the entire estate from granting a stay far outweighed any benefit to the lienholders.

Court Summary:

Application for Stay Pending Appeal of the Order by the Honourable Madam Justice B.E. Romaine dated the 28th day of September, 2007 filed the 28th day of September, 2007 (Docket: 0601-08395).

Counsel:

T.P. Lysak for the Appellant.

R.S. Van De Mosselaer for the Respondent, Hardie & Kelly Inc.

D.S. Nishimura and C.A. Murray for the Purchasers Arc Resources Limited (Not a Party to this Application).

C. Nicholson for the Purchasers Milagro Energy Inc.
(Not a Party to this Application).

Reasons for Decision

1 **M.S. PAPERNY J.A.**:-- The appellants are a group of lienholders who seek to stay execution of the orders of the chambers judge granted September 28, 2007, approving the sale of various assets of Interex Oilfield Services Ltd., Cam-Star Resources (1990) Ltd., and Roblyn Oilfield Maintenance Ltd. (the "Interex Group") to three different purchasers and liquidation of a CO2 plant.

2 By order dated July 26, 2006, Hardie & Kelly Inc. was appointed receiver-manager of the Interex Group. By orders dated February 9 and March 22, 2007, the court approved a process for the sale of the assets of the Interex Group. The appellants had notice of those orders and of the sale process, which included a deadline for the submission of sealed bids. Having determined the most favourable bids and negotiated agreements of purchase and sale with various purchasers, the receiver brought a motion seeking court approval of the sales and of the liquidation. That motion was returnable on September 26, 2007, but was adjourned to September 28, 2007, at the request of these appellants to give the stakeholders time to resolve their differences. At that time, the appellants sought disclosure of the purchase prices of all the assets (including the liquidation expenses and the projected liquidation revenues) and requested an adjournment for one week in order to determine their position, including the possibility that they might bid on the assets. The appellants submitted that as interested and affected stakeholders, they were entitled to disclosure of the purchase prices of each proposed sale before making submissions on the approval application.

3 The receiver agreed that in the usual course of a receivership, all affected stakeholders were entitled to know the purchase price on an approval hearing. However, he was of the view that the unique position of the appellants and the integrity of the sale process demanded that the purchase prices not be disclosed. Specifically, the receiver noted that the appellants had indicated early on that they might be interested bidders on the assets, and that despite their knowledge of the ongoing sale process, they chose not to bid but were now using their position as lienholders to require disclosure of the purchase prices to put together a competing late bid. The receiver submitted that that would work a fundamental unfairness to the court approved sale process it had undertaken. The chambers judge agreed and declined to disclose the purchase prices to the lienholders or grant the requested adjournment. She granted the four orders approving the sales and the liquidation.

4 The test for a stay of enforcement of a court order is well known and requires application of the tripartite test articulated by the Supreme Court of Canada in *R.J.R. MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311: the applicant must show there is a serious question to be tried; that the applicant will suffer irreparable harm if the stay is refused; and that the balance of convenience favours the applicant, namely, if the stay is refused the applicant will suffer greater harm than the respondent would if the stay was granted.

5 On the first branch of the test, this court must consider whether an appeal from the orders approving the sales and the liquidation raises a serious issue. The appellants submit that as a court-authorized process, the process as a whole should be transparent and fair. Accordingly, all interested parties should be given access to crucial information necessary for them to assess their positions, based on their respective rights and interests. As such, it was a reviewable error for the chambers judge to decline to provide the purchase prices for their consideration in the context of an approval application. The respondents to the application submit that a chambers judge supervising a receivership is often called upon to exercise a discretion to preserve the integrity of the process and there is no error in her having declined to disclose the purchase prices to the lienholders here.

6 In declining to require disclosure of the purchase prices, and approving the sales and liquidation as requested, the chambers judge stated:

> There has been a thorough and diligent sales process with respect to the CO2 assets, commencing in early February of this year through to mid-July. The deadline was extended twice for particular reasons in order to maximize value for the stakeholders. I note that unsecured creditors have little to hope for from the process so this is not a case of a last minute offer coming in that would improve matters for all stakeholders, recognizing of course that the lienholders certainly are major stakeholders.
>
> I also note that Mr. Busse and his clients [the lienholders] have been part of this process since the beginning, that they have participated in court applications and were certainly aware of the sales process as it occurred. ... [The lienholders] have come forward asking that approval of the sales to [purchasers] who have complied with the process and whose offers have been recommended by the receivers should be delayed to allow them to try to put together what they say should not be characterized as a competing bid, but certainly appears to be that[.] [T]hey wish to consider whether they want to put together a scheme to have the assets turned over to the lienholders in settlement of their liens. This is not a firm proposal of any kind, but an idea and would require successful negotiations to take out the major secured creditor that have not yet been effected.
>
> The lienholders have made it clear that they are acting in two capacities, as creditors and as potential bidders of some kind. I have heard from the receiver the reason why the receiver felt that they - it would not be appropriate to provide information to the lienholders, given the two hats that they wore, that they wear, and I am satisfied that this is justifiable given what the lienholders have said in this court, they want to do with the information.

7 While recognizing that candour and fairness of process were critical, she further held "... fairness of process does not mean that lienholders are entitled to, in effect, lie in the weeds to see if they are happy with the price for the assets and then obtain that information in order to determine whether they can come up with something better."

8 The determination of whether there is a serious question to be tried is a preliminary assessment of the merits of the case only, and I need only be satisfied that the application is neither frivolous nor vexatious. I am satisfied that the appeal here raises a serious issue.

9 The sale process in the context of a court-appointed receiver includes both the submission of bids and the court approval process. Fairness and candour are paramount in both stages of the process. As this court noted in *Bank of Nova Scotia v. Henuset Resources Ltd.* (1989), 70 Alta L.R. (2d) 320, [1989] A.J. No. 945 (C.A.), the entire process must be objectively fair to all parties having a legitimate interest in it. The purchase price is material information to which a creditor would be entitled in the usual course. In other words, public disclosure is part of a judicial approval process. The integrity of the sale process is but one aspect of a court approval process that demands fairness and equality of treatment to all, including disclosure of all necessary information for stakeholders to make informed decisions. How those competing interests could or should be balanced to achieve these objectives is such an issue.

10 The second branch of the test, irreparable harm, refers to the nature of the harm that would be suffered were a stay not to be granted. The applicants submit that absent a stay, the sales "may be closed" and the disassembly of the Interex Group's CO2 plant will begin, thus precluding consideration of "potential alternatives available" to them. In other words, the appeal will be moot and as such, their interest in considering alternatives will be gone. However, the chambers judge found that the appellants were well aware of the orders authorizing the sale process and of the deadline for bids. They made no effort to pursue other alternatives or to make a reserve bid, an option that was open to them and that would have preserved the integrity of the court-ordered sale process. Any harm resulting from declining a stay is not entirely the result of the appellants' lack of access to the purchase prices. It was open to the appellants to prevent such potential harm earlier in the process. The lienholders also concede that there may be no harm at all if the prices are high enough to leave them with no concerns regarding approval of the sales. At its highest, the irreparable harm here is the loss of an opportunity to put a different deal together, an opportunity which is at best speculative. However, it may be sufficient to establish irreparable harm where it can be shown that the relief sought would be nugatory if a stay was not allowed: *Triple Five Corp. v. United Western Communications* (1994), 19 Alta. L.R. (3d) 153, 27 C.P.C. (3d) 201 (C.A.), (motion for a stay of execution dismissed: [1994] S.C.C.A. No. 226). I am prepared to so find for the purpose of this application.

11 Finally, does the balance of convenience favour granting a stay? Do the interests of the appellants in a stay outweigh the interests of the other stakeholders and the estate as a whole? Serious potential consequences of a stay include a loss of all of the sales approved by the court below, and a "tainting of the market" such that the value of the assets are diminished in the eyes of prospective purchasers, a potential harm to all of the stakeholders, including the appellants. No one has challenged the propriety or efficacy of the receiver's sale process. In other words, there has been a broad canvassing of the available market with a view to maximizing the return to all stakeholders. The process undertaken by the receiver is not impugned. Nor are its conclusions that the sale agreements represent the best offers available for the assets. In assessing the balance of convenience, I am obliged to consider the impact of a stay on the sale process and on the stakeholders as a whole. The real prospect that the sales will not proceed and that the market will be negatively affected with no assurance that there will be any other comparable offer forthcoming from the appellants or elsewhere tips the balance of convenience in favour of the respondents. The potential harm to the entire estate from granting a stay far outweighs any benefit to the appellants.

12 The application for a stay pending appeal is dismissed.

M.S. PAPERNY J.A.

cp/e/qlhjk/qlmxt

Case Name:

Romspen Investment Corp. v. Woods Property Development Inc.

Between
Romspen Investment Corporation, Applicant (Respondent), and
Woods Property Development Inc. and TDCI Holdings Inc.,
Respondents

[2011] O.J. No. 5871

2011 ONCA 817

286 O.A.C. 189

210 A.C.W.S. (3d) 302

85 C.B.R. (5th) 21

346 D.L.R. (4th) 273

2011 CarswellOnt 14462

14 R.P.R. (5th) 1

Docket: C53496 and C54375

Ontario Court of Appeal
Toronto, Ontario

J.I. Laskin, M. Rosenberg and P.S. Rouleau JJ.A.

Heard: November 18, 2011.
Judgment: December 22, 2011.

(53 paras.)

Creditors and debtors law -- Receivers -- Court appointed receivers -- Powers -- Realization of property -- Appeal by Home Depot from decisions approving sale of property upon which its store was situated allowed -- Judge applied wrong standard of proof to issue of whether affiliate of mortgagee of property was entitled to purchase property free and clear of Home Depot's interest --

From evidence presented, inference could be made that mortgagee knew of and implicitly consented to Home Depot's ground lease of property, potentially rendering Home Depot's interest superior in equity to interest of mortgagee.

Real property law -- Mortgages -- Partial discharge -- Appeal by Home Depot from decisions approving sale of property upon which its store was situated allowed -- Judge applied wrong standard of proof to issue of whether affiliate of mortgagee of property was entitled to purchase property free and clear of Home Depot's interest -- From evidence presented, inference could be made that mortgagee knew of and implicitly consented to Home Depot's ground lease of property, potentially rendering Home Depot's interest superior in equity to interest of mortgagee.

Real property law -- Registration of documents -- Priorities -- Ranking of priority of interest -- Appeal by Home Depot from decisions approving sale of property upon which its store was situated allowed -- Judge applied wrong standard of proof to issue of whether affiliate of mortgagee of property was entitled to purchase property free and clear of Home Depot's interest -- From evidence presented, inference could be made that mortgagee knew of and implicitly consented to Home Depot's ground lease of property, potentially rendering Home Depot's interest superior in equity to interest of mortgagee.

Real property law -- Proceedings -- Practice and procedure -- Evidence -- Appeal by Home Depot from decisions approving sale of property upon which its store was situated allowed -- Judge applied wrong standard of proof to issue of whether affiliate of mortgagee of property was entitled to purchase property free and clear of Home Depot's interest -- From evidence presented, inference could be made that mortgagee knew of and implicitly consented to Home Depot's ground lease of property, potentially rendering Home Depot's interest superior in equity to interest of mortgagee.

Appeal by Home Depot from two orders, the first authorizing the receiver of Woods to sell a property free and clear of Home Depot's lien and refusing to permit Home Depot to purchase or lease a portion of the property, and the second approving the purchase of the property by 2204604 Ontario. Woods owned the property, subject to a $17,000,000 mortgage in favour of Romspen. The court appointed a receiver for Woods in November 2008. The proposed purchaser of the property, 2204604, was owned and controlled by Romspen. Home Depot had expended $14,500,000 to construct a store on the property. In May 2005, Home Depot and Woods entered into an agreement pursuant to which Home Depot would purchase the portion of the property where its store was situated for $3,250,000. The purchase was conditional upon severance of Home Depot's portion of the property. The agreement was amended in November 2005. Romspen received a copy of the agreement, but Home Depot failed to register a caution in relation to its rights under the agreement on title to the property. Home Depot entered into a ground lease with Woods in May 2006, again failing to register a notice of ground lease. It also failed to obtain an express postponement or subordination of Romspen's rights as mortgagee. Woods represented that it had obtained Romspen's agreement to a partial discharge of its mortgage, but Romspen actually refused to consent to this. Romspen, Home Depot and the Town executed a site plan agreement in July 2006, in which Romspen's rights were postponed and subordinated to the interest of the Town but not of Home Depot. Home Depot was unable to obtain severance of its portion of the property because no comprehensive subdivision plan was provided. It completed its store and started operating it in 2007. Woods also defaulted on its mortgage in 2007. Payments ceased on the mortgage in early 2008,

leading to the appointment of the receiver. The receiver was authorized to market the property and sought the court's approval of an offer by 2204604 to purchase the property for $14,100,000, free and clear of any claim by Home Depot. The court found that Home Depot's interest ranked after Romspen's mortgage and authorized the receiver to sell the property free and clear of any lien or claim by Home Depot. The court refused to approve 2204604's purchase agreement, ordering the receiver to conduct a further sales process. When these further efforts proved unsuccessful, the court approved the sale to 2204604, vesting title to the property in 2204604 free and clear of any lien or claim by Home Depot. Throughout the court's reasons, the motion judge indicated that he was required to make factual determinations on the basis of undisputed facts, and that he could not make findings of fact by way of inference.

HELD: Appeal allowed. The matter was remitted for a new hearing. The motion judge applied the incorrect standard of proof. His belief that he was not allowed to draw inferences was an error which could have changed the outcome. Because of his error, the judge never considered whether or not Romspen gave its implied consent to Home Depot's ground lease. He failed to consider all the facts and circumstances in order to decide whether consent could be inferred and whether equitable principles such as estoppel applied to grant Home Depot's interest priority over Romspen's mortgage. There were facts from which an inference could be drawn that Romspen had knowledge of and impliedly consented to Home Depot's ground lease of the property.

Statutes, Regulations and Rules Cited:

Conveyancing and Law of Property Act, R.S.O. 1990, c. C.34, s. 37(1)

Land Titles Act, R.S.O. 1990, c. L.5, s. 71(1.1)

Ontario Rules of Civil Procedure, R.R.O. 1990, Reg. 194, Rule 37.13(2)(b)

Planning Act, R.S.O. 1990, c. P.13,

Appeal From:

On appeal from the orders of Justice Herman J. Wilton-Siegel of the Superior Court of Justice dated March 17, 2011 and September 28, 2011, with reasons dated March 17, 2011, September 28, 2011 and October 3, 2011, with the March 17, 2011 reasons reported at 2011 ONSC 3648, 75 C.B.R. (5th) 109 and the October 3, 2011 reasons reported at 2011 ONSC 5704.

Counsel:

Ronald Slaght, Q.C. and John J. Chapman, for the appellant Home Depot Canada Inc.

David P. Preger and Lisa Corne, for the respondent.

Harvin D. Pitch, for the respondent SF Partners Inc.

The judgment of the Court was delivered by

P.S. ROULEAU J.A.:--

OVERVIEW

1 The appellant, Home Depot Canada Inc. ("Home Depot"), appeals from two orders. The first order is dated March 17, 2011 and granted, in part, a motion brought by SF Partners Inc., the receiver of Woods Property Development Inc. ("Woods"), (the "Receiver"). It authorized the Receiver to sell the property known as 20 High Street in Collingwood, Ontario (the "Woods Property") free and clear of any lien or claim of Home Depot. The motion judge, however, refused to approve the purchase of the Woods Property by 2204604 Ontario Inc. (the "Purchaser") without further marketing efforts.

2 The first order also dismissed Home Depot's cross-motion requesting an order that it be entitled to purchase a portion of the Woods Property or to lease the Woods Property. Alternatively, Home Depot requested that it be entitled to a statutory lien pursuant to s. 37(1) of the *Conveyancing and Law of Property Act*, R.S.O. 1990, c. C.34 or an equitable lien ranking prior to the mortgage over the Woods Property held by the respondent, Romspen Investment Corporation ("Romspen").

3 The second order under appeal is dated September 28, 2011. It approved the purchase of the Woods Property by the Purchaser and vested title in the Purchaser.

4 Romspen and the Receiver cross-appeal the first order seeking to set aside the refusal, at that time, to approve the purchase of the Woods Property by the Purchaser and substituting an order approving the purchase. Romspen recognized that the cross-appeal is moot but argues that it raises issues of importance such that this court should exercise its discretion to hear it.

FACTS

5 Woods is an Ontario corporation that owns the Woods Property. Romspen is a secured lender to Woods and Woods' sister company, TDCI Holdings Inc. ("TDCI"). Romspen's security includes an approximate $17 million mortgage over the Woods Property, which was used, in part, to discharge earlier mortgages given by Romspen (the "Romspen Mortgage"). The Receiver was appointed the interim receiver of all assets, undertakings and properties of Woods and TDCI by order of the Superior Court of Justice dated November 25, 2008. The Purchaser of the Woods Property is an Ontario corporation owned and controlled by Romspen.

6 These appeals center on a store built by Home Depot on an 8.67 acre parcel of land, which forms part of the larger 43 acre Woods Property (the "Home Depot Lands"). Home Depot constructed the store at a total cost to it of approximately $14.5 million. The issue in the motions under appeal was the fate of that store and the Home Depot Lands. Specifically, whether Home Depot could retain the store and either lease or purchase the Home Depot Lands.

7 On May 19, 2005, Home Depot entered into a purchase agreement with Woods for the purchase of the Home Depot Lands for a purchase price of $3.25 million. Among other terms, the purchase is conditional upon severance of the Home Depot Lands from the Woods Property in compliance with the *Planning Act*, R.S.O. 1990, c. P.13.

8 The purchase agreement between Woods and Home Depot was amended on November 30, 2005 (the "Home Depot Agreement"). Romspen received a copy of the Home Depot Agreement. Home Depot, however, did not register a caution in respect of its rights under the Home Depot Agreement pursuant to s. 71(1.1) of the *Land Titles Act*, R.S.O. 1990, c. L.5.

9 As the Home Depot Agreement is central to these appeals, I will outline the material provisions. The Home Depot Agreement provides as follows:

1) a portion of an industrial building located on the Woods Property is to be demolished to permit construction of the Home Depot store;
2) Home Depot is obligated to apply for a consent under the *Planning Act* to sever the Woods Property;
3) the Home Depot Agreement will be effective to create an interest in land only if the provisions of the *Planning Act* for severance are complied with;
4) Home Depot is entitled to apply to the Town of Collingwood for approval and a building permit to construct the Home Depot store on the Home Depot Lands;
5) if, within 270 days of the date of execution of the Home Depot Agreement, Home Depot fulfills all zoning conditions and obtains all necessary approvals for its proposed store, including a building permit, Home Depot will take possession of an area slightly larger than the Home Depot Lands pursuant to a ground lease (as there is no significance to the slight difference between the area covered by the ground lease and the area of land subject to the purchase agreement, both will be referred to as the "Home Depot Lands");
6) the ground lease is to run for a term of 50 years at a rental of $300,000 per year for the first seven years and thereafter at $100 per year;
7) the ground lease will terminate upon the severance of the Woods Property under the *Planning Act*, at which point, the purchase of the Home Depot Lands by Home Depot will be completed and the rental payments already made will be credited against the purchase price;
8) prior to entering into the ground lease and as a condition thereof, Woods will deliver an acknowledgment of Romspen's agreement to:

(a) permit the demolition of the existing industrial building without acceleration of the Romspen mortgages secured against the Woods Property; and
(b) provide a partial discharge of the Romspen mortgages upon payment of the purchase price of $3.25 million under the Home Depot Agreement, without requiring that the mortgages be in good standing at the time; and

9) Home Depot is entitled to register a caution in respect of its rights under the Home Depot Agreement pursuant to s. 71(1.1) of the *Land Titles Act*.

10 On May 4, 2006, Home Depot entered into the ground lease with Woods as contemplated by the Home Depot Agreement (the "Ground Lease"). Although the Ground Lease contained a provision relating to the registration of a notice of Ground Lease pursuant to s. 111(1) of the *Land Titles Act*, Home Depot did not register the notice nor did it obtain an express postponement or subordination of Romspen's rights as mortgagee.

11 In the Ground Lease, Woods represented that it had obtained the acknowledgement from Romspen contemplated in the Home Depot Agreement to the effect that Romspen had agreed that:

1) the demolition of the portion of the industrial building would not accelerate the Romspen mortgages on the Woods Property at the time so as to allow construction of the Home Depot store; and
2) Romspen would provide a partial discharge of its mortgage should Home Depot purchase the Home Depot Lands.

12 Romspen had agreed to the demolition of a portion of the industrial building but denies that there was any agreement respecting the partial discharge of the mortgage. The materials filed in the motion show that Woods requested that acknowledgment but that Romspen refused to give it. The motion judge simply observed that: "It is unclear on what basis Woods gave the representation".

13 To allow construction of the Home Depot store, Romspen signed a site plan control agreement dated July 20, 2006 to which Woods, Home Depot and the Town of Collingwood were also parties (the "Site Plan Agreement"). The Site Plan Agreement refers to the Home Depot Agreement as well as to the demolition of the portion of the industrial building and the proposed construction of the Home Depot store. It also refers to the existence of the Romspen mortgages and contains an express postponement and subordination by Romspen of its interest in the Woods Property to that of the Town of Collingwood. There is no postponement or subordination by Romspen to Home Depot.

14 Home Depot applied for severance of the Home Depot Lands but the Town of Collingwood will not consent to the severance until a comprehensive plan of subdivision is filed and approved for the entire Woods Property.

15 The Home Depot store was constructed and has been operating since early 2007.

16 Woods first defaulted on the Romspen Mortgage in 2007. Payments ceased on the Romspen Mortgage in early 2008, leading to the Receiver's appointment. The receivership order authorized the Receiver to market the Woods Property. After approximately 10 months, the Receiver accepted the Purchaser's offer dated October 13, 2009 regarding the sale of the Woods Property for a purchase price of $14.1 million (the "Purchase Agreement"). The Purchase Agreement is conditional upon the Woods Property being delivered free and clear of any claims of Home Depot unless arrangements are reached on terms satisfactory to the Purchaser in its sole discretion. No such arrangements were reached. The proceeds of the sale are insufficient to cover the indebtedness owing to Romspen under its mortgage.

17 The Receiver moved for court approval of the Purchase Agreement and for an order vesting title to the Woods Property in the Purchaser. Home Depot took the position that the Receiver could not sell the Woods Property on which the Home Depot store is located free and clear of any interest of Home Depot and argued that it should be entitled to purchase the Home Depot Lands or to a lease or, alternatively, to a statutory or equitable lien ranking ahead of the Romspen Mortgage.

18 In very thorough reasons, the motion judge laid out the factual situation and the relevant case law. He concluded that Home Depot's leasehold interest in the Home Depot Lands ranked after the Romspen Mortgage and, although Home Depot was entitled to an equitable lien against the Woods Property, that lien was subordinate to the Romspen Mortgage. He then considered the equities between the parties in relation to the specific issues and concluded that the equities favoured Romspen.

19 Accordingly, in the first order, he authorized the Receiver to proceed with the sale of the Woods Property free and clear of any lien or claim of Home Depot. That is, he vested out or ex-

punged any interest Home Depot had in the Woods Property. The motion judge, however, refused to approve the Purchase Agreement at that time and ordered the Receiver to conduct a further sales process in respect of the Woods Property.

20 Further efforts at finding a purchaser for the Woods Property were unsuccessful and a new motion was brought seeking the approval of the Purchase Agreement. On September 28, 2011, the motion judge granted the second order approving the sale transaction and vesting the Woods Property in the Purchaser free and clear of any lien or claim of Home Depot.

21 By order of this court, the motion judge's order approving the sale transaction was stayed until the hearing of the appeals or further order of this court.

ISSUES

22 Home Depot raised several grounds of appeal. In oral submissions, however, Home Depot focused on the following two grounds:

1) Did the motion judge apply an incorrect standard of proof? Specifically, did his failure to draw reasonable inferences render his findings of fact unreliable?
2) Did the motion judge fail to consider the ownership of the Home Depot store separate and apart from the Ground Lease?

23 I need only deal with the first issue as, in my view, it is dispositive of the appeals. The motion judge's misapprehension of the standard of proof requires that the orders be set aside and that the matter be remitted to the Superior Court of Justice for a new hearing. As I would remit the matter for a new hearing, I would dismiss Romspen and the Receiver's cross-appeal of the first order.

ANALYSIS

Applicable Law

24 The parties agree that the criteria to be applied by the court in a receivership sale are those set out by this court in *Royal Bank of Canada v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (C.A.). At p. 6, this court summarized the factors a court must consider when deciding whether a receiver, who has sold a property, acted properly:

1) It should consider whether the receiver has made a sufficient effort to get the best price and has not acted improvidently.
2) It should consider the interests of all parties.
3) It should consider the efficacy and integrity of the process by which offers are obtained.
4) It should consider whether there has been unfairness in the working out of the process.

25 The central issue raised on the motions and in these appeals is the application of the second criterion, the consideration of the interests of all parties, when deciding whether the court should vest the Woods Property in the Purchaser free and clear of Home Depot's interest. In considering this criterion, the motion judge referred to Ground J.'s statement in *Meridian Credit Union Ltd. v. 984 Bay Street Inc.*, 2006 CanLII 26476 (Ont. S.C.), at para. 19, that: "[I]n determining whether to issue a vesting order terminating the interests of parties in a property, the court must review the eq-

uitable considerations supporting the respective positions of the parties." The motion judge then set about making the findings of fact necessary to apply these legal principles.

Position of the Parties on Appeal: Standard of Proof in Making Findings of Fact

26 Home Depot argues that the motion judge committed an error of law in the standard of proof he applied when making findings of fact. Throughout his reasons, the motion judge indicates that he is required to make factual determinations "on the basis of undisputed facts" and that he "cannot make findings of fact by way of inference." Home Depot maintains that this is clearly an error and that the failure to apply the correct standard of proof resulted in the motion judge's failure to draw reasonable inferences from the evidence.

27 Home Depot submits that several important inferences were available on the evidence. Specifically, it could be inferred from the evidence that Romspen gave its express or implied consent to the construction of the Home Depot store and to entering into the Ground Lease. Alternatively, Home Depot submits that if there is no express or implied consent, the record is sufficient to draw the inference that, from the outset, Romspen knew about the construction of the Home Depot store, knew about the Ground Lease and knew or ought to have known that Home Depot believed it had Romspen's consent to build the store and enter into the Ground Lease. These and other possible inferences, if drawn, would have been relevant considerations in the exercise of the court's equitable jurisdiction when deciding whether to vest out Home Depot's interest and/or whether to grant Home Depot some form of equitable relief.

28 The respondents could provide no legal basis for the motion judge's statement that factual findings must be made on the basis of "undisputed facts" and that the court could not "make findings of fact by way of inference." It may be that, because this was a motion argued on affidavit evidence, the motion judge understood that he was constrained in this way. In any event, the respondents did not seriously dispute that these constituted errors, rather, they argued that these errors were harmless because:

1) there were no disputed facts;
2) the errors were mere inadvertent slips and, when read as a whole, it is apparent that the motion judge nonetheless applied the appropriate standard of proof;
3) it was clear from the evidence that Romspen's mortgage had legal priority over any interest Home Depot had in the Woods Property;
4) there was insufficient evidence on the record before the motion judge from which actual or implied consent to the Ground Lease or construction of the Home Depot store could be drawn; and
5) even accepting that the court could infer or imply consent, the equities nonetheless favoured Romspen and the vesting out of Home Depot's interest.

DISCUSSION

29 In my view, the appeals must be allowed and the matter remitted to the Superior Court of Justice for a new hearing. I acknowledge that, in granting equitable relief, motion judges have a good deal of latitude and ought to be afforded considerable deference. As set out by this court in *York (Regional Municipality) v. Thornhill Green Cooperative Homes Inc.*, 2010 ONCA 393, 68 C.B.R. (5th) 73, at para. 20, an order approving a sale by a receiver is discretionary and attracts great deference from appellate courts. Appellate courts will only interfere where the trial judge (or

the motion judge) "erred in law, seriously misapprehended the evidence, exercised his or her discretion based upon irrelevant or erroneous considerations, or failed to give any or sufficient weight to relevant considerations."

30 In the present case, however, the motion judge's application of an incorrect standard of proof and his belief that he was not allowed to draw inferences on a motion such as this one are errors that go to the very basis upon which the court's equitable discretion is exercised: the factual matrix. As explained by Rothstein J. in *F.H. v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41, at para. 40, "there is only one civil standard of proof at common law and that is proof on a balance of probabilities." Therefore, facts in issue are to be proved on a balance of probabilities and, as a general rule, this applies to motions' as well as to trials.

31 As I will explain, the errors committed by the motion judge are not, as suggested by the respondents, harmless. Had the motion judge applied the appropriate standard of proof and been willing to draw inferences where appropriate, the result may well have been different. I turn now to the five points raised by the respondents in response to the appeals.

1) There were no disputed facts

32 The respondents argue that the motion judge's adoption of a higher standard of proof - undisputed fact - is a harmless error as there was no dispute as to the facts. It was therefore unnecessary for the motion judge to engage in an assessment of the weight to be given to the evidence or to make credibility findings.

33 The argument put forward by Home Depot, however, is not that it disputed the facts set out in the record, but rather that the motion judge ought to have drawn inferences from the record and the conduct of the parties.

34 Inferences are not undisputed facts and, as a general rule, inferences need only flow reasonably and logically from established facts. By limiting himself to undisputed facts, the motion judge did not assess the landscape of facts presented to him with a view to determining what inferences could appropriately be drawn.

35 The potential importance of inferences is apparent when considering whether Romspen's interest in the Woods Property should be subordinate to the Ground Lease by virtue of Romspen having consented to it. In dealing with this issue, the motion judge set out the law as follows, at para. 142: "[I]f a lease is executed by a mortgagor after the mortgage has been granted, the mortgagee will be bound by the terms of the lease if it is made with his express or implied consent" (footnote omitted).

36 The record did not contain an express consent by Romspen. The relevant question on the issue of subordination was, therefore, whether consent by Romspen to the Ground Lease could be implied. Home Depot argued that the conduct of Romspen and the various documents in the record were more than sufficient to show that consent ought to be implied.

37 The motion judge, however, does not appear to have turned his mind to the issue of implied consent. The motion judge simply stated, at para. 145, that: "Home Depot has failed to establish as an *undisputed fact* that Romspen consented to either the Home Depot Agreement or the Ground Lease" (emphasis added). The motion judge's use of the expression "undisputed fact" clearly reflects his understanding that, absent Romspen expressly acknowledging that it consented to the

Ground Lease or it being set out in the written materials, he could not find that Romspen had consented. In effect, the motion judge excluded the possibility of finding an implied consent because of his belief that he was somehow prevented or unable to draw appropriate inferences from the available facts. Inferences are important tools in the fact-finding process and the motion judge erred in refusing to avail himself of that source.

2) The errors were inadvertent slips

38 The respondents argue that the motion judge's references to the need for "undisputed facts" and his inability to "make findings of fact by way of inference" were simply inadvertent slips and that, read as a whole, it was apparent that the motion judge nonetheless applied the appropriate standard of proof.

39 I disagree. A critical portion of the motion judge's reasons is the portion dealing with Romspen's knowledge and alleged consent to the Home Depot Agreement, the Ground Lease and the construction of the Home Depot store. In that portion of his reasons, he repeats, at paras. 40 and 44 of his March 17, 2011 reasons, that the court must make its determination on the basis of "undisputed facts". He also states, at para. 40 of those reasons, that the court "cannot make findings of fact by way of inference." After making these statements, he concludes, at para. 52, that "[t]here is no evidence of any such consent, and it *cannot be inferred* from the existence of the Home Depot Agreement. Nor *can it be inferred* from the existence of the Ground Lease" (emphasis added). The motion judge then goes on to state, at para. 53, that "Home Depot cannot, however, establish as an *undisputed fact* that Romspen's execution of the Site Plan Agreement either constituted, or evidenced, its consent to ... [the] construction [of the Home Depot store]" (emphasis added).

40 However, despite the motion judge having stated that he could not draw inferences, the respondents argue that his statement that he did "not think that ... knowledge [of the Ground Lease] could be inferred" (at para. 42), suggests that he did in fact consider whether inferences could be drawn. I disagree.

41 When that statement is viewed in the context of the entire paragraph, it does not, as the respondents suggest, indicate that the motion judge was applying the correct standard of proof. The balance of the paragraph shows that the motion judge was still operating on the premise that Home Depot had to demonstrate either actual knowledge or knowledge as an undisputed fact.

42 The fact that the motion judge applied the incorrect higher standard of proof is confirmed later in his March 17, 2011 reasons where, at para. 145, he confirms that he has "concluded that Home Depot has failed to establish as an *undisputed fact* that Romspen consented to either the Home Depot Agreement or the Ground Lease" (emphasis added).

43 Further, it was central to Home Depot's case to determine whether knowledge or implied consent of the Ground Lease and construction of the Home Depot store could be inferred from all of the circumstances. Given the motion judge's extensive and comprehensive reasons, I simply cannot accept that, had he understood that he could draw reasonable inferences from all of the facts and circumstances, his analysis of whether to draw the inference would be limited to a single paragraph without reference to the facts both for and against drawing such an inference.

3) Romspen's mortgage has legal priority

44 The respondents submit that the errors are of no consequence because the Romspen Mortgage had clear legal priority over any Home Depot interest and the funds generated from the sale of the Woods Property are not even sufficient to pay off the mortgage debt. Moreover, nothing in the record suggests that Romspen ever intended to waive any of its legal rights.

45 The respondents argue that the motion judge correctly weighed the equities between the parties. More specifically, in granting the Receiver's request for an order vesting out the interest of Home Depot in the Woods Property, the motion judge stated, at para. 187, that:

> [T]he court must consider the equities between the parties in the context of findings that:
>
> (1) Romspen's interest in the Woods Property ranks ahead of that of Home Depot to the extent of the monies secured under the Romspen Mortgage ... ;
> (2) Home Depot's equitable lien against the [Woods] Property arising as a result of the construction of the Home Depot store does not rank prior to the interest of Romspen in the [Woods] Property; and
> (3) Home Depot is unable to establish as an undisputed fact that Romspen consented to the Home Depot Agreement, the Ground Lease or the construction of the Home Depot store in a manner that was intended to affect its rights in the [Woods] Property.

46 There are two problems with this submission. First, although the motion judge appears to view the need, in considering the equities, to look beyond the legal priorities created by the instruments registered on title, he limits his equitable considerations to: (1) a recitation of the legal priorities; and (2) the single additional question of whether there was consent "in a manner that was *intended* to affect its right in the [Woods] Property" (emphasis added). The motion judge had to look beyond these considerations. He had to consider all of the facts and circumstances in order to decide whether consent should be inferred and whether equitable principles, such as estoppel, applied in making the determination to vest out Home Depot's interest.

47 Second, although the motion judge refers to his earlier analysis of the equitable considerations and the need to take them into account in the weighing exercise, that earlier analysis was, as I have explained, tainted by his understanding that he was limited to undisputed facts and could not draw inferences.

4) <u>There was no basis from which to draw the inferences sought by Home Depot</u>

48 In the alternative, the respondents argue that even if the motion judge erred with respect to his ability to draw inferences, this court should find that there was no basis from which the inferences sought by Home Depot could be drawn.

49 As I would remit the matter to the Superior Court of Justice, it would be inappropriate for this court to draw inferences and make findings of fact. In order to address the respondents' submission that there was no basis in the evidence to draw relevant inferences, I must, however, review the record to determine whether facts exist from which a motion judge might draw at least one of the inferences sought by Home Depot. I will focus on Home Depot's submission that the motion judge ought to have inferred that Romspen knew of and by implication consented to the Ground Lease. If

such an inference were drawn, it would clearly be a significant fact to be weighed in resolving the issues raised in the motion.

50 In my view, there are several facts from which such an inference might be drawn, for example:

1) the earlier Romspen mortgages provided that Romspen could not unreasonably withhold its consent to any lease by Woods;
2) in November 2005, Romspen received a copy of the Home Depot Agreement which contained the material terms of the contemplated ground lease to Home Depot;
3) the Home Depot Agreement contemplated the construction of a store on the Home Depot Lands within 270 days of the signature of the Home Depot Agreement;
4) the Home Depot Agreement set out the terms of the Ground Lease and contemplated the purchase of the Home Depot Lands by Home Depot if severance had been obtained or the Ground Lease if severance had not been obtained (these broad terms were known to Romspen);
5) although Romspen refused to provide an acknowledgment that it would provide a partial discharge to allow Home Depot to purchase the Home Depot Lands, Woods asked Romspen to sign an acknowledgment that a portion of the industrial building located on the Woods Property could be demolished to allow construction of the Home Depot store without accelerating the Romspen Mortgage. Romspen was asked to provide this acknowledgement so that Home Depot would not "stop moving forward." This acknowledgment was provided in May 2006 and refers to a proposed ground lease between Woods and Home Depot;
6) the Romspen Mortgage included a provision that contemplated that "any land lease payments made by Home Depot pursuant to the Home Depot Agreement ... which in aggregate exceed $250,000 shall be due and payable, on account of principle, upon receipt and [Woods and TDCI] shall direct Home Depot to make such payments directly to [Romspen]";
7) the Site Plan Agreement executed by Romspen made specific reference to the Home Depot Agreement and to the proposed partial demolition of the existing industrial building;
8) under the Site Plan Agreement, Romspen would have known that Home Depot was spending millions of dollars to build a store on the Woods Property and that, pursuant to the Home Depot Agreement, Home Depot was entitled to enter into the Ground Lease; and
9) Romspen's representative testified in cross-examination that, by August 2006, after the Site Plan Agreement had been signed, he was able to draw the inference that Home Depot had received the Ground Lease.

51 These are some of the facts from which an inference might be drawn. Of course, there are many facts that suggest that the inference should not be drawn. I need not list them here. Suffice it to say that a basis does exist from which a relevant inference could be drawn and, contrary to the respondents' submission, I do not view the motion judge's error as being necessarily harmless.

5) Even assuming that the inferences sought by Home Depot could be drawn, the equities still favour vesting out Home Depot's interest in the Woods Property

52 The respondents argue that regardless of the inferences that might be drawn, the equities will still inevitably favour the vesting out of Home Depot's interest. I disagree. The inferences Home Depot argues ought to have been drawn are central to the decision of whether to vest out its interest. This decision therefore cannot properly be made until the fact-finding process, including drawing reasonable inferences, is complete. That fact-finding process is more appropriately done by the Superior Court.

CONCLUSION

53 I would, therefore, allow the appeals, dismiss the cross-appeal and remit the matter to the Superior Court of Justice for a new hearing. If the parties cannot agree as to costs, they are to make brief written submissions within 20 days hereof.

P.S. ROULEAU J.A.
J.I. LASKIN J.A.:-- I agree.
M. ROSENBERG J.A.:-- I agree.

cp/e/qlacx/qlvxw/qlgpr/qlana/qlhcs

1 A motion judge can, in appropriate circumstances, order the trial of an issue pursuant to rule 37.13(2)(b) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

Royal Bank of Canada v. Soundair Corp., Canadian Pension Capital Ltd. and Canadian Insurers Capital Corp. Indexed as: Royal Bank of Canada v. Soundair Corp. (C.A.)

4 O.R. (3d) 1

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ONTARIO
Court of Appeal for Ontario

Goodman, McKinlay and Galligan JJ.A.

July 3, 1991

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

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

Held, the appeal should be dismissed.

Per Galligan J.A.: When deciding whether a receiver has acted providently, the court should examine the conduct of the receiver in light of the information the receiver had when it agreed to accept an offer, and should be very cautious before deciding that the receiver's conduct was improvident

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

While the primary concern of a receiver is the protecting of the interests of creditors, a secondary but important consideration is the integrity of the process by which the sale is effected. The court must exercise extreme caution before it interferes with the process adopted by a receiver to sell an unusual asset. It is important that prospective purchasers know that, if they are acting in good faith, bargain seriously with a receiver and enter into an agreement with it, a court will not lightly interfere with the commercial judgment of the receiver to sell the asset to them.

The failure of the receiver to give an offering memorandum to those who expressed an interest in the purchase of Air Toronto did not result in the process being unfair, as there was no proof that if an offering memorandum had been widely distributed among persons qualified to have purchased Air Toronto, a viable offer would have come forth from a party other than 922 or OEL.

The fact that the 922 offer was supported by Soundair's secured creditors did not mean that the court should have given effect to their wishes. Creditors who asked the court to appoint a receiver to dispose of assets (and therefore insulated themselves from the risks of acting privately) should not be allowed to take over control of the process by the simple expedient of supporting another purchaser if they do not agree with the sale by the receiver. If the court decides that a court-appointed receiver has acted providently and properly (as the receiver did in this case), the views of creditors should not be determinative.

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

Per Goodman J.A. (dissenting): The fact that a creditor has requested an order of the court appointing a receiver does not in any way diminish or derogate from his right to obtain the maximum benefit to be derived from any disposition of the debtor's assets. The creditors in this case were convinced that acceptance of the 922 offer was in their best interest and the evidence supported that belief. Although the receiver acted in good faith, the process which it used was unfair insofar as 922 was concerned and improvident insofar as the secured creditors were concerned.

Cases referred to

Beauty Counsellors of Canada Ltd. (Re) (1986), 58 C.B.R. (N.S.) 237 (Ont. Bkcy.); British Columbia Development Corp. v. Spun Cast Industries Inc. (1977), 5 B.C.L.R. 94, 26 C.B.R. (N.S.) 28 (S.C.); Cameron v. Bank of Nova Scotia (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303, 86 A.P.R. 303 (C.A.); Crown Trust Co. v. Rosenberg (1986), 60 O.R. (2d) 87, 22 C.P.C. (2d) 131, 67 C.B.R. (N.S.) 320 (note), 39 D.L.R. (4th) 526 (H.C.J.); Salima Investments Ltd. v. Bank of Montreal (1985), 41 Alta. L.R. (2d) 58, 65 A.R. 372, 59 C.B.R. (N.S.) 242, 21 D.L.R. (4th) 473 (C.A.); Sel-

kirk (Re) (1986), 58 C.B.R. (N.S.) 245 (Ont. Bkcy.); Selkirk (Re) (1987), 64 C.B.R. (N.S.) 140 (Ont. Bkcy.)

Statutes referred to

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

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

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

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

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

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

W.G. Horton, for Ontario Express Ltd.

Nancy J. Spies, for Frontier Air Ltd.

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

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

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

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

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

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

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

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

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

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

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

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

The first 922 offer contained a condition which was unacceptable to the receiver. I will refer to that condition in more detail later. The receiver declined the 922 offer and on March 8, 1991, accepted the OEL offer. Subsequently, 922 obtained an order allowing it to make a second offer. It

then submitted an offer which was virtually identical to that of March 7, 1991, except that the unacceptable condition had been removed.

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

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

(1) Did the receiver act properly when it entered into an agreement to sell Air Toronto to OEL?
(2) What effect does the support of the 922 offer by the secured creditors have on the result?

I will deal with the two issues separately.

I. DID THE RECEIVER ACT PROPERLY IN AGREEING TO SELL TO OEL?

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

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

As did Rosenberg J., I adopt as correct the statement made by Anderson J. in Crown Trust Co. v. Rosenberg (1986), 60 O.R. (2d) 87, 39 D.L.R. (4th) 526 (H.C.J.), at pp. 92-94 O.R., pp. 531-33 D.L.R., of the duties which a court must perform when deciding whether a receiver who has sold a property acted properly. When he set out the court's duties, he did not put them in any order of priority, nor do I. I summarize those duties as follows:

1. It should consider whether the receiver has made a sufficient effort to get the best price and has not acted improvidently.
2. It should consider the interests of all parties.
3. It should consider the efficacy and integrity of the process by which offers are obtained.

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

I intend to discuss the performance of those duties separately.

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

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

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

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

When deciding whether a receiver had acted providently, the court should examine the conduct of the receiver in light of the information the receiver had when it agreed to accept an offer. In this case, the court should look at the receiver's conduct in the light of the information it had when it made its decision on March 8, 1991. The court should be very cautious before deciding that the receiver's conduct was improvident based upon information which has come to light after it made its decision. To do so, in my view, would derogate from the mandate to sell given to the receiver by the order of O'Brien J. I agree with and adopt what was said by Anderson J. in Crown Trust v. Rosenberg, supra, at p. 112 O.R., p. 551 D.L.R.:

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

(Emphasis added)

I also agree with and adopt what was said by Macdonald J.A. in Cameron v. Bank of Nova Scotia (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303 (C.A.), at p. 11 C.B.R., p. 314 N.S.R.:

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

(Emphasis added)

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

> 24. An asset purchase agreement was received by Ernst & Young on March 7, 1991 which was dated March 6, 1991. This agreement was received from CCFL in respect of their offer to purchase the assets and undertaking of Air Toronto. Apart from financial considerations, which will be considered in a subsequent affidavit, the Receiver determined that it would not be prudent to delay acceptance of the OEL agreement to negotiate a highly uncertain arrangement with Air Canada and CCFL. Air Canada had the benefit of an "exclusive" in negotiations for Air Toronto and had clearly indicated its intention to take itself out of the running while ensuring that no other party could seek to purchase Air Toronto and maintain the Air Canada connector arrangement vital to its survival. The CCFL offer represented a radical reversal of this position by Air Canada at the eleventh hour. However, it contained a significant number of conditions to closing which were entirely beyond the control of the Receiver. As well, the CCFL offer came less than 24 hours before signing of the agreement with OEL which had been negotiated over a period of months, at great time and expense.

(Emphasis added)

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

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

I mentioned earlier that, pursuant to an order, 922 was permitted to present a second offer. During the hearing of the appeal, counsel compared at great length the price contained in the second 922

offer with the price contained in the OEL offer. Counsel put forth various hypotheses supporting their contentions that one offer was better than the other.

It is my opinion that the price contained in the 922 offer is relevant only if it shows that the price obtained by the Receiver in the OEL offer was not a reasonable one. In Crown Trust v. Rosenberg, supra, Anderson J., at p. 113 O.R., p. 551 D.L.R., discussed the comparison of offers in the following way:

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

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

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

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

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

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

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

(Emphasis added)

What those cases show is that the prices in other offers have relevance only if they show that the price contained in the offer accepted by the receiver was so unreasonably low as to demonstrate that the receiver was improvident in accepting it. I am of the opinion, therefore, that if they do not tend to show that the receiver was improvident, they should not be considered upon a motion to confirm a sale recommended by a court-appointed receiver. If they were, the process would be changed from a sale by a receiver, subject to court approval, into an auction conducted by the court at the time ap-

proval is sought. In my opinion, the latter course is unfair to the person who has entered bona fide into an agreement with the receiver, can only lead to chaos, and must be discouraged.

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

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

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

The 922 offer provided for $6,000,000 cash to be paid on closing with a royalty based upon a percentage of Air Toronto profits over a period of five years up to a maximum of $3,000,000. The OEL offer provided for a payment of $2,000,000 on closing with a royalty paid on gross revenues over a five-year period. In the short term, the 922 offer is obviously better because there is substantially more cash up front. The chances of future returns are substantially greater in the OEL offer because royalties are paid on gross revenues while the royalties under the 922 offer are paid only on profits. There is an element of risk involved in each offer.

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

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

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

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

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

2. Consideration of the interests of all parties

It is well established that the primary interest is that of the creditors of the debtor: see Crown Trust Co. v. Rosenberg, supra, and Re Selkirk (1986, Saunders J.), supra. However, as Saunders J. pointed out in Re Beauty Counsellors, supra, at p. 244 C.B.R., "it is not the only or overriding consideration".

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

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

3. Consideration of the efficacy and integrity of the process by which the offer was obtained

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

The importance of a court protecting the integrity of the process has been stated in a number of cases. First, I refer to Re Selkirk (1986), supra, where Saunders J. said at p. 246 C.B.R.:

> In dealing with the request for approval, the court has to be concerned primarily with protecting the interest of the creditors of the former bankrupt. A secondary but important consideration is that the process under which the sale agreement is arrived at should be consistent with commercial efficacy and integrity.

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

In Salima Investments Ltd. v. Bank of Montreal (1985), 41 Alta. L.R. (2d) 58, 21 D.L.R. (4th) 473 (C.A.), at p. 61 Alta. L.R., p. 476 D.L.R., the Alberta Court of Appeal said that sale by tender is not necessarily the best way to sell a business as an ongoing concern. It went on to say that when some other method is used which is provident, the court should not undermine the process by refusing to confirm the sale.

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

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

(Emphasis added)

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

Before this court, counsel for those opposing the confirmation of the sale to OEL suggested many different ways in which the receiver could have conducted the process other than the way which he did. However, the evidence does not convince me that the receiver used an improper method of at-

tempting to sell the airline. The answer to those submissions is found in the comment of Anderson J. in Crown Trust Co. v. Rosenberg, supra, at p. 109 O.R., p. 548 D.L.R.:

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

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

4. Was there unfairness in the process?

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

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

The offering memorandum had not been completed by February 11, 1991. On that date, the receiver entered into the letter of intent to negotiate with OEL. The letter of intent contained a provision that during its currency the receiver would not negotiate with any other party. The letter of intent was renewed from time to time until the OEL offer was received on March 6, 1991.

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

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

with the receiver. I see no unfairness on the part of the receiver when it honoured its letter of intent with OEL by not releasing the offering memorandum during the negotiations with OEL.

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

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

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

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

There are two statements by Anderson J. contained in Crown Trust Co. v. Rosenberg, supra, which I adopt as my own. The first is at p. 109 O.R., p. 548 D.L.R.:

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

The second is at p. 111 O.R., p. 550 D.L.R.:

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

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

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

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

I agree.

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

II. THE EFFECT OF THE SUPPORT OF THE 922 OFFER BY THE TWO SECURED CREDITORS

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

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

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

The second reason is that, in the particular circumstances of this case, I do not think the support of CCFL and the Royal Bank of the 922 offer is entitled to any weight. The support given by CCFL

can be dealt with summarily. It is a co-owner of 922. It is hardly surprising and not very impressive to hear that it supports the offer which it is making for the debtors' assets.

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

On April 5, 1991, the Royal Bank and CCFL agreed to settle the interlender dispute. The settlement was that if the 922 offer was accepted by the court, CCFL would receive only $1,000,000 and the Royal Bank would receive $5,000,000 plus any royalties which might be paid. It was only in consideration of that settlement that the Royal Bank agreed to support the 922 offer.

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

While there may be circumstances where the unanimous support by the creditors of a particular offer could conceivably override the proper and provident conduct of a sale by a receiver, I do not think that this is such a case. This is a case where the receiver has acted properly and in a provident way. It would make a mockery out of the judicial process, under which a mandate was given to this receiver to sell this airline, if the support by these creditors of the 922 offer were permitted to carry the day. I give no weight to the support which they give to the 922 offer.

In its factum, the receiver pointed out that, because of greater liabilities imposed upon private receivers by various statutes such as the Employment Standards Act, R.S.O. 1980, c. 137, and the Environmental Protection Act, R.S.O. 1980, c. 141, it is likely that more and more the courts will be asked to appoint receivers in insolvencies. In those circumstances, I think that creditors who ask for court-appointed receivers and business people who choose to deal with those receivers should know that if those receivers act properly and providently their decisions and judgments will be given great weight by the courts who appoint them. I have decided this appeal in the way I have in order to assure business people who deal with court-appointed receivers that they can have confidence that an agreement which they make with a court-appointed receiver will be far more than a platform upon which others may bargain at the court approval stage. I think that persons who enter into agreements with court-appointed receivers, following a disposition procedure that is appropriate given the nature of the assets involved, should expect that their bargain will be confirmed by the court.

The process is very important. It should be carefully protected so that the ability of court-appointed receivers to negotiate the best price possible is strengthened and supported. Because this receiver acted properly and providently in entering into the OEL agreement, I am of the opinion that Rosenberg J. was right when he approved the sale to OEL and dismissed the motion to approve the 922 offer.

I would, accordingly, dismiss the appeal. I would award the receiver, OEL and Frontier Airlines Limited their costs out of the Soundair estate, those of the receiver on a solicitor-and-client scale. I would make no order as to the costs of any of the other parties or interveners.

MCKINLAY J.A. (concurring in the result):-- I agree with Galligan J.A. in result, but wish to emphasize that I do so on the basis that the undertaking being sold in this case was of a very special and unusual nature. It is most important that the integrity of procedures followed by court-appointed receivers be protected in the interests of both commercial morality and the future confidence of business persons in their dealings with receivers. Consequently, in all cases, the court should carefully scrutinize the procedure followed by the receiver to determine whether it satisfies the tests set out by Anderson J. in Crown Trust Co. v. Rosenberg (1986), 60 O.R. (2d) 87, 39 D.L.R. (4th) 526 (H.C.J.). While the procedure carried out by the receiver in this case, as described by Galligan J.A., was appropriate, given the unfolding of events and the unique nature of the assets involved, it is not a procedure that is likely to be appropriate in many receivership sales.

I should like to add that where there is a small number of creditors who are the only parties with a real interest in the proceeds of the sale (i.e., where it is clear that the highest price attainable would result in recovery so low that no other creditors, shareholders, guarantors, etc., could possibly benefit therefrom), the wishes of the interested creditors should be very seriously considered by the receiver. It is true, as Galligan J.A. points out, that in seeking the court appointment of a receiver, the moving parties also seek the protection of the court in carrying out the receiver's functions. However, it is also true that in utilizing the court process the moving parties have opened the whole process to detailed scrutiny by all involved, and have probably added significantly to their costs and consequent shortfall as a result of so doing. The adoption of the court process should in no way diminish the rights of any party, and most certainly not the rights of the only parties with a real interest. Where a receiver asks for court approval of a sale which is opposed by the only parties in interest, the court should scrutinize with great care the procedure followed by the receiver. I agree with Galligan J.A. that in this case that was done. I am satisfied that the rights of all parties were properly considered by the receiver, by the learned motions court judge, and by Galligan J.A.

GOODMAN J.A. (dissenting):-- I have had the opportunity of reading the reasons for judgment herein of Galligan and McKinlay JJ.A. Respectfully, I am unable to agree with their conclusion.

The case at bar is an exceptional one in the sense that upon the application made for approval of the sale of the assets of Air Toronto two competing offers were placed before Rosenberg J. Those two offers were that of Frontier Airlines Ltd. and Ontario Express Limited (OEL) and that of 922246 Ontario Limited (922), a company incorporated for the purpose of acquiring Air Toronto. Its shares were owned equally by Canadian Pension Capital Limited and Canadian Insurers Capital Corporation (collectively CCFL) and Air Canada. It was conceded by all parties to these proceedings that the only persons who had any interest in the proceeds of the sale were two secured creditors, viz., CCFL and the Royal Bank of Canada (the Bank). Those two creditors were unanimous in their position that they desired the court to approve the sale to 922. We were not referred to nor am I aware of any case where a court has refused to abide by the unanimous wishes of the only interested creditors for the approval of a specific offer made in receivership proceedings.

In British Columbia Development Corp. v. Spun Cast Industries Inc. (1977), 5 B.C.L.R. 94, 26 C.B.R. (N.S.) 28 (S.C.), Berger J. said at p. 95 B.C.L.R., p. 30 C.B.R.:

> Here all of those with a financial stake in the plant have joined in seeking the court's approval of the sale to Fincas. This court does not having a roving commission to decide what is best for investors and businessmen when they have agreed among themselves what course of action they should follow. It is their money.

I agree with that statement. It is particularly apt to this case. The two secured creditors will suffer a shortfall of approximately $50,000,000. They have a tremendous interest in the sale of assets which form part of their security. I agree with the finding of Rosenberg J., Gen. Div., May 1, 1991, that the offer of 922 is superior to that of OEL. He concluded that the 922 offer is marginally superior. If by that he meant that mathematically it was likely to provide slightly more in the way of proceeds it is difficult to take issue with that finding. If on the other hand he meant that having regard to all considerations it was only marginally superior, I cannot agree. He said in his reasons [pp. 17-18]:

> I have come to the conclusion that knowledgeable creditors such as the Royal Bank would prefer the 922 offer even if the other factors influencing their decision were not present. No matter what adjustments had to be made, the 922 offer results in more cash immediately. Creditors facing the type of loss the Royal Bank is taking in this case would not be anxious to rely on contingencies especially in the present circumstances surrounding the airline industry.

I agree with that statement completely. It is apparent that the difference between the two offers insofar as cash on closing is concerned amounts to approximately $3,000,000 to $4,000,000. The Bank submitted that it did not wish to gamble any further with respect to its investment and that the acceptance and court approval of the OEL offer, in effect, supplanted its position as a secured creditor with respect to the amount owing over and above the down payment and placed it in the position of a joint entrepreneur but one with no control. This results from the fact that the OEL offer did not provide for any security for any funds which might be forthcoming over and above the initial downpayment on closing.

In Cameron v. Bank of Nova Scotia (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303 (C.A.), Hart J.A., speaking for the majority of the court, said at p. 10 C.B.R., p. 312 N.S.R.:

> Here we are dealing with a receiver appointed at the instance of one major creditor, who chose to insert in the contract of sale a provision making it subject to the approval of the court. This, in my opinion, shows an intention on behalf of the parties to invoke the normal equitable doctrines which place the court in the position of looking to the interests of all persons concerned before giving its blessing to a particular transaction submitted for approval. In these circumstances the court would not consider itself bound by the contract entered into in good faith by the receiver but would have to look to the broader picture to see that the contract was for the benefit of the creditors as a whole. When there was evidence that a higher price was readily available for the property the chambers judge was, in my opinion, justified in exercising his discretion as he did. Otherwise he could have deprived the creditors of a substantial sum of money.

This statement is apposite to the circumstances of the case at bar. I hasten to add that in my opinion it is not only price which is to be considered in the exercise of the judge's discretion. It may very

well be, as I believe to be so in this case, that the amount of cash is the most important element in determining which of the two offers is for the benefit and in the best interest of the creditors.

It is my view, and the statement of Hart J.A. is consistent therewith, that the fact that a creditor has requested an order of the court appointing a receiver does not in any way diminish or derogate from his right to obtain the maximum benefit to be derived from any disposition of the debtor's assets. I agree completely with the views expressed by McKinlay J.A. in that regard in her reasons.

It is my further view that any negotiations which took place between the only two interested creditors in deciding to support the approval of the 922 offer were not relevant to the determination by the presiding judge of the issues involved in the motion for approval of either one of the two offers nor are they relevant in determining the outcome of this appeal. It is sufficient that the two creditors have decided unanimously what is in their best interest and the appeal must be considered in the light of that decision. It so happens, however, that there is ample evidence to support their conclusion that the approval of the 922 offer is in their best interests.

I am satisfied that the interests of the creditors are the prime consideration for both the receiver and the court. In Re Beauty Counsellors of Canada Ltd. (1986), 58 C.B.R. (N.S.) 237 (Ont. Bkcy.) Saunders J. said at p. 243:

> This does not mean that a court should ignore a new and higher bid made after acceptance where there has been no unfairness in the process. The interests of the creditors, while not the only consideration, are the prime consideration.

I agree with that statement of the law. In Re Selkirk (1986), 58 C.B.R. (N.S.) 245 (Ont. Bkcy.) Saunders J. heard an application for court approval for the sale by the sheriff of real property in bankruptcy proceedings. The sheriff had been previously ordered to list the property for sale subject to approval of the court. Saunders J. said at p. 246 C.B.R.:

> In dealing with the request for approval, the court has to be concerned primarily with protecting the interests of the creditors of the former bankrupt. A secondary but important consideration is that the process under which the sale agreement is arrived at should be consistent with the commercial efficacy and integrity.

I am in agreement with that statement as a matter of general principle. Saunders J. further stated that he adopted the principles stated by Macdonald J.A. in Cameron, supra, at pp. 92-94 O.R., pp. 531-33 D.L.R., quoted by Galligan J.A. in his reasons. In Cameron, the remarks of Macdonald J.A. related to situations involving the calling of bids and fixing a time limit for the making of such bids. In those circumstances the process is so clear as a matter of commercial practice that an interference by the court in such process might have a deleterious effect on the efficacy of receivership proceedings in other cases. But Macdonald J.A. recognized that even in bid or tender cases where the offeror for whose bid approval is sought has complied with all requirements a court might not approve the agreement of purchase and sale entered into by the receiver. He said at pp. 11-12 C.B.R., p. 314 N.S.R.:

> There are, of course, many reasons why a court might not approve an agreement of purchase and sale, viz., where the offer accepted is so low in relation to the appraised

> value as to be unrealistic; or, where the circumstances indicate that insufficient time was allowed for the making of bids or that inadequate notice of sale by bid was given (where the receiver sells property by the bid method); or, where it can be said that the proposed sale is not in the best interest of either the creditors or the owner. Court approval must involve the delicate balancing of competing interests and not simply a consideration of the interests of the creditors.

The deficiency in the present case is so large that there has been no suggestion of a competing interest between the owner and the creditors.

I agree that the same reasoning may apply to a negotiation process leading to a private sale but the procedure and process applicable to private sales of a wide variety of businesses and undertakings with the multiplicity of individual considerations applicable and perhaps peculiar to the particular business is not so clearly established that a departure by the court from the process adopted by the receiver in a particular case will result in commercial chaos to the detriment of future receivership proceedings. Each case must be decided on its own merits and it is necessary to consider the process used by the receiver in the present proceedings and to determine whether it was unfair, improvident or inadequate.

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

> On March 8, 1991 the trustee accepted the OEL offer subject to court approval. The receiver at that time had no other offer before it that was in final form or could possibly be accepted. The receiver had at the time the knowledge that Air Canada with CCFL had not bargained in good faith and had not fulfilled the promise of its letter of March 1. The receiver was justified in assuming that Air Canada and CCFL's offer was a long way from being in an acceptable form and that Air Canada and CCFL's objective was to interrupt the finalizing of the OEL agreement and to retain as long as possible the Air Toronto connector traffic flowing into Terminal 2 for the benefit of Air Canada.

In my opinion there was no evidence before him or before this court to indicate that Air Canada with CCFL had not bargained in good faith and that the receiver had knowledge of such lack of good faith. Indeed, on this appeal, counsel for the receiver stated that he was not alleging Air Canada and CCFL had not bargained in good faith. Air Canada had frankly stated at the time that it had made its offer to purchase which was eventually refused by the receiver that it would not become involved in an "auction" to purchase the undertaking of Air Canada and that, although it would fulfil its contractual obligations to provide connecting services to Air Toronto, it would do no more than it was legally required to do insofar as facilitating the purchase of Air Toronto by any other person. In so doing Air Canada may have been playing "hard ball" as its behaviour was characterized by some of the counsel for opposing parties. It was nevertheless merely openly asserting its legal position as it was entitled to do.

Furthermore there was no evidence before Rosenberg J. or this court that the receiver had assumed that Air Canada and CCFL's objective in making an offer was to interrupt the finalizing of the OEL agreement and to retain as long as possible the Air Toronto connector traffic flowing into Terminal 2 for the benefit of Air Canada. Indeed, there was no evidence to support such an assumption in any event although it is clear that 922 and through it CCFL and Air Canada were endeav-

ouring to present an offer to purchase which would be accepted and/or approved by the court in preference to the offer made by OEL.

To the extent that approval of the OEL agreement by Rosenberg J. was based on the alleged lack of good faith in bargaining and improper motivation with respect to connector traffic on the part of Air Canada and CCFL, it cannot be supported.

I would also point out that, rather than saying there was no other offer before it that was final in form, it would have been more accurate to have said that there was no unconditional offer before it.

In considering the material and evidence placed before the court I am satisfied that the receiver was at all times acting in good faith. I have reached the conclusion, however, that the process which he used was unfair insofar as 922 is concerned and improvident insofar as the two secured creditors are concerned.

Air Canada had been negotiating with Soundair Corporation for the purchase from it of Air Toronto for a considerable period of time prior to the appointment of a receiver by the court. It had given a letter of intent indicating a prospective sale price of $18,000,000. After the appointment of the receiver, by agreement dated April 30, 1990, Air Canada continued its negotiations for the purchase of Air Toronto with the receiver. Although this agreement contained a clause which provided that the receiver "shall not negotiate for the sale ... of Air Toronto with any person except Air Canada", it further provided that the receiver would not be in breach of that provision merely by receiving unsolicited offers for all or any of the assets of Air Toronto. In addition, the agreement, which had a term commencing on April 30, 1990, could be terminated on the fifth business day following the delivery of a written notice of termination by one party to the other. I point out this provision merely to indicate that the exclusivity privilege extended by the Receiver to Air Canada was of short duration at the receiver's option.

As a result of due diligence investigations carried out by Air Canada during the month of April, May and June of 1990, Air Canada reduced its offer to 8.1 million dollars conditional upon there being $4,000,000 in tangible assets. The offer was made on June 14, 1990 and was open for acceptance until June 29, 1990.

By amending agreement dated June 19, 1990 the receiver was released from its covenant to refrain from negotiating for the sale of the Air Toronto business and assets to any person other than Air Canada. By virtue of this amending agreement the receiver had put itself in the position of having a firm offer in hand with the right to negotiate and accept offers from other persons. Air Canada in these circumstances was in the subservient position. The receiver, in the exercise of its judgment and discretion, allowed the Air Canada offer to lapse. On July 20, 1990 Air Canada served a notice of termination of the April 30, 1990 agreement.

Apparently as a result of advice received from the receiver to the effect that the receiver intended to conduct an auction for the sale of the assets and business of the Air Toronto Division of Soundair Corporation, the solicitors for Air Canada advised the receiver by letter dated July 20, 1990 in part as follows:

> Air Canada has instructed us to advise you that it does not intend to submit a further offer in the auction process.

This statement together with other statements set forth in the letter was sufficient to indicate that Air Canada was not interested in purchasing Air Toronto in the process apparently contemplated by the receiver at that time. It did not form a proper foundation for the receiver to conclude that there was no realistic possibility of selling Air Toronto to Air Canada, either alone or in conjunction with some other person, in different circumstances. In June 1990 the receiver was of the opinion that the fair value of Air Toronto was between $10,000,000 and $12,000,000.

In August 1990 the receiver contacted a number of interested parties. A number of offers were received which were not deemed to be satisfactory. One such offer, received on August 20, 1990, came as a joint offer from OEL and Air Ontario (an Air Canada connector). It was for the sum of $3,000,000 for the good will relating to certain Air Toronto routes but did not include the purchase of any tangible assets or leasehold interests.

In December 1990 the receiver was approached by the management of Canadian Partner (operated by OEL) for the purpose of evaluating the benefits of an amalgamated Air Toronto/Air Partner operation. The negotiations continued from December of 1990 to February of 1991 culminating in the OEL agreement dated March 8, 1991.

On or before December, 1990, CCFL advised the receiver that it intended to make a bid for the Air Toronto assets. The receiver, in August of 1990, for the purpose of facilitating the sale of Air Toronto assets, commenced the preparation of an operating memorandum. He prepared no less than six draft operating memoranda with dates from October 1990 through March 1, 1991. None of these were distributed to any prospective bidder despite requests having been received therefor, with the exception of an early draft provided to CCFL without the receiver's knowledge.

During the period December 1990 to the end of January 1991, the receiver advised CCFL that the offering memorandum was in the process of being prepared and would be ready soon for distribution. He further advised CCFL that it should await the receipt of the memorandum before submitting a formal offer to purchase the Air Toronto assets.

By late January CCFL had become aware that the receiver was negotiating with OEL for the sale of Air Toronto. In fact, on February 11, 1991, the receiver signed a letter of intent with OEL wherein it had specifically agreed not to negotiate with any other potential bidders or solicit any offers from others.

By letter dated February 25, 1991, the solicitors for CCFL made a written request to the Receiver for the offering memorandum. The receiver did not reply to the letter because he felt he was precluded from so doing by the provisions of the letter of intent dated February 11, 1991. Other prospective purchasers were also unsuccessful in obtaining the promised memorandum to assist them in preparing their bids. It should be noted that exclusivity provision of the letter of intent,expired on February 20, 1991. This provision was extended on three occasions, viz., February 19, 22 and March 5, 1991. It is clear that from a legal standpoint the receiver, by refusing to extend the time, could have dealt with other prospective purchasers and specifically with 922.

It was not until March 1, 1991 that CCFL had obtained sufficient information to enable it to make a bid through 922. It succeeded in so doing through its own efforts through sources other than the receiver. By that time the receiver had already entered into the letter of intent with OEL. Notwithstanding the fact that the receiver knew since December of 1990 that CCFL wished to make a bid for the assets of Air Toronto (and there is no evidence to suggest that at any time such a bid would be in conjunction with Air Canada or that Air Canada was in any way connected with CCFL) it took

no steps to provide CCFL with information necessary to enable it to make an intelligent bid and, indeed, suggested delaying the making of the bid until an offering memorandum had been prepared and provided. In the meantime by entering into the letter of intent with OEL it put itself in a position where it could not negotiate with CCFL or provide the information requested.

On February 28, 1991, the solicitors for CCFL telephoned the receiver and were advised for the first time that the receiver had made a business decision to negotiate solely with OEL and would not negotiate with anyone else in the interim.

By letter dated March 1, 1991 CCFL advised the receiver that it intended to submit a bid. It set forth the essential terms of the bid and stated that it would be subject to customary commercial provisions. On March 7, 1991 CCFL and Air Canada, jointly through 922, submitted an offer to purchase Air Toronto upon the terms set forth in the letter dated March 1, 1991. It included a provision that the offer was conditional upon the interpretation of an interlender agreement which set out the relative distribution of proceeds as between CCFL and the Royal Bank. It is common ground that it was a condition over which the receiver had no control and accordingly would not have been acceptable on that ground alone. The receiver did not, however, contact CCFL in order to negotiate or request the removal of the condition although it appears that its agreement with OEL not to negotiate with any person other than OEL expired on March 6, 1991.

The fact of the matter is that by March 7, 1991, the receiver had received the offer from OEL which was subsequently approved by Rosenberg J. That offer was accepted by the receiver on March 8, 1991. Notwithstanding the fact that OEL had been negotiating the purchase for a period of approximately three months the offer contained a provision for the sole benefit of the purchaser that it was subject to the purchaser obtaining:

> ... a financing commitment within 45 days of the date hereof in an amount not less than the Purchase Price from the Royal Bank of Canada or other financial institution upon terms and conditions acceptable to them. In the event that such a financing commitment is not obtained within such 45 day period, the purchaser or OEL shall have the right to terminate this agreement upon giving written notice of termination to the vendor on the first Business Day following the expiry of the said period.

The purchaser was also given the right to waive the condition.

In effect the agreement was tantamount to a 45-day option to purchase excluding the right of any other person to purchase Air Toronto during that period of time and thereafter if the condition was fulfilled or waived. The agreement was, of course, stated to be subject to court approval.

In my opinion the process and procedure adopted by the receiver was unfair to CCFL. Although it was aware from December 1990 that CCFL was interested in making an offer, it effectively delayed the making of such offer by continually referring to the preparation of the offering memorandum. It did not endeavour during the period December 1990 to March 7, 1991 to negotiate with CCFL in any way the possible terms of purchase and sale agreement. In the result no offer was sought from CCFL by the receiver prior to February 11, 1991 and thereafter it put itself in the position of being unable to negotiate with anyone other than OEL. The receiver, then, on March 8, 1991 chose to accept an offer which was conditional in nature without prior consultation with CCFL (922) to see whether it was prepared to remove the condition in its offer.

I do not doubt that the receiver felt that it was more likely that the condition in the OEL offer would be fulfilled than the condition in the 922 offer. It may be that the receiver, having negotiated for a period of three months with OEL, was fearful that it might lose the offer if OEL discovered that it was negotiating with another person. Nevertheless it seems to me that it was imprudent and unfair on the part of the receiver to ignore an offer from an interested party which offered approximately triple the cash down payment without giving a chance to the offeror to remove the conditions or other terms which made the offer unacceptable to it. The potential loss was that of an agreement which amounted to little more than an option in favour of the offeror.

In my opinion the procedure adopted by the receiver was unfair to CCFL in that, in effect, it gave OEL the opportunity of engaging in exclusive negotiations for a period of three months notwithstanding the fact that it knew CCFL was interested in making an offer. The receiver did not indicate a deadline by which offers were to be submitted and it did not at any time indicate the structure or nature of an offer which might be acceptable to it.

In his reasons Rosenberg J. stated that as of March 1, CCFL and Air Canada had all the information that they needed and any allegations of unfairness in the negotiating process by the receiver had disappeared. He said [p. 31]:

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

If he meant by "acceptable in form" that it was acceptable to the receiver, then obviously OEL had the unfair advantage of its lengthy negotiations with the receiver to ascertain what kind of an offer would be acceptable to the receiver. If, on the other hand, he meant that the 922 offer was unacceptable in its form because it was conditional, it can hardly be said that the OEL offer was more acceptable in this regard as it contained a condition with respect to financing terms and conditions "acceptable to them".

It should be noted that on March 13, 1991 the representatives of 922 first met with the receiver to review its offer of March 7, 1991 and at the request of the receiver withdrew the inter-lender condition from its offer. On March 14, 1991 OEL removed the financing condition from its offer. By order of Rosenberg J. dated March 26, 1991, CCFL was given until April 5, 1991 to submit a bid and on April 5, 1991, 922 submitted its offer with the interlender condition removed.

In my opinion the offer accepted by the receiver is improvident and unfair insofar as the two creditors are concerned. It is not improvident in the sense that the price offered by 922 greatly exceeded that offered by OEL. In the final analysis it may not be greater at all. The salient fact is that the cash down payment in the 922 offer constitutes approximately two-thirds of the contemplated sale price whereas the cash down payment in the OEL transaction constitutes approximately 20 to 25 per cent of the contemplated sale price. In terms of absolute dollars, the down payment in the 922 offer would likely exceed that provided for in the OEL agreement by approximately $3,000,000 to $4,000,000.

In Re Beauty Counsellors of Canada Ltd., supra, Saunders J. said at p. 243 C.B.R.:

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

> duty to endeavour to obtain the best price for the estate. In such a case the proper course might be to refuse approval and to ask the trustee to recommence the process.

I accept that statement as being an accurate statement of the law. I would add, however, as previously indicated, that in determining what is the best price for the estate the receiver or court should not limit its consideration to which offer provides for the greater sale price. The amount of down payment and the provision or lack thereof to secure payment of the balance of the purchase price over and above the down payment may be the most important factor to be considered and I am of the view that is so in the present case. It is clear that that was the view of the only creditors who can benefit from the sale of Air Toronto.

I note that in the case at bar the 922 offer in conditional form was presented to the receiver before it accepted the OEL offer. The receiver in good faith, although I believe mistakenly, decided that the OEL offer was the better offer. At that time the receiver did not have the benefit of the views of the two secured creditors in that regard. At the time of the application for approval before Rosenberg J. the stated preference of the two interested creditors was made quite clear. He found as a fact that knowledgeable creditors would not be anxious to rely on contingencies in the present circumstances surrounding the airline industry. It is reasonable to expect that a receiver would be no less knowledgeable in that regard and it is his primary duty to protect the interests of the creditors. In my view it was an improvident act on the part of the receiver to have accepted the conditional offer made by OEL and Rosenberg J. erred in failing to dismiss the application of the receiver for approval of the OEL offer. It would be most inequitable to foist upon the two creditors who have already been seriously hurt more unnecessary contingencies.

Although in other circumstances it might be appropriate to ask the receiver to recommence the process, in my opinion, it would not be appropriate to do so in this case. The only two interested creditors support the acceptance of the 922 offer and the court should so order.

Although I would be prepared to dispose of the case on the grounds stated above, some comment should be addressed to the question of interference by the court with the process and procedure adopted by the receiver.

I am in agreement with the view expressed by McKinlay J.A. in her reasons that the undertaking being sold in this case was of a very special and unusual nature. As a result the procedure adopted by the receiver was somewhat unusual. At the outset, in accordance with the terms of the receiving order, it dealt solely with Air Canada. It then appears that the receiver contemplated a sale of the assets by way of auction and still later contemplated the preparation and distribution of an offering memorandum inviting bids. At some point, without advice to CCFL, it abandoned that idea and reverted to exclusive negotiations with one interested party. This entire process is not one which is customary or widely accepted as a general practice in the commercial world. It was somewhat unique having regard to the circumstances of this case. In my opinion the refusal of the court to approve the offer accepted by the receiver would not reflect on the integrity of procedures followed by court-appointed receivers and is not the type of refusal which will have a tendency to undermine the future confidence of business persons in dealing with receivers.

Rosenberg J. stated that the Royal Bank was aware of the process used and tacitly approved it. He said it knew the terms of the letter of intent in February 1991 and made no comment. The Royal Bank did, however, indicate to the receiver that it was not satisfied with the contemplated price nor the amount of the down payment. It did not, however, tell the receiver to adopt a different process in

endeavouring to sell the Air Toronto assets. It is not clear from the material filed that at the time it became aware of the letter of intent, it knew that CCFL was interested in purchasing Air Toronto.

I am further of the opinion that a prospective purchaser who has been given an opportunity to engage in exclusive negotiations with a receiver for relatively short periods of time which are extended from time to time by the receiver and who then makes a conditional offer, the condition of which is for his sole benefit and must be fulfilled to his satisfaction unless waived by him, and which he knows is to be subject to court approval, cannot legitimately claim to have been unfairly dealt with if the court refuses to approve the offer and approves a substantially better one.

In conclusion I feel that I must comment on the statement made by Galligan J.A. in his reasons to the effect that the suggestion made by counsel for 922 constitutes evidence of lack of prejudice resulting from the absence of an offering memorandum. It should be pointed out that the court invited counsel to indicate the manner in which the problem should be resolved in the event that the court concluded that the order approving the OEL offer should be set aside. There was no evidence before the court with respect to what additional information may have been acquired by CCFL since March 8, 1991 and no inquiry was made in that regard. Accordingly, I am of the view that no adverse inference should be drawn from the proposal made as a result of the court's invitation.

For the above reasons I would allow the appeal with one set of costs to CCFL-922, set aside the order of Rosenberg J., dismiss the receiver's motion with one set of costs to CCFL-922 and order that the assets of Air Toronto be sold to numbered corporation 922246 on the terms set forth in its offer with appropriate adjustments to provide for the delay in its execution. Costs awarded shall be payable out of the estate of Soundair Corporation. The costs incurred by the receiver in making the application and responding to the appeal shall be paid to him out of the assets of the estate of Soundair Corporation on a solicitor-and-client basis. I would make no order as to costs of any of the other parties or interveners.

Appeal dismissed.

Case Name:

Meridian Credit Union Ltd. v. 984 Bay Street Inc.

Between
Meridian Credit Union Limited, Plaintiff, and
984 Bay Street Inc. and Devendranauth Misir also known as Devi Misir, Defendants

[2006] O.J. No. 3169

150 A.C.W.S. (3d) 622

2006 CANLII 26476

Court File No. 05-CL-5785

Ontario Superior Court of Justice

J.D. Ground J.

Heard: July 13, 2006.
Judgment: August 1, 2006.

(25 paras.)

Landlord and tenant law -- The lease -- Commercial tenancies -- Motion by receiver and manager to terminate leases and to approve a sale of real property allowed -- Plaintiff had a registered charge against defendants' property -- Corporate defendant entered into non-arm's length leases that were subordinate to the charge -- Plaintiff delivered notice of sale -- Equities of the situation supported a termination of the leases and vesting title in the purchaser free and clear of the leasehold interests.

Real property law -- Title -- Encumbrances -- Motion by receiver and manager to terminate leases and to approve a sale of real property allowed -- Plaintiff had a registered charge against defendants' property -- Corporate defendant entered into non-arm's length leases that were subordinate to the charge -- Plaintiff delivered notice of sale -- Equities of the situation supported a termination of the leases and vesting title in the purchaser free and clear of the leasehold interests.

Real property law -- Mortgages -- Motion by receiver and manager to terminate leases and to approve a sale of real property allowed -- Plaintiff had a registered charge against defendants' prop-

erty -- Corporate defendant entered into non-arm's length leases that were subordinate to the charge -- Plaintiff delivered notice of sale -- Equities of the situation supported a termination of the leases and vesting title in the purchaser free and clear of the leasehold interests.

Motion by the receiver and manager of the corporate defendant to terminate leases and to approve a sale of real property, plus related relief -- The plaintiff, Meridian Credit Union Ltd., had a registered charge against the defendants' property -- The corporate defendant entered into non-arm's length leases with three allegedly related parties, one of which was controlled by the defendant Misir -- The leases were subordinate to the Meridian charge -- Meridian delivered a notice of sale -- The receiver obtained an order that it was entitled to sell the property free and clear of the non-arm's length leases -- An appeal by two of the tenants was allowed on the ground that it was not apparent that the motions judge had considered the equities among the parties -- The receiver found a buyer and brought another motion -- HELD: Motion allowed -- The leases were with companies controlled by Misir and his nephew, and were entered into when the Meridian charge was in default and when the corporate defendant was in serious financial difficulty -- The leases were an impediment to the receiver's ability to market and sell the property -- The equities of the situation supported a termination of the leases and vesting title in the purchaser free and clear of the leasehold interests.

Statutes, Regulations and Rules Cited:

Land Titles Act,

Personal Property Security Act,

Counsel:

Paul MacDonald and Jonathan Hood for KPMG Inc., Receiver and Manager of 984 Bay Street Inc.

Scott Venton for Meridian Credit Union Limited.

Ben Salsberg for Bay Wellesley Health Services Inc.

Sean Cumming for Integrated Health Investments Corporation.

Michael T. Chilco for the Bay Wellesley Doctors' Group.

ENDORSEMENT

1 **J.D. GROUND J.** (endorsement):-- By Order dated March 24, 2005 (the "Appointment Order"), KPMG Inc. (the "Receiver") was appointed Receiver and Manager of the property, assets and undertaking of 984 Bay Street Inc. ("984 Bay"), including the property known municipality as 984 Bay Street, Toronto, Ontario (the "Property"). 984 Bay is the registered owner of the Property. At the time of the Receiver's appointment, 984 Bay was controlled by Devendranauth Misir ("Misir"). Misir has admitted that he also controls Integrated Health Investments Corporation ("Integrated"). The controlling shareholder of Bay-Wellesley Health Services Inc. ("BW Health") is Omar Rambhajan ("Rambhajan"), Misir's nephew.

2 As security for a demand loan in the original principal amount of $7,020,000 (the "Meridian Loan"), 984 Bay granted Meridian Credit Union Limited ("Meridian") a debenture dated December 4, 2000 in the principal amount of $7,020,000, which was registered as a security pursuant to the *Personal Property Security Act* and as a charge (the "Meridian Charge") against title to the Property pursuant to the *Land Titles Act.* The Meridian Charge was validly registered in the Land Registry Office Number 66 on December 7, 2000 as Instrument Number CA703105 and provides in part:

> "Whenever the security hereby constituted shall have become enforceable, and so long as it shall remain enforceable the Credit Union may proceed to realize the security hereby constituted and to enforce its rights by entry; or by the appointment by instrument in writing of a receiver or receivers of the subject matter of such security or any part thereof and such receiver or receivers may be any person or persons, whether an officer or officers or employee or employees of the Credit Union or not and the Credit Union may remove any receiver or receivers so appointed and appoint another or others in his or their stead; or by proceedings in any court of competent jurisdiction for the appointment of a receiver or receivers or for sale of the subject matter of such security or any part thereof; or by any other action, suit, remedy or proceeding authorized or permitted hereby or by law or by equity, and may file such proofs of claim and other documents as may be necessary or advisable in order to have its claim lodged in any bankruptcy, winding-up or other judicial proceedings relative to the Corporation. Any such receiver or receivers so appointed shall have all of the powers conferred on the Credit Union by this debenture and shall have power to take possession of the mortgaged property or any part thereof and to carry on the business of the Corporation, and to borrow money required for the maintenance, preservation or protection of the mortgaged property or any part thereof or the carrying on of the business of the Corporation and to further charge the mortgaged property in priority to the charge of this debenture as security for money so borrowed, and to sell, lease or otherwise dispose of the whole or any part of the mortgaged property on such terms and conditions and in such manner as he shall determine. In exercising any powers any such receiver or receivers shall act as agent or agents for the Corporation and the Credit Union shall not be responsible for his or their actions".

3 On or about January 13, 2005, Meridian delivered a Notice of Sale Under Mortgage with respect to the Meridian Charge. As at February 16, 2005, 984 Bay owed the Plaintiff the sum of $5,616,597.67 which amount was secured by, among other things, the Meridian Charge. The appointment of a court-appointed receiver on March 24, 2005 was not opposed in this receivership. On various dates in 2004 and 2005, 984 Bay entered into Non-Arm's Length leases (the "Non-Arm's Length Leases") with three allegedly related parties, as follows:

(a) lease dated January 1, 2005 of suite 100 (2,400 square feet) to BW Health;
(b) lease dated October 1, 2004 of suites 200 and 300 (5,500 and 1,000 square feet, respectively) to BW Health;
(c) lease dated May 1, 2004 of suite 400 (3,710 square feet) to Physiotherapy Wellness Institute Inc. ("Wellness Institute");

(d) lease dated October 1, 2004 of suite 700 west (2,800 square feet) to Integrated; and

(e) lease dated October 1, 2004 of suite 700 east (3,200 square feet) to Integrated.

4 Each of the Non-Arm's Length Leases, by its terms, provides that it is subordinate to the Meridian Charge, as follows:

ARTICLE 14.00 -- SUBORDINATION AND ATTORNMENT

14.01 It is a condition that this Lease and Tenant's rights granted hereunder that this Lease and all of the rights of the Tenant hereunder are subordinate to any and all mortgages, trust deeds or other instruments of financing, refinancing or collateral financing, from time to tome in existence against the Property. Upon request, the Tenant will subordinate this Lease and all of its rights hereunder in such form as the Landlord requires to any and all mortgages, trust deeds or other instruments of financing, refinancing or collateral financing, as aforesaid, and will, if requested, attorn to the holder thereof or to the registered owner of the Property, as the case may be. If within three (3) days after request by the Landlord to the Tenant to execute the instruments or certificates to give effect to the foregoing the Tenant has not executed same, the Tenant irrevocably appoints the Landlord as the Tenant's attorney with full power and authority to execute and deliver in the name of the Tenant any such instrument or certificate.

5 None of the Non-Arm's Length Leases have been registered pursuant to the *Land Titles Act.*

6 Each of the Non-Arm's Length Leases contains provisions that grant the tenant lengthy rent-free periods (typically 9 or 12 months at the commencement of the lease and a further three rent-free months in each year of the lease and any renewal thereof).

7 Neither Integrated nor BW Health has paid any rent at all since the commencement of the terms of the Non-Arm's Length Leases (either October 1, 2004 or January 1, 2005).

8 It is the Receiver's position that, properly interpreted, BW Health was granted an initial nine-month rent-free period commencing January 1, 2005 (in the case of the First Floor Lease) and a 12-month rent-free period commencing October 1, 2004 (in the case of the Second and Third Floor Lease) followed by a three-month rent-free period to be taken in each subsequent year of the term of the leases. Under this interpretation, BW Health owed arrears of rent as at May 31, 2006 of $34,550 after giving credit for payments received directly by the Bay-Wellesley Doctors Group (the "Doctors") referred to below.

9 In the case of Integrated, it is the Receiver's position that under both the Seventh Floor West Lease and the Seventh Floor East Lease, Integrated was granted an initial 12-month rent-free period commencing October 1, 2004 and a further three rent-free months in each year of the leases and any

renewal thereof. Under this interpretation, Integrated owed arrears of rent of $31,877.07 as at May 31, 2006.

10 In August of 2005, the Receiver moved before me for a declaration that the Receiver was entitled to sell the Property free and clear of the Non-Arm's Length Leases on the basis that (a) the Non-Arm's Length Leases were fraudulent conveyances and of no force and effect; and (b) in any event, the Non-Arm's Length Leases were subordinate to the Meridian Charge and the Receiver was entitled to sell the Property free and clear of the Non-Arm's Length Leases as a matter of mortgage law.

11 By Endorsement and Order dated September 6, 2005 (the "September 6 Order") I found that the Receiver had the right to terminate the Non-Arm's Length Leases and to market and sell the Property free and clear of them.

12 BW Health and Integrated appealed my decision. By Endorsement dated April 28, 2006, the Court of Appeal set aside the September 6 Order and remitted the motion to this Court for hearing on the basis that it was not apparent from my Endorsement that I considered the equities among the parties in reaching my decision.

13 Pursuant to paragraphs 3(k) and (l) of the Appointment Order, the Receiver was expressly authorized to market the Property, including advertising and soliciting offers in respect of the Property and negotiating terms and conditions of sale, and, subject to further approval of the Court, to sell the Property. Pursuant to an Order dated June 2, 2005 (the "June 2 Order"), this Court approved the Receiver's proposed marketing plan for the Property, as outlined in the Receiver's First Report to the Court. Pursuant to the June 2, 2005 Order, the Receiver conducted a process to solicit offers to purchase 984 (the "Sales Process"). Offers were due by July 6, 2005. In its Second Report, the Receiver advised the Court of the outcome of the Sales Process. 75 prospects registered by executing a confidentiality agreement and five offers were received, however, none was acceptable to the Receiver. In its Second Report, the Receiver also advised the court that it intended to continue discussions with certain offerors from the Sales Process and to pursue other inquiries that came forward to the Receiver subsequent to the Sales Process. The Receiver subsequently entered into an agreement of purchase and sale on December 20, 2005 (the "Sale Agreement") with Ahmed Baig, in trust. As set out in the Fourth Report, the Receiver recommends that the Court approve the Sale Agreement since:

(a) there are no substantial changes to the standard terms and conditions,
(b) the purchase price was the highest received, notwithstanding a price reduction that was allowed following the purchaser's inspection of the Property;
.(c) the Receiver is of the opinion that the equities favour the granting of a vesting order to convey title to 984 Bay free and clear of, among other things, the Non Arm's Length Leases; and
(d) Meridian has advised the Receiver that it is supportive of the Sale Agreement even though the purchase price is substantially less than the amount of the mortgage debt due to Meridian.

14 The Receiver has prepared a supplemental report to this court dated May 31, 2006 (the "Supplemental Report") and has provided a summary of offers received, including purchase prices and a copy of the Sale Agreement, as amended.

15 Pursuant to the Endorsement of the Court of Appeal, the Receiver has now brought the present motion before this court. The relief sought on this motion is:

(a) approval of the Receiver's 4th, 5th, 6th and 7th reports;
(b) approval of the sale of the Property to Ahmed Baig in trust;
(c) termination of the Non-Arm's Length Leases;
(d) an order for vacant possession of the premises leased to BW Health and to Integrated;
(e) a vesting order vesting the Property in Ahmed Baig in trust, free and clear of all charges, mortgages, liens and leases other than certain assumed leases;
(f) authority to terminate the Non-Arm's Length Leases;
(g) judgment against BW Health and Integrated for rentals in arrears;
(h) a temporary sealing order with respect to the Sale Agreement.

16 The approval of the Receiver's Reports was not in issue in the motion before this court although BW Health has advised the court that it intends to seek leave to bring action against the Receiver in respect of certain of its activities relating to the premises leased to BW Health and occupied by the Bay-Wellesley Doctors Group. Neither BW Health nor Integrated has any issue with the approval of the sale to Ahmed Baig in trust but submits that the purchaser should take title to the property subject to the leases in favour of BW Health and Integrated and opposes the termination of such leases and the order for vacant possession of the leased premises. The issuance of a vesting order was not contested by BW Health or Integrated except that it should be subject to the leases granted to BW Health and Integrated. The issuance of the sealing order was not contested by BW Health or Integrated.

17 BW Health and Integrated appear to have abandoned their previous position, based upon a rather absurd interpretation of the rent free periods provision in the leases, that no rentals were owing, although on the hearing of this motion at least BW Health seemed to question the calculation of rental arrears made by the Receiver.

18 The real issue between the parties is, therefore, termination of the BW Health and Integrated leases. Counsel for BW Health submits that, on the basis of the material before this court from appraisers retained by the Receiver and by BW Health, there are material issues in dispute as to whether the leases were on commercially reasonable terms and that that determination would require the trial of an issue. Counsel for BW Health also submits that the leases to BW Health, being a company controlled by Misir's nephew, should not be regarded as a non-arm's length lease. I am of the view that neither of these issues precludes me from making a determination on this motion of whether, in view of the equities involved, this court should order the termination of the leases to BW Health and to Integrated.

19 I think the law is clear that, if Meridian had proceeded by way of power of sale, it could have sold the Property to a purchaser free and clear of the leasehold interest of BW Health and Integrated on the basis that the subordination provision contained in the leases clearly subordinate the rights of the tenants to the rights of Meridian under the Meridian Charge and on the basis that none of the leases was registered on title to the property. This sale is, however, being conducted by a court-appointed receiver and, when seeking to convey title to assets free and clear of the interest of other parties, a receiver must apply to the court for a vesting order. In *New Skeena Products Inc. v.*

Kitwanga Lumber Co. (2005), 75 D.L.R. (4th) 328, the British Columbia Court of Appeal clearly states that, in determining whether to issue a vesting order terminating in the interests of parties in a property, the court must review the equitable considerations supporting the respective positions of the parties.

20 In the case at bar, I have considered the following equities. The BW Health leases and the Integrated leases were entered into when the Meridian Charge was in default and when 984 Bay was in serious financial difficulties. The leases were entered into with companies controlled by Misir and by his nephew. The leases contained generous rent-free periods. No rent has been paid by either BW Health or Integrated since the date of commencement of the leases. A number of potential purchasers of the property expressed the view that the leases were at below market terms in rent. Three offers submitted required that the Property be conveyed free and clear of the leasehold interests of BW Health and Integrated. The Sales Process clearly established that the existence of the BW Health leases and the Integrated leases were an impediment to the Receiver's ability to market and sell the Property. The Sale Agreement with Ahmed Baiz, in trust, which the Receiver believes represents the best opportunity to realize maximum value for the Property, contains a condition that the Property be conveyed free and clear of the BW Health leases and the Integrated leases. Meridian supports the sale in spite of the fact that it will realize a substantial shortfall on the amount owing under the Meridian Charge. I am firmly of the view that the equities of the situation support an order terminating the BW Health leases and the Integrated leases and vesting title to the Property in the purchaser free and clear of those leasehold interests.

21 The only other party whose equities should be considered by the court is the Bay-Wellesley Doctors Group (the "Doctors"). The Doctors occupied the premises now leased to BW Health pursuant to a rather odd arrangement with Misir or 984 Bay, or another entity called Bay-Wellesley Medical Services, whereby payments from OHIP and Insurers were directed to Misir or 984 Bay and a certain percentage then remitted to the Doctors. This arrangement was terminated when Misir and 984 Bay failed to pay staff salaries and other expenses of the Doctors' clinic. Subsequently, when the Doctors were advised by a bailiff that the municipal taxes for the building were in arrears, the Doctors began to make arbitrary voluntary payments of $2,500 a month to the bailiff to be applied toward the taxes in arrears. When the Receiver paid the taxes in arrears, these payments were then made to an agent for the Receiver. At no time was there any lease entered into between Misir or 984 Bay and the Doctors or any sublease between BW Health and the Doctors when the premises occupied by the Doctors were subsequently leased to BW Health and at no time was there any agreement with respect to the rental payments for the premises. In my view, the Doctors occupied the premises on some sort of tenancy at will. I also note that BW Health never demanded possession of the premises until a letter of April 2006 and has never brought a motion to have the premises vacated.

22 In any event, the court is advised by counsel for the Doctors that they do not object to the sale of the Property or to the termination of the BW Health leases so long as they are given ample time to vacate the premises and to move their furniture and equipment. In addition, the court is advised that the purchaser is interested in negotiating a new lease with the Doctors for the premises now occupied by them. In my view, the equities of the Doctors' position do not impact upon the issuance of an order by this order terminating the BW Health leases and the Integrated leases.

23 Accordingly, an order will issue granting the relief sought by the Receiver on this motion provided that the determination of the arrears of rentals owed by BW Health and Integrated, if not

agreed between the parties, will be determined by reference to a Master and the Receiver may move for judgment upon such determination.

24 The order of Justice Mesbur dated May 19, 2006 is to continue in effect until my order is issued and entered.

25 Any submissions as to costs of this proceeding may be made to me by way of brief written submissions on or before August 31, 2006.

J.D. GROUND J.

cp/e/qw/qljhh/qlrsg/qlmll/qlgpr

Her Majesty the Queen in Right of Ontario v. Shehrazad Non-Profit Housing Inc. [Indexed as: Ontario v. Shehrazad Non-Profit Housing Inc.]

85 O.R. (3d) 81

Court of Appeal for Ontario,

MacPherson J.A. (In Chambers)

April 13, 2007

Judgments and orders -- Final or interlocutory -- Applicant seeking appointment of receiver pursuant to s. 101(1) of Courts of Justice Act by bringing application rather than interlocutory motion -- Order appointing receiver finally determining issues raised in application -- Order constituting final order -- Court of Appeal having jurisdiction to hear appeal from order -- Courts of Justice Act, R.S.O. 1990, c. C.43, s. 101(1).

Judgments and orders -- Stay pending appeal -- Applicant bringing successful application for appointment of receiver pursuant to s. 101(1) of Courts of Justice Act -- Respondent seeking stay pending appeal -- Stay granted -- Appeal raising serious issues including whether respondent was in fact insolvent and whether it was appropriate for applicant to commence application for appointment of receiver without that application ancillary to another proceeding for relief -- Respondent suffering irreparable harm if stay refused -- Balance of convenience favouring respondent -- Courts of Justice Act, R.S.O. 1990, c. C.43, s. 101(1).

The Corporation operated two social housing projects and depended on funding from the Ministry of Municipal Affairs and Housing. The Ministry had a number of financial concerns about the Corporation, including its failure to make mortgage payments. The Ministry suspended subsidy payments and subsequently brought an application pursuant to s. 101(1) of the Courts of Justice Act for the appointment of a receiver and manager. The motion was granted. The Corporation appealed, and moved for a stay of the appointment of a receiver pending the hearing of the appeal. The Ministry submitted that the court did not have jurisdiction to hear the appeal, and therefore did not have jurisdiction to grant a stay, as the order appealed from was interlocutory rather than final.

Held, the motion should be granted.

The Ministry sought the appointment of a receiver by way of an application rather than an interlocutory motion. Orders that finally determine the issues raised in an application are final orders. The Court of Appeal had jurisdiction to hear the appeal and to grant a stay.

The appeal raised serious issues, including whether the Corporation was, in fact, insolvent, and whether it was appropriate for the Ministry to commence an application for the appointment of a receiver without that application being ancillary to another proceeding for relief. The Corporation would suffer irreparable harm if the stay were refused, as it would lose its primary assets, all its sources of income and its reason for being. The balance of convenience favoured the Corporation.

Cases referred to

Illidge (Trustee of) v. St. James Securities Inc. (2002), 60 O.R. (3d) 155, [2002] O.J. No. 2174, 34 C.B.R. (4th) 227 (C.A.); RJR-MacDonald Inc. v. Canada (Attorney General), [1994] 1 S.C.R. 311, [1994] S.C.J. No. 17, 60 Q.A.C. 241, 111 D.L.R. (4th) 385, 164 N.R. 1, 20 C.R.R. (2d) D-7, 54 C.P.R. (3d) 114, apld [page82]

Other cases referred to

Circuit World Corp. v. Lesperance (1997), 33 O.R. (3d) 674, [1997] O.J. No. 2081 (C.A.); Kanda Tsushin Kogyo Co. v. Coveley, [1997] O.J. No. 56, 96 O.A.C. 324 (Div. Ct.); Longley v. Canada (Attorney General), [2007] O.J. No. 929, 2007 ONCA 149 (C.A.)

Statutes referred to

Courts of Justice Act, R.S.O. 1990, c. C.43, s. 101 [as am.]

Rules and regulations referred to

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rules 14.05 [as am.], 41.02

MOTION for a stay pending appeal.

Michael Jaeger, for respondent/appellant/moving party.

Troy Harrison, for applicant/respondent/responding party.

MACPHERSON J.A. (In Chambers):--

A. Introduction

[1] The moving party, Shehrazad Non-Profit Housing Inc. (the "Corporation"), seeks a stay pending appeal of the order of Spence J. dated January 20, 2007 appointing a receiver. The respondent, the Ministry of Municipal Affairs and Housing (the "Ministry"), opposes the motion on two bases: (1) the Court of Appeal has no jurisdiction to hear the motion because the order being appealed is an interlocutory order and, therefore, an appeal must be taken, to the Divisional Court; and (2) on the merits, the moving party cannot meet the test for obtaining a stay.

B. Facts

(1) The parties

[2] The Corporation was established in 1985 to provide social housing services in the City of Kitchener. The Corporation operates two social housing projects, known as Shehrazad I and Shehrazad II. Each project is governed by a contract between the Corporation and the Ministry. The Corporation depends on funding from the Ministry. Funding for the construction of the projects was provided through mortgages insured by the Canada Mortgage Housing Corporation ("CMHC"). The Ministry is ultimately liable for the mortgage payments in the event the Corporation defaults. The Corporation also received subsidies from the Ministry. Each project is governed by a different subsidy scheme, but generally speaking, the subsidies are designed to compensate for the difference between the Corporation's operating costs and revenues. [page83]

[3] The Corporation is run by a Board of Directors made up of volunteers, many of whom have been involved since its inception.

[4] Several years ago, problems between the Board and the Ministry arose concerning the finances of the Corporation. On July 21, 2003, the Ministry sent a letter to the Board raising a number of concerns. The Ministry and the Corporation were in the process of establishing a plan for retrofitting the housing projects. The Ministry requested a list of firms that the Corporation wanted to include in the tender process. The Ministry also pointed to a number of financial concerns. It alleged that the Corporation had accumulated a deficit, unfunded replacement reserves, mortgage arrears, outstanding loans, excess costs, significant vacancies and outstanding financial statements. In the letter, the Ministry demanded immediate action on the part of the Corporation and stated that it would "exercise the remedies available" if necessary. The Corporation responded by letter on September 10, 2003. The Ministry was not satisfied with the Corporation's response and suspended subsidy payments in September 2003.

[5] The Ministry alleges that the Corporation failed to make mortgage payments on Shehrazad I from 2002 to 2006 and on Shehrazad II from 2003 to the present. The Ministry has been indemnifying CMHC for these mortgage payments. Between 2005 and 2006, the projects underwent a $1.7 million retrofit, funded by the Ministry.

[6] The Corporation states that, with the exception of the mortgage payments, all of its financial obligations are up to date. It further notes that it re-started mortgage payments on Shehrazad I in 2006.

(2) The litigation

[7] The Ministry commenced an application in Toronto (on the Commercial List) for the appointment of a receiver and manager on February 27, 2006. In its notice of application, the Ministry states that the appointment of a receiver is necessary in order to prepare for the sale of the projects to another non-profit corporation.

[8] On September 18, 2006, the Corporation launched an action in Kitchener against the Ministry for over $3 million in damages and for the reinstatement of subsidies.

[9] In a statement of defence and counterclaim filed by the Ministry in October 2006, the Ministry seeks over $4 million in damages.

[10] The application for the appointment of a receiver was heard on January 20, 2007. The application judge refused the Corporation's motions for a stay of the receivership application, a [page84]consolidation of the proceedings and a change of venue to Kitchener. The application judge or-

dered the appointment of a receiver and manager. He held that the Corporation was insolvent, the receiver was qualified and there was "a risk to the assets and the operation of the project".

[11] The Corporation is appealing the order of the application judge and seeks a stay of the appointment of the receiver pending the hearing of the appeal.

C. Issues

[12] The issues are:

(1) Does the court have jurisdiction to order a stay?
(2) If the answer to (1) is "Yes", should a stay pending appeal be ordered?

D. Analysis

(1) Jurisdiction

[13] The Ministry submits that the Corporation has brought its appeal in the wrong court and that the appeal should be to the Divisional Court with leave. It follows that the motion for a stay of the application judge's order should also be to the Divisional Court and this court does not have jurisdiction to issue a stay of the order.

[14] The Ministry commenced its application, including the relief to appoint a receiver and manager, pursuant to s. 101(1) of the Courts of Justice Act, R.S.O. 1990, c. C.43, which provides:

> 101(1) In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so.

The Ministry submits that the application judge's order pursuant to this provision was, by definition, interlocutory.

[15] I disagree. The Ministry did not bring a motion to appoint a receiver; rather, it made an application. The judge specifically referred to it as an application in his endorsement. The draft order prepared by the Ministry refers to an application.

[16] It follows that the decision of this court in Illidge (Trustee of) v. St. James Securities Inc. (2002), 60 O.R. (3d) 155, [2002] O.J. No. 2174 (C.A.) governs the question of which court has jurisdiction to hear the appeal in these proceedings. In Illidge, the appellant sought an order setting aside the appointment of the respondent as receiver on the basis of an alleged conflict of [page85]interest by reason of the respondent's role as trustee in the bankruptcy for other parties. The respondent argued that the Court of Appeal lacked jurisdiction to hear the appeal because the order appointing the receiver was interlocutory and not final.

[17] The court rejected this argument. Armstrong J.A. stated at para. 4:

> At the initial proceeding, Soberman sought the appointment as receiver by way of application rather than on interlocutory motion. As stated by this court in Hendrickson v. Kallio, [1932] O.R. 675, . . . and in numerous subsequent cases, orders that finally determine the issues raised in an application are final orders.

In my view, this passage is directly applicable to, and disposes of, the Ministry's objection that the Corporation has brought its appeal to the wrong court. It follows that the Corporation's motion for a stay should be considered on the merits.

(2) The merits

[18] Recently, in Longley v. Canada (Attorney General), [2007] O.J. No. 929, 2007 ONCA 149 (C.A.), at para. 14, Weiler J.A. reaffirmed that the test from RJR-MacDonald Inc. v. Canada (Attorney General), [1994] 1 S.C.R. 311, [1994] S.C.J. No. 17, is to be used on a motion for a stay pending appeal:

> The test for staying an order pending an appeal is the same as the test for an interlocutory injunction: Circuit World Corp. v. Lesperance et al. (1997), 33 O.R. (3d) 674 (C.A.) at 676-677. First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be determined on the appeal. Second, the court must determine if the appellant would suffer irreparable harm if the application were refused. Finally, the balance of convenience must be determined by assessing which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits.

Is there a serious issue to be determined on appeal?

[19] In Circuit World Corp. v. Lesperance (1997), 33 O.R. (3d) 674, [1997] O.J. No. 2081 (C.A.), Laskin J.A. held that this first part of the test constitutes a low threshold. At p. 677 O.R., he wrote that the court "should not extensively review the merits of the appeal", but it must determine that the issues raised are not frivolous or vexatious.

[20] In this case, the Corporation submits that the following serious issues must be determined:

-- Whether or not the appointment of a receiver is necessary;

-- Whether or not the appointment of Grant Thornton Limited as receiver is appropriate; [page86]

-- Whether or not the appointment of a receiver should occur prior to a resolution of the damages claims;

-- Whether or not the subsidies terminated by the Ministry were justifiably terminated and whether or not an abuse of process occurred.

In essence, the Corporation argues that a receiver should not have been appointed.

[21] The Ministry argues that there are no serious issues concerning the application judge's appointment of a receiver. It states that the application judge properly considered the relationship between the parties, whether the Ministry's security was at risk and the prejudice to the parties. The

Ministry further submits that the outcome of the subsidy action is irrelevant to the receivership application -- even if the Corporation were successful, it would still owe the Ministry over $1 million and have an operating deficit.

[22] In my view, the Corporation raises questions that are not merely frivolous or vexatious. First, the financial state of the Corporation is a contested issue. The Ministry argues (and the application judge held) that the Corporation is insolvent. Conversely, the Corporation argues that it is up to date on its financial commitments, except for the money owing on the mortgages. The Corporation further argues that it would not owe this money but for the Ministry's cessation of the subsidy payments. Therefore, issues for determination on appeal include whether the Corporation was in fact insolvent and whether the action for damages is relevant to that question.

[23] Second, while this was not raised by either party, it appears to me that there may be a procedural issue to be determined on appeal, namely, whether it was appropriate for the Ministry to commence an application for the appointment of a receiver without that application being ancillary to another proceeding for relief. According to rule 14.05(3)(g) of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194, an application for the appointment of a receiver can be brought "when ancillary to relief claimed in a proceeding properly commenced by a notice of application". Similarly, rule 41.02 contemplates that a motion for the appointment of a receiver can be brought "in a pending or intended proceeding". In this case, the Ministry commenced its application for the appointment of a receiver without seeking any other relief. In fact, it was not until the Corporation commenced an action for damages that the Ministry counterclaimed seeking the repayment of its debts. This suggests that the Ministry's sole [page87]purpose in appointing a receiver was to transfer the operation of the projects to another non-profit corporation. While the Corporation has not raised this procedural issue, it does argue that the purpose behind the application was for the Ministry "to 'wash its hands' of this social housing project and transfer administrative responsibility over the project to the Region of Waterloo". Arguably, there is an issue as to whether it was appropriate to appoint a receiver in these circumstances where the Ministry did not appear to be concerned about having its debts repaid, but was concerned only with transferring the business to another corporation.

[24] On balance, given the low threshold for this stage of the test, I conclude that there are serious issues to be determined on appeal that are not frivolous or vexatious.

Would the moving party suffer irreparable harm if the stay is refused?

[25] The Corporation raises a number of arguments that point to the irreparable harm it would suffer if a stay is not granted. In my view, the strongest argument is that the Corporation faces the risk that the projects could be transferred to another non-profit corporation by the receiver. As set out in the affidavit of Edna Coupal, "the harm against Shehrazad would be irreparable, as it would lose its primary assets (i.e., the housing projects), all its sources of income (i.e., rents), and its reason for being (i.e. to manage non-profit housing in Kitchener at the premises)". In RJR-MacDonald, irreparable harm was described as "harm which either cannot be quantified in monetary terms or which cannot be cured" (p. 341 S.C.R.). In this case, the harm suffered by the Corporation should the projects be transferred by the receiver would not be compensable or curable.

[26] The Ministry notes in its factum that evidence of irreparable harm "must be clear and not speculative": Kanda Tsushin Kogyo Co. v. Coveley, [1997] O.J. No. 56, 96 O.A.C. 324 (Div. Ct.),

at para. 14. While the harm discussed above was expressed in terms of a "risk", this risk seems more than speculative given that the receiver's mandate is to transfer the business to a new entity.

Does the balance of convenience favour the granting of a stay?

[27] This stage of the analysis requires balancing the harm that would be suffered by each party. I have concluded that the Corporation risks suffering irreparable harm should the stay be refused. [page88]

[28] The harm to the Ministry must also be considered. Essentially, the harm that the Ministry will suffer if the stay is granted is continued financial losses. This is purely financial and therefore is technically compensable. However, the ability of the debtor to pay is a relevant consideration and the Ministry argues that the Corporation is insolvent: RJR-MacDonald, p. 341 S.C.R. The Ministry states that it has already incurred substantial losses. However, the effect of a stay would only be to aggravate these losses temporarily until the appeal is heard (probably a matter of months). When this is compared to the harm that the Corporation risks suffering if the stay is refused, this factor favours granting the stay.

E. Disposition

[29] The motion for a stay of the application judge's order dated January 20, 2007 pending appeal to this court is granted.

[30] The appeal is to be perfected within 30 days of the release of these reasons. Once perfected, the appeal should be heard on an expedited basis.

[31] The Corporation is entitled to its costs of the motion fixed at $5,000 inclusive of disbursements and GST.

Motion granted.

HOME TRUST COMPANY
Applicant

v.

2122775 ONTARIO INC.
Appellant
(Respondent)

Court of Appeal No.

COURT OF APPEAL FOR ONTARIO

Proceeding commenced at Toronto

BRIEF OF AUTHORITIES OF THE APPELLANT, 2122775 ONTARIO INC.

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