2019 Hfx No.494188

Supreme Court of Nova Scotia
In Bankruptcy and Insolvency

IN THE MATTER OF: the Receivership of Civic Homes Limited

Between:

ROYAL BANK OF CANADA

Applicant

-and-

CIVIC HOMES LIMITED

Respondent

BOOK OF AUTHORITIES SUBMITTED ON BEHALF OF THE RECEIVER, DELOITTE RESTRUCTURING INC.

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INDEX

1

2017 NSSC 105
Nova Scotia Supreme Court

Royal Bank of Canada v. 2M Farms Ltd.

2017 CarswellNS 272, 2017 NSSC 105, 278 A.C.W.S. (3d) 474, 47 C.B.R. (6th) 157, 7 P.P.S.A.C. (4th) 151

Royal Bank of Canada (Applicant) v. 2M Farms Ltd. (Respondent)

Moir J.

Heard: February 23; March 2, 2017
Judgment: March 3, 2017
Docket: Hfx. 425907

Counsel: Gavin D.F. MacDonald, Meryn Steves, for Applicant
Tim Peacock, for Intervenor, National Building Group Inc.
Marc Comeau, for Dana Robinson Fisheries Limited

***Moir J.* (orally):**

Introduction

1 BDO Canada Limited, as receiver of 2M Farms Ltd., moves for approval of a sale of a five acre lot including a potato warehouse and as counsel puts it: "foreclose out the encumbrances on title to the property." The receivership and power of sale are to enforce security for bank debts. The only known encumbrancer, besides the plaintiff, had been joined as a party.

2 The other encumbrancer is National Building Group Inc. It has a builder's lien that was registered after the banks' security. The priority between the banks' security and the builder's lien is in dispute. National Building Group seeks to make a case under s. 8(3) of the *Builder's Lien Act*.

3 The proposed order provides for proceeds of sale to be paid into court and for the proceeds to stand in the place of the property pending determination of the priorities.

4 In addition to the issues of approving the sale and ordering the proceeds be paid into court, I raised questions about the proposed terms for the order for sale by the receiver. Also, some questions about the appropriateness of permitting sale before priorities are settled have been raised by National Building Group. I will deal with those issues after determining whether to accept the receiver's recommendation.

Approval of Sale

5 The receiver submits that *Royal Bank v. Soundair Corp.*, [1991] O.J. No. 1137 (Ont. C.A.) is the leading case on approval of sales. It emphasizes: (1) sufficiency of the sales effort, (2) interests of the parties, (3) efficacy or integrity of the sale process, and (4) fairness in working out the process.

6 The *Bankruptcy and Insolvency Act* was amended after *Soundair*. The amendment established a national receivership and included a provision on the general duties of receivers, which must now be kept in mind when approval of a receiver sale is sought. An appointment of a receiver to enforce security is now usually made under both the national receivership provisions and provincial law (both statutory and common law).

7 As stated by Justice Wood at paragraph 14 of *Enterprise Cape Breton Corp. v. Crown Jewel Resort Ranch Inc.*, 2014 NSSC 420 (N.S. S.C.): "it is not the role of the Court to review in detail every element of the process followed by the Receiver". Under s. 247(b) of the *Bankruptcy and Insolvency Act*, a receiver must deal with the receivership property in a commercially reasonable manner. Justice Wood followed long standing authorities when he held, also at paragraph 14 of *Crown Jewel*, that the court will consider fairness of the process that led to the sale.

8 As I see it, the general obligation under s. 247(b) is the touchstone for approval of a sale by the receiver when the receiver has been appointed under the *Bankruptcy and Insolvency Act*, alone or in combination with provincial law. Commercial reasonableness is the touchstone for approval. The case law tells us that commercial reasonableness includes fairness, efficacy, integrity, and sufficiency of the sale process. It also tells us that the interests of the parties have to be borne in mind.

9 BDO Canada Limited was appointed receiver of 2M Farms Ltd. in April 2014 and it was given power to sell assets, mainly the potato warehouse in Berwick. The Royal Bank of Canada held a general security agreement and a collateral mortgage of the property. National Building Group Inc. registered a builders' lien. It appears that the Royal Bank is owned about a million dollars and National Building Group is owed about $130,000. These are the only secured creditors of the warehouse property. As I said, priority is in dispute.

10 The land is five acres just outside Berwick. The bank financed and the National Building Group constructed a building on the property. It is a 18,300 square foot vegetable warehouse equipped to store and ventilate potatoes. The construction was nearly complete when the bank called its' loans and National Building Group filed its' lien.

11 To finish the building, a new owner will have to install heating, plumbing, and septic systems. A part of the concrete floor remains to be poured.

12 The receiver listed the property with a firm of commercial realtors in July, 2014 for about $700,000. No offers were received until June, 2015. Offers were well under list prices. As a consequence of the apparent lack of interest in the first year and disappointing offers after that, the receiver reduced the list price from time to time. In rounded figures the list prices went as follows:

February, 2015	$600,000
January, 2016	$550,000
March, 2016	$500,000
June, 2016	$425,000
July, 2016	$350,000
October, 2016	$315,000.

13 The realtors reported regularly to the receiver and the bank. The reports, and testimony from one of the realtors, evidenced the marketing efforts and recommendations on listing prices. The evidence also shows that there were at least three impediments in the market. First, was the incomplete state of the construction. Secondly, uses desired by at least one potential purchaser required a change from the agriculture A1 zone attached to the five acres. Thirdly, there were problems with egress in the winter months.

14 Four offers were made and negotiated over. The first was for $300,000 in June, 2015. The receiver attempted to move the price to $400,000 but the party was not interested. In August, 2015 $200,000 was offered. The negotiations stopped at $240,000. In June, 2016 there was an offer of $275,000, which the receiver succeeded in increasing to $350,000. The agreement failed when the purchaser attempted to negotiate a lengthy extension of a due diligence condition, mainly to pursue a change in the zoning.

15 In November of 2016, Dana Robinson Fisheries Limited offered $200,000. Negotiations only got this party to $210,000. The receiver accepted an offer of that much, subject of course to approval by the court. That is the sale that concerns us today.

16 National Building Group criticizes the sale in a number of ways. An MLS listing was not pursued. For several months before the sale there were no signs on the road that passes the property. There was a sign visible from Highway 101, but it was inadequate. At one time, the property could have been sold for $300,000, which is $90,000 more than the present sale.

17 National Building Group also argues "the reasonableness of the purchase price... is a difficult analysis without an accounting by the receiver of the expenses incurred in the management and marketing of the property." It proposed that we determine the priorities before considering sale approval or "delay the proposed sale for 30 days to allow for an accounting", and an opportunity for National Building Group "to explore its' options".

18 The difficulty with these arguments is that the purchaser will not be bound unless the receiver closes on the closing date or an agreed extension of it. The court cannot "delay the proposed sale". Further, I failed to see the connection between expense of receivership and the reasonableness of the sale price. The representatives of the lien holder explained that knowing the amount of the expense was requisite to National Building Group formulating or soliciting an amount to be offered now.

19 This argument is augmented by the disclosure that there was a failure in communications between the receiver and National Building Group about the sale. Also, National Building Group counsel argues that the receiver's failure to consult when reducing the list price to $315,000 caused unfairness and obscured transparency. I will dispose of the other criticisms, then come back to the issue of whether National Building Group was treated fairly.

20 The decision to reject the $300,000 offer was made almost two years ago. At that time the list price was $600,000, appraisals were available, and experienced commercial realtors were advising. To seek $400,000 was a judgement made by the receiver in the circumstances of that time. It may not have been commercially reasonable to accept $300,000 at that time.

21 The complaint about signs takes us into a review far to detailed for a motion to approve a receiver's sale. Also, I refer to the details of the marketing effort and the testimony of Mr. Tom Carpenter, which I accept.

22 The complaint about MLS was fully answered by Mr. Carpenter. That kind of listing is not usually helpful for marketing a commercial property in the Annapolis Valley. What is important is that MLS realtors were regularly informed about the property and the list prices. This was one of the several marketing techniques Mr. Carpenter's firm used, and it did lead to potential purchasers.

23 In light of the amount of secured debt and the appraisals, a $210,000 purchase price is disappointing. However, the property was exposed to the market for over twenty months while it was the subject of a professional marketing effort. I find the sale is commercially reasonable, unless it treats National Building Group unfairly.

24 Communications between the receiver and National Building Group were through lawyers.

25 In this case, the receiver chose to discharge its' power of sale by listing with a commercial realtor and exercising skill and judgement as exposure to the market unfolded. Just as when a receiver markets secured property through tender, auction, or direct negotiations, the receiver who employs a realtor advances a sale by the court.

26 On May 8, 2015, National Building Group wrote to the receiver and its' lawyer complaining that there was no forsale sign on the warehouse property and requesting a report on the marketing efforts. That complaint and request was reiterated by National Building Group's counsel on August 13, 2015.

27 Receiver's counsel provided a full response on August 13, 2015. He advised of the two offers and the termination of negotiations when the potential purchasers were unwillingly to come up towards what the receiver believed at the time was a reasonable price. He said negotiations with a "sophisticated property owner" were underway. He provided a detailed report from Mr. Carpenter. And, receiver's counsel wrote "Again, if your client knows of any person willing and able to make an offer on the property, they should encourage that person to make the offer either to the listing brokerage or to the receiver directly."

28 There was further correspondence in December 2015 and January 2016 which included various requests by National Building Group for disclosure and disclosure by the receiver in response.

29 By letter dated June 17, 2016, receiver's counsel advised National Building Groups counsel of the $350,000 agreement purchase and sale and provided a copy. A little over a month later counsel had to advise that the agreement was terminated under the due diligence conditions.

30 An inadvertent failure occurred on November 24, 2016. The agreement of purchase and sale now sought to be approved had been concluded. On that day, receivers' counsel prepared a letter to be sent by email to National Building Groups' counsel. It was to advise of the $210,000 sale to Dana Robinson Fisheries Limited. Copies were sent to the receiver, but through inadvertence nothing was sent to the main addressee.

31 After the approval hearing started, National Building Group produced an offer of $230,000 and evidence that another offer could be coming. That offer would be for $236,500.

32 A motion to approve a sale by the receiver is not an opportunity to reopen the marketing effort. Potential purchasers need to understand that a contract with the receiver will be approved if it is commercially reasonable. The integrity of the sale process depends on this. See Justice Nunn's decision in *Bank of Montreal v. Maitland Seafoods Ltd.* (1983), 57 N.S.R. (2d) 20 (N.S. T.D.).

33 The failure to send the email on November 24, 2016, caused no unfairness to National Building Group. If it wanted to drum up interest in the receiver's sale it ought to have done so as the receiver suggested and directed interested parties to the realtor or the receiver before an agreement of purchase sale was finalized. On November 24, 2016, there was nothing left for National Building Group to do because the receiver was subject to a binding agreement of sale subject to an approval process that cannot be turned into a new opportunity for making offers.

34 National Building Group says that the prospects it has recently solicited show that the receiver could have gotten a better price last November if National Building Group was advised of the sale. Again, producing slightly higher offers after the agreement of purchase and sale was completed would make no difference. To make a difference, National Building Group needed to solicit interest before the receiver contracted in good faith with a purchaser.

35 National Building Group was not consulted about the reductions in list prices. It says this caused unfairness. There are three answers to that. First, National Building Group knew the receiver had concluded that the earlier list prices were too high because in June, 2016 National Building Group was told of the $350,000 sale. Second, list prices are public. Third, the lowest list price and the actual sale price exceed the debt owed to National Building Group. The reductions in list price would be of practical concern to the Royal Bank, to the defendant, to any guarantors, but not to National Building Group.

36 I find that the sale process was fairly conducted in the interest of the various parties.

Proposed Terms for Foreclosure

37 The draft order approving the sale provides for a receivers' deed and a receivers' certificate that would foreclosure "all of the right, title and interest of 2M Farms Ltd. and all those claiming through it". That language is fine for an order for sale to which all of those claiming through the mortgagor are bound.

38 However, the draft order goes further. It says:

> including all property interests, security interests (whether contractual, statutory or otherwise), mortgages, trusts or deemed trusts (whether contractual, statutory or otherwise), liens, executions, levees, charges or other financial or monetary claims whether or not they have attached or been perfected, registered or filed or whether secured, unsecured or otherwise (collectively the "Claims"), including without limiting the generality of the foregoing (i) any encumbrances or charges

created by orders of the Court in this proceeding; (ii) all mortgages and charges held by the Applicant; and, (iii) all recorded interests showing in the parcel register for the Property (collectively, the "Encumbrances").

Clearly, this language captures unascertained or unknown property interests.

39 Does the broad language of the proposed order exceed the bounds of Nova Scotia receivership sales?

Foreclosure-Based Versus Vesting Order-Based Receiverships

40 Counsel for the receiver writes:

> With respect for the concerns identified in *enterprise Cape Breton Corporation v. Crown Jewel Resort Ranch Inc.*, 2014 NSSC 420, the Applicant submits the following arguments in favour of the Court's power to order a sale of property by a receiver and foreclose out the various encumbrances on title subsequent to the security of the Applicant.

41 Counsel then argues that s. 15 the *Real Property Act* incorporates the English Conveyancing Act, 1881 into Nova Scotia law. Subsection 25(2) of the English statute permitted the high court to order a sale of mortgaged property.

42 This same argument, and others, were put forward by Mr. Robert G. MacKeigan, later of Queen's Counsel, in an extensive brief on receivership sales in *Canadian Imperial Bank of Commerce v. Yarcom Cable T.V. Limited and K-Right Communications Limited* 1977 S.H. No. 13482. For the past forty years that brief has often been consulted by lawyers and judges. So much so, that it should be regarded as a published authority, as a reliable record of long standing practices, and as a work that has much influenced receivership practice in our province.

43 Mr. MacKeigan finds, in the statutes, judicial decisions, and learned texts he cites equitable and statutory sources for our power to order a receiver's sale in proceedings to enforce security. He grounds the power in the equitable jurisdiction to order foreclosure.

44 Justice Wood's decision in *Enterprise Cape Breton Corp. v. Crown Jewel Resort Ranch Inc.* is not about the foreclosure-based receivership order that has been our practice for many years. In that case the receiver agreed to a sale. It sought approval. The subsequent encumbrancers got notice. Justice Wood approved the sale. The problem was that the receiver, following the practice in Ontario, sought a vesting order rather than an order for sale effecting foreclosure. Vesting orders are statutory and we have no statute for them. See paragraphs 19 and 20 of *Crown Jewel*.

45 Also, the receiver of *Crown Jewel* had agreed to provide a deed and the purchaser had an opportunity to investigate title, consistent with our foreclosure-based receivership. Justice Wood said at paragraph 25:

> The effect of the vesting order requested by the Receiver is that the purchaser assumes no risk with respect to the title and the Court discharges all encumbrances. There is no need for the purchaser to investigate title and raise objections. The Receiver has not explained why the Court should provide this assurance and override the terms of the Agreement.

46 The *Crown Jewel* decision suggests that we may not have broad authority to grant vesting orders on unlimited grounds. It, therefore, questions the use of a vesting order-based receivership sale. It does not, however, raise any question about our foreclosure-based receivership sale.

47 I respectfully adopt Justice Wood's reasons in *Crown Jewel Resort Ranch Inc.* . In my opinion, there is no statutory authority in Nova Scotia giving the court unbound authority to vest property. In my opinion, a power to sell a stranger's interests without notice cannot be found in "take any other action that the Court considers advisable", the words of paragraph 242(1)(c) of the *Bankruptcy and Insolvency Act*. In Nova Scotia, a receiver appointed to enforce securities sells the right, title, interest, property, and demand of the debtor at the time of the security or afterwards and the interests of the those claiming by, through, or under the debtor.

48 I am prepared to make an order along those lines and not an order that appears to end unascertained or unknown rights the way a vesting order might do.

The Need to Join Interested Parties

49 We do not take rights away from people without giving them a chance to be heard. So, the foreclosure-based receivership sale requires subsequent encumbrancers to be parties.

50 I am told that a receiver had to get releases from subsequent encumbrancers in some unreported cases. Not joining subsequent encumbrancers as parties could be fatal to foreclosure. If joined in a receivership proceeding to enforce security in this province, subsequent encumbrancers are foreclosed by the receiver's sale and have no right that may require a release.

51 *Snell's Equity* says this at page 947:

> When a foreclosure claim is made, all encumbrancers subsequent to the claimant, as well as all other persons interested in the equity of redemption must be made parties or they will not be bound by the foreclosure decree.

John McGhee, Q.C., *Snell's Equity, Thirty-Third Edition* (2015, Sweet & Maxwell, London).

52 There are several ways in which a subsequent encumbrancer may be bound by an order for a receivers' sale that enforcers security. They can be joined as defendants without naming them in the style of cause or claiming anything against them besides foreclosure. They can be made parties through the mechanism of a notice to subsequent encumbrancer under Rule 35.12. Or, they may be privies prevented by collateral estopple for denying the foreclosure.

53 The problem with relying on the third way is that the parties, and more importantly, the purchaser have no certainty until there is finding against the subsequent encumbrancer. The better practice therefore, is to join all subsequent encumbrancers as parties by the first or second method. In the case of 2M Farms, the only known encumbrancers are parties.

Dispute about Priorities

54 When priorities are in dispute, the court commonly orders a sale with the proceeds standing in the place of the property. This preserves the value of the property while allowing time for a resolution or determination of the dispute. See, Rule 42.09.

55 Thus, even if National Building Group Inc. turns out to have priority, the purchaser will take title free of that interest.

Conclusion

56 I will grant an order approving the sale agreed to by the receiver. The order will contain the terms for approval and for payment into court found in the draft order. The terms concerning foreclosure need to conform with what I have said on that subject.

Motion granted.

2

2019 NSSC 297
Nova Scotia Supreme Court

Royal Bank of Canada v. Eastern Infrastructure Inc.

2019 CarswellNS 713, 2019 NSSC 297, 11 P.P.S.A.C. (4th) 121, 311 A.C.W.S. (3d) 21, 73 C.B.R. (6th) 104

Royal Bank of Canada (Plaintiff) v. Eastern Infrastructure Inc. and Allcrete Restoration Limited (Defendant)

Peter P. Rosinski J.

Heard: September 19, 2019
Judgment: October 10, 2019
Docket: 483616

Counsel: Gavin MacDonald, for Royal Bank of Canada
Stephen Kingston, for Receiver

***Peter P. Rosinski J.*:**

Introduction

1 The companies herein have previously been placed into receivership. The Receiver has requested that, *inter alia*, I authorize an Approval and Vesting Order (Auction) to allow it to sell assets of the companies that are encumbered. While it appears that such orders had been granted by this court as recently as 2011 (re-Scanwood Canada Limited, Halifax number 342377, per John Murphy, J.), more recent decisions have concluded that, absent legislation providing this court the authority to do so, this court has no jurisdiction to grant such vesting orders.

2 Speaking only for myself on this issue and with the greatest of respect to those holding contrary opinions, I am satisfied that, although there is no distinctly expressed basis in Nova Scotian legislation to do so, this court does have jurisdiction pursuant to s. 243(1)(c) the Bankruptcy and Insolvency Act (BIA) to grant such vesting orders. I find it appropriate to do so in the circumstances of this case [1] .

The authority for vesting orders pursuant to s. 243(1)(c) BIA

3 Regarding the concern that such orders should no longer be granted on the basis of the authority provided by section 243 (1)(c) BIA, based on decisions by Justices Michael Wood (as he then was) and Moir, wherein they concluded there was no such jurisdiction to do so (*Enterprise Cape Breton Corp. v. Crown Jewel Resort Ranch Inc.*, 2014 NSSC 420 (N.S. S.C.) and *Royal Bank of Canada v. 2M Farms Ltd.*, 2017 NSSC 105 (N.S. S.C.)), I note that Justice Wood relied on an Ontario Court of Appeal decision, *Regal Constellation Hotel Ltd., Re*, [2004] O.J. No. 2744 (Ont. C.A.), in making his *obiter dicta* (para 22) comment regarding jurisdiction. That decision suggested that such vesting orders must be grounded in legislation, such as the Ontario legislation, the *Courts of Justice Act* (para. 31 *Regal*).

4 As Justice Blair stated for the court in *Regal*:

> [23] Underlying these considerations are the principles the courts apply when reviewing a sale by a court-appointed receiver. They exercise considerable caution when doing so, and will interfere only in special circumstances — particularly when the receiver has been dealing with an unusual or difficult asset. Although the courts will carefully scrutinize the procedure followed by a receiver, they rely upon the expertise of their appointed receivers, and are reluctant to second-guess the considered business decisions made by the receiver in arriving at its recommendations. The court will assume

that the receiver is acting properly unless the contrary is clearly shown. See *Royal Bank of Canada v. Soundair Corp.* (1991), 4 O.R. (3d) 1, 83 D.L.R. (4th) 76 (C.A.).

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

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

[25] In Soundair as well, McKinlay J.A. emphasized [at p. 19 O.R.] the importance of protecting the integrity of the procedures followed by a court-appointed receiver "in the interests of both commercial morality and the future confidence of business persons in their dealings with receivers".

[26] A court-appointed receiver is an officer of the court. It has a fiduciary duty to act honestly and fairly on behalf of all claimants with an interest in the debtor's property, including the debtor (and, where the debtor is a corporation, its shareholders). It must make candid and full disclosure to the court of all material facts respecting pending applications, whether favourable or unfavourable. See *Toronto-Dominion Bank v. Usarco Ltd.* (2001), 196 D.L.R. (4th) 448, 17 M.P.L.R. (3d) 57 (Ont. C.A.), per Austin J.A. at paras. 28-31, and the authorities referred to by him, for a more elaborate outline of these principles. It has been said with respect to a court-appointed receiver's standard of care that the receiver "must act with meticulous correctness, but not to a standard of perfection": Bennett on Receiverships, 2nd ed. (Toronto: Carswell, 1999) at p. 181, cited in *Toronto-Dominion Bank v. Usarco*, supra, at p. 459 D.L.R.

[27] The foregoing principles must be kept in mind when considering the exercise of discretion by the motions judges in the context of these proceedings.

. . .

[31] **In Ontario, the power to grant a vesting order is conferred by the Courts of Justice Act**, R.S.O. 1990, c. C.43, s. 100, which provides as follows:

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

[32] **The vesting order itself is a creature of statute**, although it has its origins in equitable concepts regarding the enforcement of remedies granted by the Court of Chancery. Vesting orders were discussed by this court in Chippewas of *Sarnia Band v. Canada* (Attorney General) (2000), 51 O.R. (3d) 641 195, D.L.R. (4th) 135 (C.A.) at pp. 726-27 O.R., p. 227 D.L.R., where it was observed that:

> Vesting orders are equitable in origin and discretionary in nature. The Court of Chancery made in personam orders, directing parties to deal with property in accordance with the judgment of the court. Judgments of the Court of Chancery were enforced on proceedings for contempt, followed by imprisonment or sequestration. The statutory power to make a vesting order supplemented the contempt power by allowing the court to effect the change of title directly: see McGhee, Snell's Equity, 30th ed., (London: Sweet and Maxwell, 2000) at pp. 41-42.
>
> (Emphasis added)

[33] A vesting order, then, has a dual character. It is on the one hand a court order ("allowing the court to effect the change of title directly"), and on the other hand a conveyance of title (vesting "an interest in real or personal property"

in the party entitled thereto under the order). This duality has important ramifications for an appeal of the original court decision granting the vesting order because, in my view, once the vesting order has been registered on title, its attributes as a conveyance prevail and its attributes as an order are spent; the change of title has been effected. Any appeal from it is therefore moot.

[34] I reach this conclusion for the following reasons.

. . .

[45] Vesting orders properly registered on title, then — like other conveyances — are not immune from attack. However, any such attack is limited to the remedies provided under the Land Titles Act and no longer may lie by way of appeal from the original decision granting the vesting order. Title has effectively been changed and innocent third parties are entitled to rely upon that change. The effect of the vesting order qua order has been spent."

5 Notably, the BIA has changed since the issuance of the *Regal* decision, however it does not appear that that factor was brought to Justice Wood's attention. As a result of the legislative change the Ontario Court of Appeal itself has given a much more comprehensive decision recently that comes to the opposite result, namely, in *Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.*, 2019 ONCA 508 (Ont. C.A.) per Pepall JA:

(e) Section 243 of the BIA

43 The BIA is remedial legislation and should be given a liberal interpretation to facilitate its objectives: *Ford Motor Company of Canada, Limited v. Welcome Ford Sales Ltd.*, 2011 ABCA 158, 505 A.R. 146, at para. 43; *Nautical Data International Inc., Re*, 2005 NLTD 104, 249 Nfld. & P.E.I.R. 247, at para. 9; *Re Bell*, 2013 ONSC 2682, at para. 125; and *Scenna v. Gurizzan* (1999), 11 C.B.R. (4th) 293 (Ont. S.C.), at para. 4. Within this context, and in order to understand the scope of s. 243, it is helpful to review the wording, purpose, and history of the provision.

The Wording and Purpose of s. 243

44 Section 243 was enacted in 2005 and came into force in 2009. It authorizes the court to appoint a receiver where it is "just or convenient" to do so. As explained by the Supreme Court in *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53, [2015] 3 S.C.R. 419, prior to 2009, receivership proceedings involving assets in more than one province were complicated by the simultaneous proceedings that were required in different jurisdictions. There had been no legislative provision authorizing the appointment of a receiver with authority to act nationally. Rather, receivers were appointed under provincial statutes, such as the CJA, which resulted in a requirement to obtain separate appointments in each province or territory where the debtor had assets. "Because of the inefficiency resulting from this multiplicity of proceedings, the federal government amended its bankruptcy legislation to permit their consolidation through the appointment of a national receiver": *Lemare Lake Logging*, at para. 1. Section 243 was the outcome.

45 Under s. 243, the court may appoint a receiver to, amongst other things, take any other action that the court considers advisable. Specifically, s. 243(1) states:

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

46 "Receiver" is defined very broadly in s. 243(2), the relevant portion of which states:

> 243(2) [I]n this Part, ***receiver*** means a person who
>
> (a) is appointed under subsection (1); or
>
> (b) is appointed to take or takes possession or control — of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt — under
>
> (i) an agreement under which property becomes subject to a security (in this Part referred to as a "security agreement"), or
>
> (ii) a court order made under another Act of Parliament, or an Act of a legislature of a province, that provides for or authorizes the appointment of a receiver or a receiver — manager. [Emphasis in original.]

47 *Lemare Lake Logging* involved a constitutional challenge to Saskatchewan's farm security legislation. **The Supreme Court concluded, at para. 68, that s. 243 had a simple and narrow purpose: the establishment of a regime allowing for the appointment of a national receiver and the avoidance of a multiplicity of proceedings and resulting inefficiencies.** It was not meant to circumvent requirements of provincial laws such as the 150 day notice of intention to enforce requirement found in the Saskatchewan legislation in issue.

. . . .

71 In contrast, as I will discuss further, typically the nub of a receiver's responsibility is the liquidation of the assets of the insolvent debtor. There is much less debate about the objectives of a receivership, and thus less of an impetus for legislative guidance or codification. In this respect, the purpose and context of the sales provisions in s. 65.13 of the BIA and s. 36 of the CCAA are distinct from those of s. 243 of the BIA. Due to the evolving use of the restructuring powers of the court, the former demanded clarity and codification, whereas the law governing sales in the context of receiverships was well established. Accordingly, rather than providing a detailed code governing sales, **Parliament utilized broad wording to describe both a receiver and a receiver's powers under s. 243. In light of this distinct context and legislative purpose, I do not find that the absence of the express language found in s. 65.13 of the BIA and s. 36 of the CCAA from s. 243 forecloses the possibility that the broad wording in s. 243 confers jurisdiction to grant vesting orders.**

Section 243 — Jurisdiction to Grant a Sales Approval and Vesting Order

72 This brings me to an analysis of the broad language of s. 243 in light of its distinct legislative history, objective and purposes. As I have discussed, s. 243 was enacted by Parliament to establish a receivership regime that eliminated a patchwork of provincial proceedings. In enacting this provision, Parliament imported into s. 243(1)(c) the broad wording from the former s. 47(2)(c) which courts had interpreted as conferring jurisdiction to direct an interim receiver to do not only what "justice dictates" but also what "practicality demands". Thus, in interpreting s. 243, it is important to elaborate on the purpose of receiverships generally.

73 The purpose of a receivership is to "enhance and facilitate the preservation and realization of the assets for the benefit of creditors": *Hamilton Wentworth Credit Union Ltd. v. Courtcliffe Parks Ltd.* (1995), 23 O.R. (3d) 781 (Gen. Div.), at p. 787. Such a purpose is generally achieved through a liquidation of the debtor's assets: Wood, at p. 515. **As the Appeal Division of the Nova Scotia Supreme Court noted in *Bayhold Financial Corp. v. Clarkson Co. Ltd. and Scouler* (1991), 108 N.S.R. (2d) 198 (N.S.C.A.), at para. 34, "the essence of a receiver's powers is to liquidate the assets".** The receiver's "primary task is to ensure that the highest value is received for the assets so as to maximise the return to the creditors": *1117387 Ontario Inc. v. National Trust Company*, 2010 ONCA 340, 262 O.A.C. 118, at para. 77.

74 This purpose is reflected in commercial practice. Typically, the order appointing a receiver includes a power to sell: see for example the Commercial List Model Receivership Order, at para. 3(k). There is no express power in the BIA authorizing a receiver to liquidate or sell property. However, such sales are inherent in court-appointed receiverships and the jurisprudence is replete with examples: see e.g. *bcIMC Construction Fund Corp. v. Chandler Homer Street Ventures Ltd.*, 2008 BCSC 897, 44 C.B.R. (5th) 171 (in Chambers), *Royal Bank v. Fracmaster Ltd.*, 1999 ABCA 178, 11 C.B.R. (4th) 230, *Skyepharma PLC v. Hyal Pharmaceutical Corp.* (1999), 12 C.B.R. (4th) 87 (Ont. S.C.), aff'd (2000), 47 O.R. (3d) 234 (C.A.).

75 Moreover, the mandatory statutory receiver's reports required by s. 246 of the BIA direct a receiver to file a "statement of all property of which the receiver has taken possession or control that has not yet been sold or realized" during the receivership (emphasis added): *Bankruptcy and Insolvency General Rules*, C.R.C. c. 368, r. 126 ("BIA Rules").

76 It is thus evident from a broad, liberal, and purposive interpretation of the BIA receivership provisions, including s. 243(1)(c), that implicitly the court has the jurisdiction to approve a sale proposed by a receiver and courts have historically acted on that basis. There is no need to have recourse to provincial legislation such as s.100 of the CJA to sustain that jurisdiction.

77 Having reached that conclusion, the question then becomes whether this jurisdiction under s. 243 extends to the implementation of the sale through the use of a vesting order as being incidental and ancillary to the power to sell. In my view it does. I reach this conclusion for two reasons. First, vesting orders are necessary in the receivership context to give effect to the court's jurisdiction to approve a sale as conferred by s. 243. Second, this interpretation is consistent with, and furthers the purpose of, s. 243. I will explain."

6 Thus, the *obiter dicta* in *Crown Jewel* has been superseded by legislative change. Justice Moir did not cite any other authority than *Crown Jewel.*

7 *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.* [2015 CarswellSask 680 (S.C.C.)] was released one year after Justice Wood made his comments in *Crown Jewel.* Although Nova Scotia does not have express provincial legislation giving the court jurisdiction to make such vesting orders, it is clear that in appropriate circumstances courts can rely on s 243(1)(c) BIA to do so. In *Dianor*, the court cited *Crown Jewel* at para. 78, noting that "...the case law on vesting orders in the insolvency context is limited."

8 Regarding what are the appropriate circumstances to make such orders, I keep in mind Justice Duncan's list of considerations set out in *Bank of Montreal v. Sportsclick Inc.*, 2009 NSSC 354 (N.S. S.C.) at paras 32-33, which the court will eventually apply to all such sales:

Law

32 In *Royal Bank of Canada v. Soundair Corp.*, *supra*, Galligan J.A. set out at paragraph 16, the duties which a court must perform when deciding whether a Receiver who has sold a property acted properly, which duties he summarized 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.

33 Certain principles have been enunciated by the courts in consideration of these points:

> The decision must be assessed as a matter of business judgment on the elements then available to the Receiver. That is the function of Receiver and "... to reject [such] recommendation ... in any but the most exceptional circumstances ... 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." *see*, Anderson J. in *Crown Trust v. Rosenberg* (1986), 60 O.R. (2d) 87 at 112;
>
> the primary interest is that of the creditors of the debtor although that is not the only nor the overriding consideration. The interests of the debtor must be taken into account. Where a purchaser has bargained at some expense in time and money to achieve the bargain then their interest too should be taken into account. *see, Soundair* at para. 40;
>
> the process by which the sale of a unique asset is achieved should be consistent with commercial efficacy and integrity. In *Crown Trust Co. v. Rosenberg, supra*, at page 124, Anderson J. said:
>
> 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 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.
>
> a court should not reject the recommendation of Receiver except in special circumstances where the necessity and propriety of doing so is plain. see, *Crown Trust Co., supra.*

Conclusion

9 As a matter of law, and on the circumstances in this case, I am prepared to grant the Approval and Vesting Order (Auction) as drafted.

Motion granted.

Appendix "A"

Supreme Court of Nova Scotia in Bankruptcy and Insolvency

Between:

Royal Bank of Canada

Plaintiff

and

Eastern Infrastructure Inc. and Allcrete Restoration Limited

Defendants

APPROVAL AND VESTING ORDER (AUCTION)

Before the Honourable Justice *Peter P. Rosinski* Chambers:

UPON HEARING Stephen Kingston on behalf of Ernst & Young Inc. (the "Receiver") in its capacity as Court-appointed Receiver for Eastern Infrastructure Inc. and Allcrete Restoration Limited (collectively, the "*Debtor*");

AND UPON appearing that appropriate Notice of this Motion has been provided to all interested parties;

AND UPON having read the First Report of the Receiver dated September 11, 2019 (the "*Receiver's First Report*") and all other materials filed in connection with this Motion;

AND UPON the Receiver having negotiated an Auction Agreement (the "*Auction Agreement*") with Mirterra Industrial Appraisers & Auctioneers (the "*Auctioneer*") as more particularly described in the Receiver's First Report;

AND UPON the Receiver having applied for an Order authorizing and approving the Receiver to execute the Auction Agreement as regards the sale of the Debtor's Alberta Assets as described in the Receiver's First Report (the "*Alberta Assets*"), and vesting the Debtor's right, title and interest in and to the Alberta Assets in the purchasers thereof free and clear of all claims.

NOW UPON MOTION:

IT IS ORDERED THAT:

1. This Honourable Court does hereby grant its approval and authorization to the Receiver to execute the Auction Agreement on the same or substantially the same terms as described in the Receiver's First Report.

2. The Receiver is hereby authorized and directed to take such additional steps and execute such additional documents as may be necessary or desirable for the completion of the transactions (the "*Transactions*") contemplated by the Auction Agreement and for the conveyance of items sold at auction (the "*Purchased Assets*").

3. Upon the Auctioneer completing the sale of any of the Alberta Assets to a successful bidder (the "*Purchaser*") and upon receipt of the purchase price by the Auctioneer and delivery by the Auctioneer of a Bill of Sale or similar evidence of purchase to the Purchaser (the "*Purchaser Bill of Sale*"), all rights, title and interest of the Debtor in and to the assets described in the Purchaser Bill of Sale shall vest in such Purchaser, free and clear of and from any and all security interests (whether contractual, statutory, or otherwise), hypothecs, mortgages, trusts or deemed trusts (whether contractual, statutory, or otherwise), liens, executions, levies, charges or other financial or monetary claims, whether or not they attached or been perfected, registered or filed and whether secured, unsecured or otherwise (collectively, the "*Claims*") including, without limiting the generality of the foregoing:

(a) any encumbrances or charges created by Orders of this Honourable Court dated February 4, 2019 and June 7, 2019; and

(b) all charges, security interests or claims evidenced by registrations pursuant to the *Personal Property Security Act* (Nova Scotia) or any other personal property registry system.

4. For the purposes of determining the nature and priority of Claims, the monies payable to the Receiver under the Auction Agreement from the sale of the Alberta Assets shall stand in the place of and stead of the Alberta Assets, and that from and after the delivery of the Purchaser Bill of Sale all claims shall attach to the net proceeds from the sale of the Alberta Assets with the same priority as they had with respect to the Alberta Assets immediately prior to the sale, as if the Alberta Assets had not been sold and remained in the possession or control of the person having that possession or control immediately prior to the sale.

5. Notwithstanding:

(a) the pendency of these proceedings;

(b) any application for a bankruptcy order now or hereafter issued pursuant to the *Bankruptcy and Insolvency Act* (Canada) in respect of the debtors and any bankruptcy order issued pursuant to any such applications; and

(c) any assignment of bankruptcy made in respect of the Debtor;

the vesting of the Alberta Assets in a purchaser pursuant to this Order shall be binding on any trustee in bankruptcy that may be appointed in respect of the Debtor and shall not be void or avoidable by creditors of the Debtor, nor shall it constitute nor be deemed to be a settlement, fraudulent preference, assignment, fraudulent conveyance, transfer at undervalue, or other

reviewable transaction under the *Bankruptcy and Insolvency Act* (Canada) or any other applicable federal or provincial legislation, nor shall it constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

6. This Court here requests the aid and recognition of any Court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States to give effect to this Order and to assist the Receiver and its agents in carrying out the terms of this Order. All Courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such Orders and to provide such assistance to the Receiver, as an Officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Receiver and its agents in carrying out the terms of this Order.

Dated at Halifax, Nova Scotia this *19* day of September, 2019

Kim Hebbler

Prothonotary

Graphic 1

Footnotes

1 Attached hereto as Appendix "A" is the order granted.

3

2014 NSCA 98
Nova Scotia Court of Appeal

Canadian Financial Wellness Group v. Resolve Business Outsourcing

2014 CarswellNS 800, 2014 NSCA 98, 1112 A.P.R. 257, 246 A.C.W.S. (3d) 544, 352 N.S.R. (2d) 257, 378 D.L.R. (4th) 612, 62 C.P.C. (7th) 223

Resolve Business Outsourcing Income Fund, Resolve Corporation and D+H Limited, Appellants v. The Canadian Financial Wellness Group Limited, Respondent

Saunders, Fichaud, Bryson JJ.A.

Heard: September 16, 2014
Judgment: October 28, 2014
Docket: C.A. 423907

Proceedings: reversing *Canadian Financial Wellness Group v. Resolve Business Outsourcing* (2013), 337 N.S.R. (2d) 396, 1067 A.P.R. 396, 297 C.R.R. (2d) 19, 2013 NSSC 394, 2013 CarswellNS 930, N.M. Scaravelli J. (N.S. S.C.)

Counsel: Scott R. Campbell, Christopher W. Madill, for Appellants
Peter Coulthard, Q.C., Alexander C. Grant, for Respondent

***Fichaud J.A.*:**

1 The defendants sought a confidentiality order. The proposed order would prevent the public disclosure of documents to be produced by the defendants to the plaintiff in the discovery stage of the lawsuit. The defendants were concerned that the documents might become exhibits to an affidavit for a chambers motion. The motions judge denied the order. He held that the defendants had not established a public interest in confidentiality, beyond their own commercial interest, and had not satisfied the first branch of the *Sierra Club* test.

2 The defendants appeal. They say that the documents disclose intellectual property that is integral to servicing a government-sponsored project for which a competitive bidding call is imminent. Disclosure of the documents in court, assert the defendants, would open its information to other bidders and undermine the public interest in a fair and competitive bidding process.

Background

3 The Appellant D+H Limited Partnership (D+H) administers $20 billion in student loans. Its portfolio includes student loans provided by the Government of Canada's Student Loan Program (CSLP) and those provided by most provincial governments. D+H provides loan-related services to 1.7 million students in Canada.

4 D+H manages the CSLP loans further to a contract with the Government of Canada (Government). The contract had an operational start date of March 17, 2008 (CSLP Contract). The Government awarded the CSLP Contract to the Appellant Resolve Corporation (Resolve) after a public and competitive tendering process initiated by the Government in the spring of 2006. In 2010, D+H acquired Resolve and, with it, the CSLP Contract.

5 The Government's 2006 request for proposals for the CSLP Contract asked for "end to end" servicing of the student loans, from the initial disbursement of funds to the post-study repayment of loans. The Affidavit of Mr. Bob Zebeski, D+H's Director of Operations, summarizes the bidding process:

6. Resolve's bid for the CSLP Contract in response to the RFP in the spring of 2006 included lengthy and detailed technical submissions on the process proposed by Resolve to manage and administer the CSLP loan portfolio on an end-to-end basis. These bid submissions required a significant amount of work and included confidential process-related information that was (and is) highly commercially and competitively valuable and sensitive to Resolve (now D+H).

7. In addition to Resolve's detailed technical submissions on the proposed processes for providing end-to-end servicing of CSLP loans, the RFP for the CSLP Contract required bidders to submit a separate financial proposal outlining the costs to the Government of Canada associated with providing those services. Bids for the CSLP Contract were evaluated using a "price per point" model developed by the Government of Canada, whereby the technical process and service-related (among other) elements of the bids were assigned points. The total points awarded to the bid were divided by the total cost of the bidder's proposal, to arrive at a "price per point" score. Resolve was awarded the CSLP Contract on the basis of having the best (lowest) price-per-point score.

8. Although certain aspects of the tender and bidding process run by the Government of Canada for the CSLP Contract are in the public domain, such as the RFP and the identity of the bidders, Resolve's technical bid documents were submitted on a confidential basis.

6 The CSLP Contract had a five-year term, with an additional two-year option followed by three one-year options, all exercisable by the Government. The Government exercised the two-year option, which runs until March 2015.

7 The CSLP Contract is financially significant to the Government and the operator. The revenue from the initial five-year term approximated $380 million.

8 In 2012, the Government began the re-procurement process for the next contract to service the CSLP. On November 28, 2012, the Government held an "Industry Day" meeting to provide potential bidders with an overview of the bidding timetable and objectives for the next CSLP contract. The document distributed by the Government on Industry Day itemized the consultative steps leading to the draft RFP. According to Mr. Zebeski's Affidavit, dated September 23, 2013, the steps scheduled by the Government included "issuance of the RFP in late 2013", "evaluation of bids in response to the RFP in spring of 2014" and "awarding contract for CSLP in fall of 2014".

9 To jump ahead briefly - at the hearing in the Court of Appeal on September 16, 2014, counsel informed the Court that the Government had issued the RFP the previous week. Of course, that fact was not before the motions judge whose decision was dated December 4, 2013.

10 In late 2012, the Government issued "Rules of Engagement" for the Re-procurement process. The Rules of Engagement included:

An overriding principle of the industry consultation is that it be conducted with the utmost of fairness and equity between all parties. No one person or organization shall receive nor be perceived to have received any unusual or unfair advantage over the others.

These Rules of Engagement will apply beginning with the signing of this document and concluding with the release of the Final Request for Proposal (RFP) on MERX.

. . . . .

Canada will not disclose proprietary or commercially-sensitive information concerning a Participant to other Participants or third parties, except and only to the extent required by law.

TERMS AND CONDITIONS:

. . . . .

2. Participants will NOT reveal or discuss any information to the MEDIA/NEWSPAPER regarding the CSLP Re-procurement during this consultative process. ...

11 D+H views its systems documents as containing proprietary or confidential and commercially sensitive information that would benefit other bidders in the competitive bidding process for the new CSLP contract. Mr. Zebeski's Affidavit explains:

> 23. ... D+H's competitive advantage in this area of borrower communications will be lost if the confidential documents which are the subject of this motion become publicly available to competitive bidders as a result of this litigation.
>
> . . . . .
>
> 29. In addition, D+H maintains an internal Knowledge Base system, which stores and organizes documents for a variety of users within D+H, including CSRs [customer service representatives]. These Knowledge Base documents are strictly confidential and only for use within D+H. Within D+H, access to the Knowledge Base documents is restricted to employees with a "need-to-know" based on user access profiles which are created and monitored by D+H's system access group, which is independent of any D+H business or operational group. Furthermore, all D+H employees, including the CSRs, are bound by confidentiality agreements with D+H which they entered into as a condition of their employment with D+H. These employee confidentiality agreements prohibit the dissemination of Knowledge Base documents outside of D+H.
>
> . . . . .
>
> 33. D+H's Knowledge Base documents reflect and represent a significant expenditure of time and resources dedicated by D+H to its student loan servicing business, are central to D+H's performance of that business, and constitute highly confidential and commercially sensitive work product of D+H.

12 In August 2011, the Respondent The Canadian Financial Wellness Group Incorporated (CFW) sued D+H, Resolve Corporation and the Resolve Business Outsourcing Income Fund. CFW's Statement of Claim says that, before 2008, CFW had developed a program of confidential and proprietary material that was designed to address the relationship between student loan borrowers and service providers. CFW alleges that Resolve and D+H became privy to CFW's information, wrongly used that information for profit, and are liable to CFW for *quantum meruit*. By a Defence filed in October 2011, D+H and Resolve denied liability.

13 The parties exchanged notices of documentary disclosure. CFW provided its list and documents in late September 2012. D+H and Resolve provided their list on December 10, 2012. The D+H/Resolve notice listed almost 600 documents. D +H/Resolve's list included training and systems manuals for their customer service representatives and scripts for use by their representatives in communications with student borrowers.

14 D+H and Resolve agree that these documents pertain to the litigious issues, and should be disclosed to CFW for the purposes of the lawsuit. But D+H and Resolve wish to avoid the public disclosure of their training and systems manuals and scripts (which D+H terms "Confidential Documents"). D+H's factum says these "have been developed and refined over time, with the knowledge and experience gained through interaction, research and analysis. In the public domain, the Confidential Documents would provide a competitor with the Appellants' 'recipe for success'...."

15 D+H and Resolve state that public disclosure would make the information available to their competitors for use in the impending bidding process for the renewed CSLP Contract. D+H and Resolve are concerned that CFW may attach the information to affidavits for an upcoming chambers motion, meaning the information would be on the public court record and accessible to its competitors.

16 On June 26, 2013, D+H/Resolve moved in the Supreme Court of Nova Scotia for a confidentiality order under Civil Procedure Rule 85.04 to seal the documents that they considered to be confidential — approximately 35% of the their productions. Justice Scaravelli heard the motion on November 7, 2013, and issued a ruling on December 4, 2013 (2013 NSSC 394 (N.S. S.C.)), dismissing the motion. Later I will discuss his reasons. The Order was issued on January 28, 2014.

17 On February 3, 2014, D+H and Resolve applied for leave to appeal to the Court of Appeal.

Issues

18 The issues are whether leave should be granted and, if so, whether the motions judge committed an appealable error, under the standard of review, by denying the confidentiality order.

Standard of Review

19 Rules 85.04(1) and (2)(a) say:

> **85.04 Order for confidentiality**
>
> (1) A judge may order that a court record be kept confidential only if the judge is satisfied that it is in accordance with law to do so, including the freedom of the press and other media under section 2 of the *Canadian Charter of Rights and Freedoms* and the open courts principle.
>
> (2) An order that provides for any of the following is an example of an order for confidentiality:
>
> (a) sealing a court document or an exhibit in a proceeding; ...

20 The judge "may" issue the order. A discretionary order is reviewed by this Court for error of legal principle or patent injustice. *Innocente v. Canada (Attorney General)*, 2012 NSCA 36 (N.S. C.A.), paras 26-29. The question here is whether the motions judge erred in legal principle in the application of the open courts principle.

Analysis

21 D+H/Resolve agree that CFW is entitled to production of the documents for the purpose of the lawsuit. The pre-trial disclosure of documents carries an implied undertaking of confidentiality, acknowledged by Rule 14.03(1). As the private disclosure process does not involve the court, it does not engage the open courts principle: *Doucette (Litigation Guardian of) v. Wee Watch Day Care Systems Inc.*, [2008] 1 S.C.R. 157 (S.C.C.), para 22, per Binnie, J. for the Court; *Lac d'Amiante du Québec ltée c. 2858-0702 Québec inc.*, [2001] 2 S.C.R. 743 (S.C.C.), paras 59-72; *Foster-Jacques v. Jacques*, 2012 NSCA 83 (N.S. C.A.) [hereinafter *Coltsfoot*], para 83.

22 D+H/Resolve do not seek to limit the disclosure of documents to CFW. Their concern is that CFW may attach the documents to an affidavit for a chambers motion. In that event, the documents would be publicly accessible. D+H/Resolve indicate that a summary judgment motion may be in the offing. Hence, their request for a sealing order.

23 Rules 85.05(1) and (2) require that the applicant for a confidentiality order give "reasonable notice to representatives of media". This may be done through posting on the Courts of Nova Scotia website. D+H/Resolve gave such notice before the motion in the Supreme Court. The Courts of Nova Scotia website displays a Protocol, approved by the judges of the Court of Appeal, for notice to the media respecting proceedings in the Court of Appeal. Before the appeal hearing, D+H/Resolve gave that notice to the media under the Protocol. In neither court did any representative of the media appear or contest the confidentiality order. CFW is the only party to object.

24 The judge's discretion under Rule 85.04(1) is to be exercised in accordance with the open courts principle that was discussed in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 (S.C.C.) and *R. v. Mentuck*, [2001] 3 S.C.R. 442 (S.C.C.) and was summarized in *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522 (S.C.C.). See also *Coltsfoot*, paras 22-24, 27.

25 In *Sierra Club*, Justice Iacobucci for the Court formulated the *Dagenais/Mentuck* test in the context of *Federal Court Rule* 151, that stated:

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

Federal Court Rule 151 does not differ materially from Nova Scotia's Rule 85.04(1). In *Sierra Club*, Justice Iacobucci said:

> **(3) Adapting the Dagenais Test to the Rights and Interests of the Parties**
>
> 53 Applying the rights and interests engaged in this case to the analytical framework of *Dagenais* and subsequent cases discussed above, the test for whether a confidentiality order ought to be granted in a case such as this one should be framed as follows:
>
> A confidentiality order under Rule 151 should only be granted when:
>
> (a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and
>
> (b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.
>
> 54 As in *Mentuck*, I would add that three important elements are subsumed under the first branch of this test. First, the risk in question must be real and substantial, in that the risk is well grounded in the evidence, and poses a serious threat to the commercial interest in question.
>
> 55 In addition, the phrase "important commercial interest" is in need of some clarification. In order to qualify as an "important commercial interest", the interest in question cannot merely be specific to the party requesting the order; the interest must be one which can be expressed in terms of a public interest in confidentiality. For example, a private company could not argue simply that the existence of a particular contract should not be made public because to do so would cause the company to lose business, thus harming its commercial interests. However, if, as in this case, exposure of information would cause a breach of a confidentiality agreement, then the commercial interest affected can be characterized more broadly as the general commercial interest of preserving confidential information. Simply put, if there is no general principle at stake, there can be no "important commercial interest" for the purposes of this test. Or, in the words of Binnie J. in *F.N. (Re)*, [2000] 1 S.C.R. 880, 2000 SCC 35, at para. 10, the open court rule only yields "where the public interest in confidentiality outweighs the public interest in openness" [Justice Iacobucci's underlining].
>
> 56 In addition to the above requirement, courts must be cautious in determining what constitutes an "important commercial interest". It must be remembered that a confidentiality order involves an infringement on freedom of expression. Although the balancing of the commercial interest with freedom of expression takes place under the second branch of the test, courts must be alive to the fundamental importance of the open court rule. See generally Muldoon J. in *Eli Lilly and Co. v. Novopharm Ltd.* (1994), 56 C.P.R. (3d) 437 (F.C.T.D.), at p. 439.
>
> 57 Finally, the phrase "reasonably alternative measures" requires the judge to consider not only whether reasonable alternatives to a confidentiality order are available, but also to restrict the order as much as is reasonably possible while preserving the commercial interest in question.

26 To summarize the test's two branches, the judge determines whether (1) the confidentiality order is necessary to prevent a serious risk to an important public interest, because reasonable alternative measures would not alleviate the risk, and (2) the salutary effects of the confidentiality order, that may include the promotion of a fair trial, outweigh its deleterious effects, that include a limitation on constitutionally protected freedom of expression and public access to the courts. For the first branch, the important interest must (a) be real, substantial and well-grounded in the evidence, and (b) involve a general principle of public significance, rather than be merely personal to the parties, while (c) the judge's consideration of reasonable alternative measures must restrict the confidentiality order as much as possible while preserving the important public interest that requires confidentiality.

27 In this case, the motions judge's decision framed the issue:

[12] The plaintiff does not dispute the information sought to be protected is confidential and proprietary. Moreover, both parties agree there is no reasonable alternative to the request for a sealing order including redaction. The plaintiff submits Resolve's motion does not meet either [the] "necessity" branch or the "proportionality" branch of the "Sierra Test".

28 With that background, I will turn to the motions judge's reasons. The judge determined that there was no public interest in confidentiality under the first branch of *Sierra Club*'s test. He said:

[15] The evidentiary basis set out in the present case by way of affidavit evidence relates specifically to Resolve's upcoming participation in a RFP with other competitors it believes will participate in the process. They submit public disclosure of the confidential material would undermine Resolve's competitive advantage. Although there would be a public interest in fair competition, the interest in this case is clearly specific to Resolve in that it seeks to protect its own commercial interests. However, as stated in *Sierra Club* there must be a broader public interest at stake in order to defeat the fundamental principle of the open court process. Moreover, Resolve has the burden of establishing the risk to its commercial interest is real and grounded in evidence. However, the RFP for the contract has yet to be issued and the competitive bidding process has yet to occur. No trial dates have been set for these proceedings. There is no evidence of any pending or intended motions requiring disclosure of the confidential information. It is anticipated that the RFP will be issued in late 2013 with the valuation of the confidential bids set for the spring of 2014.

The judge concluded:

[16] ... The risk it [D+H/Resolve] identified is specific to its interests only and there is no serious risk to any broader public interest. Otherwise, all litigants possessing confidential information specific to its own commercial interest would demand confidential orders in legal proceedings based on a right to fair trial public interest which would be an affront to the proper administration of justice and the open court principle.

29 In my respectful view, the judge's reasoning erroneously restricted the meaning of "public interest in confidentiality" under *Sierra Club*.

30 That D+H and Resolve have a specific private interest does not exclude the existence of a concurrent public interest. The two are not mutually exclusive. In *Sierra Club*, Justice Iacobucci said (para 55) "the interest in question cannot *merely* be specific to the party requesting the order; the interest must be one which can be expressed in terms of a public interest in confidentiality" [emphasis added]. The question is whether D+H/Resolve's clear private interest also can be expressed in terms of a public interest in confidentiality.

31 The motions judge accepted that "there would be a public interest in fair competition". I agree, for the following reasons.

32 This is a tender call, issued by the Government of Canada, for a publicly funded, several hundred million dollar contract for a government-sponsored program governing loans to thousands of students across the country. The Government's Rules of Engagement state that "the utmost of fairness and equity between all parties" is an "overriding principle", and that the Government "will not disclose proprietary or commercially-sensitive information concerning a Participant to other Participants or third parties, except and only to the extent required by law". Clearly the integrity of the tendering process for a new CSLP Contract is a matter of public interest.

33 In *Martel Building Ltd. v. R.*, [2000] 2 S.C.R. 860 (S.C.C.), para 88, Justices Iacobucci and Major, for the Court, said that the implication of a term of fair and equal treatment in a tender process "has a certain degree of obviousness to it" and "is consistent with the goal of protecting and promoting the integrity of the bidding process, and benefits all participants involved". See also *Double N Earthmovers Ltd. v. Edmonton (City)*, 2005 ABCA 104 (Alta. C.A.), paras 23, 52, affirmed [2007] 1 S.C.R. 116 (S.C.C.), para 32.

34 The motions judge said that public interest did not apply here because the RFP "has yet to be issued" (by the decision date of December 4, 2013), and "will be issued in late 2013 with the valuation of the confidential bids set for the spring of 2014".

35 With respect, I don't follow the judge's reasoning. The motions judge acknowledged that an RFP was expected within weeks, and an evaluation of tenders within several months. If D+H/Resolve's confidential material were made available to its competitors, the competitors could tailor their imminent tenders to that material, while D+H/Resolve would not have those competitors' equivalent confidential information. This would contravene the Government's Rules of Engagement and the judicially endorsed principles of fairness and equality that should govern the tender process. That the RFP had not yet issued, but was anticipated in the immediate future, has no bearing on the public's interest in the integrity of the upcoming tender process. The risk may well peak immediately before the expected RFP, when prospective tenderers gather information to prepare their bids. The motions judge's qualification to the legal characteristics that define the public interest, in my view, errs in principle.

36 The first branch of *Sierra Club*'s test is satisfied. There is a real and substantial risk to an important commercial interest that can be expressed in terms of a public interest in confidentiality, and there is no reasonable alternative, short of a confidentiality order, that would preserve the interest in question.

37 *Sierra Club*'s second branch asks whether the salutary effects of the confidentiality order outweigh its deleterious effects, including the right to freedom of expression and the public interest in open and accessible court proceedings.

38 Despite notice, no representative of the media appeared in either the Supreme Court or this Court to object. There is little discernable public appetite for access to D+H/Resolve's operational manuals and scripts.

39 At the chambers hearing in the Supreme Court, counsel for D+H/Resolve said "the confidential information, which we're seeking to protect here, would be available to the parties and to the Court, and the order wouldn't do anything which would impair public access to any hearings related to this matter". Similarly, D+H/Resolve's factum to the Court of Appeal said "the Appellants did not ask that the public be restricted from any hearings, nor that the media be restricted from any reporting". In *Sierra Club*, para 79, Justice Iacobucci noted that such a restricted confidentiality order "represents a fairly minimal intrusion into the open court rule, and thus would not have significant deleterious effects on this principle".

40 In my view, *Sierra Club*'s second branch is satisfied.

Conclusion

41 I would grant leave to appeal and allow the appeal. I would order that, if the confidential information from D+H or Resolve's training and systems manuals and scripts is to be included in an affidavit for a chambers motion, then that confidential information be sealed from the public, but be available for the unrestricted use of counsel and the court in a hearing to which the public would have the normal access.

42 I would order that any costs paid further to the motions judge's decision be repaid. I would order costs of $750 for the motion in the Supreme Court and appeal costs of $2,000 plus disbursements be paid by CFW to the Appellants.

Appeal allowed.