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LATE BIDS IN A RECEIVERSHIP SALES PROCESS

BY DAVID MANN AND DAVID LEGEYT

In *Bank of Montreal v. River Rentals Group Ltd.* [2010] ABCA 16, the Alberta Court of Appeal had to consider the acceptance of a higher bid made after the tender closing date.

The Receiver was appointed as receiver manager of River Rentals Group Ltd., Taves Contractors Ltd., and McTaves Inc. (the “Debtor”), by order dated March 5, 2009. In discharging its duties, the Receiver issued an information package and called for offers for the purchase of the Debtor’s assets which included a property known as the Birch Hills lands (the “Birch Lands”). The call for offers was dated April 17, 2009, and the corresponding deadline for submissions was on or before May 7, 2009. On June 2, 2009, the Receiver brought an application before Justice Wachowich to approve the sale of the Birch Lands (the “Approval Application”) to Hutterite Church of Codesa (the “Appellant”). The Appellant’s offer was \$2.205 million which was considerably higher than an appraised value at \$1.56 million. An offer was also submitted, pursuant to the terms of the call for offers process, by Don Warkentin (“Warkentin”) in the amount of \$2.1 million. Warkentin learned on May 21, 2009, that he could have the Birch Lands earlier than anticipated and subsequently increased his offer to \$2.3 million. Warkentin’s position at the Approval Application was that his offer should be accepted as it is higher than that of the Appellant’s and that had Warkentin known on or before May 7, 2009, that he could have the Birch Lands earlier than anticipated, he would have made a higher offer than the offer he originally submitted.

Based on the above, Justice Wachowich adjourned the Approval Application and extended the deadline for revised offers from the Appellant and Warkentin only. During this extension period, Warkentin submitted a higher bid than the Appellant and the Appellant did not increase its original offer. Justice Wachowich subsequently granted an order directing that the Birch Lands be sold to Warkentin.

The Appellant appealed, asking that the lower Court’s approval of the late Warkentin bid be overturned, and that its original compliant offer be accepted.

The issue on appeal was whether the chambers judge should have extended the bidding process and whether the Warkentin offer should have been “entertained” and accepted. The Court of Appeal turned to an Ontario Court of Appeal case that dealt with higher offers after the close of a sales process. In *Royal Bank of Canada v. Soundair Corp* (1991) 4 O.R. (3d) 1 (C.A), the Court stated:

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 unreasonably low as to demonstrate that the receiver was improvident in accepting it...

The Court of Appeal of Alberta found that the chambers judge made no such finding, specifically, that there was no evidence that the Receiver acted improvidently in accepting the offer of the Appellant. The Court of Appeal of Alberta confirmed that it has “consistently favoured an approach that preserves the integrity of the process”. In conclusion, the Court of Appeal allowed the appeal and ordered that the Birch Lands be sold to the Appellant.

COURT COMPELS EXAMINATION UNDER *BIA* NOTWITHSTANDING SELF-INCRIMINATION OBJECTION

BY DAVID MANN AND DAVID LEGEYT

In *Rieger Printing Ink Co.*, 2009 WL 477541 (Ont. S.C.J. [Commercial]), the Ontario Superior Court of Justice dealt with a party's right to protection against self-incrimination in relation to an examination held under section 163 of the *Bankruptcy and Insolvency Act*, R.S.C., 1985 c. B-3 ("*BIA*").

Rieger Printing Ink Company Limited ("Rieger") filed a notice of intention to make a proposal. One day later, ABN Amro Bank A.V. Canada Branch ("ABN") applied to court to appoint an interim receiver, partly because it had discovered substantial financial irregularities which caused inaccurate reports of certain collateral. As a result, Rieger's borrowing base was inaccurate. Subsequently, Rieger was deemed bankrupt for failure to file a proposal in time.

The inspectors passed a resolution authorizing the trustee to examine the CFO of Rieger, pursuant to s. 163 of the *BIA*. The CFO refused to participate in the examination until her right against self-incrimination was fully protected. She was not charged with any criminal offence nor was there any evidence that she was being investigated.

Section 163 of the *BIA* provides as follows:

(1) The trustee, on ordinary resolution passed by the creditors or on the written request or resolution of a majority of the inspectors, may, without an order, examine under oath before the registrar of the court or other authorized person, the bankrupt, any person reasonably thought to have knowledge of the affairs of the bankrupt or any person who is or has been an agent or a mandatary, or a clerk, a servant, an officer, a director or an employee of the bankrupt, respecting the bankrupt or the bankrupt's dealings or property and may order any person liable to be so examined to produce any books, documents, correspondence or papers in that person's possession or power relating in all or in part to the bankrupt or the bankrupt's dealings or property....

(3) The evidence of any person examined under this section shall, if transcribed, be filed in the court and may be read in any

proceedings before the court under this Act to which the person examined is a party.

The court held that the purpose of a section 163 examination is "to provide information to assist the trustee in carrying out its duty to administer the bankrupt estate by collecting the property of the bankrupt and distributing the proceeds to its creditors. A trustee needs to find out the extent of the property of the bankrupt and whether there have been dispositions or dealings with that property which should be challenged." The evidence obtained in a section 163 examination, including reports made by the trustee for the court, may be used in the bankruptcy proceedings.

The CFO relied on the Supreme Court of Canada decision *Doucette (Litigation Guardian of) v. Wee Watch Day Care Systems Inc.*, 2008 SCC 8 ("*Doucette*"), in support of her position. *Doucette* sets out the implied undertaking rule, which provides that subject to certain exceptions, the evidence and information obtained from an examination for discovery will not be used by the parties for purposes other than the proceeding in which it was obtained.

However, Pepall J. distinguished *Doucette* on the basis that examinations for discovery and section 163 examinations are very different. Section 163 examinations "reflect a policy of public access, public scrutiny and transparency. It is clear that Parliament contemplated that the evidence of any person examined be public. Firstly, the evidence, if transcribed, must be filed with the court as set forth in section 163(3). This is mandatory. Secondly, this is not a private examination between private parties; rather, section 163(1) contemplates an examination by a trustee who is a court officer before the registrar who is a judicial officer." The court observed the decision in *Goodyear Canada Inc. v. Meloche* (1996), 41 C.B.R. (3d) 112 (Ont. Gen. Div.), which reflected this policy distinction by concluding that s. 163 evidence is not subject to any implied undertaking rule.

Pepall J. found that on a strict reading of the statute, the Trustee was clearly entitled to compel the CFO's attendance at the examination and that the onus rested on her to show that a sealing order is justified.

As is well known, *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, sets out the test for when sealing orders are available. Sealing orders should only be granted when: (1) an order is needed to prevent serious risk to an important interest because reasonable alternative measures will not prevent the risk, and (2) the salutary effects of the order outweigh its deleterious effects, including the effects on the right to free

expression, which includes the public interest in open and accessible court proceedings.

This court found that the CFO's situation failed both branches of the test. First, since there were no criminal charges laid or any evidence of an investigation, there was no serious risk. Second, the court found that a sealing order is contrary to the spirit and intent of Parliament and the principle of open courts, as noted above.

However, the court made sure to note that adequate protection against self-incrimination was still available to the CFO, regardless of the court's decision to compel her attendance at the examination and refusal to allow a sealing order. Section 5 of the *Canada Evidence Act*, R.S.C., 1985 c. C-5 ("*CEA*"), section 13 of the *Charter of Rights of Freedoms* (the "*Charter*") and the derivative use immunity as described by the Supreme Court of Canada in *R. v. S. (R.J.)*, 2008 SCC 8, provide adequate protection for the CFO's rights against self-incrimination.

For clarity, section 5 of the *CEA* states that no witness shall be excused from answering any question on the grounds that the answer may incriminate him. However, with respect to any answer which may incriminate him, and if but for the *CEA* or any provincial act the witness would therefore be excused from answering the question, the answer shall not be admissible in evidence against him in any subsequent criminal trial or other criminal proceeding.

Section 13 of the *Charter* provides that "A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence."

In summary, the court held that the trustee has a right to compel the CFO to attend the examination, and that a sealing order was not required because her right to protection against self-incrimination was adequate, given the other statutory protections she had against self-incrimination.

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