File No. CI 24-01-45056

THE KING'S BENCH
WINNIPEG CENTRE

IN THE MATTER OF: THE APPOINTMENT OF A RECEIVER PURSUANT TO SECTION 243 OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3 AS AMENDED, AND SECTION 55 OF *THE COURT OF KING'S BENCH ACT*, C.C.S.M. c. C280

BETWEEN:

BANK OF MONTREAL,

Applicant,

-and-

GENESUS INC., CAN-AM GENETICS INC. and GENESUS GENETICS INC.,

Respondents.

BRIEF OF THE COURT-APPOINTED RECEIVER
HEARING DATE: July 4, 2024 AT 9:00 A.M.
BEFORE THE HONOURABLE MR. JUSTICE CHARTIER

MLT AIKINS LLP
Barristers and Solicitors
30th Floor – 360 Main Street
Winnipeg, MB R3G 4G1

J.J. BURNELL / ANJALI SANDHU
Telephone: (204) 957-4663/(204) 957-4760
Facsimile: (204) 957-0840

File No. 0128056.00004

THE KING'S BENCH
WINNIPEG CENTRE

IN THE MATTER OF: THE APPOINTMENT OF A RECEIVER PURSUANT TO SECTION 243 OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3 AS AMENDED, AND SECTION 55 OF *THE COURT OF KING'S BENCH ACT*, C.C.S.M. c. C280

BETWEEN:

BANK OF MONTREAL,

Applicant,

-and-

GENESUS INC., CAN-AM GENETICS INC. and GENESUS GENETICS INC.,

Respondents.

BRIEF OF THE RECEIVER

INDEX

PART I	LIST OF DOCUMENTS AND AUTHORITIES TO BE RELIED UPON	1
PART II	INTRODUCTION	2
PART III	POINTS TO BE ARGUED	5
PART IV	FACTS	6
PART V	ARGUMENT	14
PART VI	CONCLUSION	24

PART I LIST OF DOCUMENTS AND AUTHORITIES RELIED UPON

Documents To Be Relied Upon:

1 Affidavit of Ed Barrington filed February 12, 2024 (the "**Barrington Affidavit**");
2 Supplementary Affidavit of Ed Barrington, filed on June 3, 2024 (the "**Supplementary Barrington Affidavit**");
3 Order (Appointing Receiver) pronounced June 11, 2024;
4 Notice of Motion dated July 1, 2024;
5 First Report of the Receiver dated July 2, 2024 (the "**First Report**");
6 Confidential Supplement of the Receiver dated July 2, 2024 (the "**Confidential Supplement**"); and
7 Affidavit of Service of Kari Klassen, to be filed (the "**Klassen Affidavit**")

Authorities To Be Relied Upon:

TAB

1. *The Court of King's Bench Act,* C.C.S.M. c. c280, s. 37(1), 77(1) (the "**KB Act**");
2. *Bankruptcy and Insolvency Act,* R.S.C. 1985, c. B-3 (the "**BIA**"), s. 243(1)(c)
3. *Royal Bank v Soundair Corp.* (1991) 4 OR (3d) 1;
4. *Royal Bank of Canada v Keller & Sons Farming Ltd*., 2016 MBQB 77;
5. *Elleway Acquisitions Ltd. v 4358376 Canada Inc*., 2013 ONSC 7009;
6. *OEL Projects Ltd (Re)*, 2020 ABQB 365;
7. *Urbancorp*, 2020 ONSC 7920
8. *Target Canada Co (Re)*, 2015 ONSC 7574
9. *Triple-I Capital Partners Limited v 12411300 Canada Inc.*, 2023 ONSC 3400;
10. *Sherman Estate v Donovan*, 2021 SCC 25;
11. *Just Energy Group Inc. et al. v Morgan Stanley Capital Group Inc*. et al, 2022 ONSC 6354;
12. *Ontario Securities Commission v Bridging Finance Inc*., 2023 ONSC 4203; and
13. Compare of draft Sale Approval and Vesting Order to the Manitoba Model Sale Approval and Vesting Order.

PART II INTRODUCTION

1. By Order (Appointing Receiver) (the "**Receivership Order**") pronounced by the Honourable Mr. Justice Chartier on June 11, 2024, BDO Canada Limited, was appointed receiver and manager (the "**Receiver**") of all of the assets, undertakings and properties of Genesus Inc. ("**Genesus**"), Can-Am Genetics Inc. ("**Can-Am**") and Genesus Genetics Inc. ("**GGI**", and together with Genesus and Can-Am, the "**Debtors**") relating to, acquired for, or used in relation to a business carried on by the Debtors, including all proceeds thereof (collectively, the "**Property**").

Receivership Order
First Report, para 1

2. As early as August 2023, the former management of the Debtors engaged in efforts to market and sell shares and/or assets of one or more the Debtors.

First Report, para 47

3. Prior to the pronouncement of the Receivership Order, BDO Canada Limited was retained by the Applicant, Bank of Montreal ("**BMO**") as financial advisor (the "**Financial Advisor**") in respect of the Debtors. Beginning in October 2023, the Financial Advisor assisted the Debtors' with their sale efforts.

First Report, paras 46 - 47

4. Pre-receivership sales efforts included extensive discussions and negotiations with six parties, including Canada ZF Investments Inc. (the "**Purchaser**"), all but one of whom progressed to the due diligence stage. Only one offer, which was received from the Purchaser, was received through the sale process.

First Report paras 47

5. Beginning in March 2024, management of the Debtors engaged in sale negotiations with the Purchaser. Following the pronouncement of the Receivership Order, the Receiver continued negotiations with the Purchaser, who conducted further due diligence.

First Report paras 55 - 57

6. On June 28, 2024, the Receiver and the Purchaser agreed upon and executed a form of an asset purchase agreement (the "**APA**"), subject to the approval of this Honourable Court, which provides for a transaction (the "**Transaction**") through which, *inter alia*, the following will be sold to the Purchaser: (i) livestock herds owned by Genesus (The "**Genesus Herds**"); (ii) livestock herds owned by Can-Am (the "**Can-Am Herds**", and together with the Genesus Herds, the "**Livestock Herds**"); (iii) intellectual property of Genesus, including proprietary software / data handling pipelines, phenotypic, genotypic and pedigree databases, trade secrets and trademarks; (iv) certain books and records of Genesus and/or Can-Am; (v) certain real property owned by Genesus (the "**Oakville Property**"); and (vi) certain Real Property owned by Can-Am (the "**Riverdale Property"**). Additionally, pursuant to the APA, certain contracts between Genesus and third parties will be assigned (the "**Assigned Contracts**") to the Purchaser.

First Report, para 58 & Appendix "C"

7. It is critical that the Transaction close as soon as possible, because, *inter alia*, the Transaction will eliminate the Receiver's ongoing operating costs, holding costs, and other costs and risks associated with the Livestock Herds, which includes approximately 8,775 swine.

First Report, paras 25 & 61(d) & Appendix "C"

8. The consideration to be provided under the APA exceeds the expected realizations from the orderly liquidation of the assets (the "**Assets**") to be sold under the APA. Additionally, the APA contemplates the re-hiring of certain of the Debtors' employees.

First Report, paras 61(b) & 61(c)

9. Accordingly, the Receiver has brought the within motion seeking, *inter alia*, this Honourable Court's approval of the APA and the Transaction by granting an approval and vesting order (the "**AVO**").

PART III POINTS TO BE ARGUED

A. Should this Honourable Court grant the AVO approving the APA and the Transaction?

B. Should this Honourable Court approve the assignment of the Assigned Contracts?

C. Should the Confidential Supplement be sealed?

D. Should the actions of the Receiver to date in respect of its administration of these receivership proceedings be approved, and should the First Report, including the statements of receipts and disbursements and the activities of the Receiver described therein be approved?

PART IV FACTS

(a) Background

1. The Receiver was appointed pursuant to the Receivership Order on June 11, 2024.

First Report, para 1

2. Genesus is a corporation incorporated pursuant to the laws of the Province of Manitoba and carries on business selling a range of swine genetics products and services, including breeding stock, semen, and technical support services to hog producers. Genesus specializes in hyper-prolific gilts, which are produced from the world's largest registered purebred swine herd.

First Report, para 9

3. Can-Am is a corporation incorporated pursuant to the laws of the Province of Manitoba and carries on business as a livestock farm to, *inter alia*, provide Genesus with swine for commercial production. Can-Am also conducts research focused on improving swine health and productivities. The shares of Can-Am are wholly owned by Genesus.

First Report, para 10

4. Both Genesus and Can-Am conduct business from the Oakville Premises, located at 101 2nd Street in the Town of Oakville in the Province of Manitoba.

First Report paras 9 -10

5. Following the appointment of the Receiver, the Receiver terminated all of the Genesus and Can-Am's employees and has made arrangements with certain former employees to assist the receiver on an "as needed" basis.

First Report, para 18(c)

6. GGI is a subsidiary of Genesus and is incorporated pursuant to the laws of the State of South Dakota and is a related corporation to Genesus and Can-Am. GGI's operations have been wound down with all assets being sold.

First Report, para 11

(b) Pre-Receivership Sale Efforts

7. On or about March 13, 2023, BMO engaged the Financial Advisor to, *inter alia*, assess restructuring options available to the Debtors, assist with the preparation of cashflow projections, and interacting with various interested stakeholders. The Financial Advisor was further engaged by BMO to monitor the Debtors' operations from October 1, 2023, to January 15, 2024.

First Report, paras 45-46

8. Prior to the appointment of the Receiver, and as early as August 2023, the former management of the Debtors engaged in efforts to solicit interest from various parties in order to market and sell shares and/or assets of one or more the Debtors. Within an eight month period, the Debtors engaged in discussions and/or negotiations with five prospective purchasers (the "**Prospective Purchasers**"), each of whom determined they would not continue to pursue the opportunity.

First Report, para 47

9. The Prospective Purchasers included: (i) two large corporations that conduct business in the field of swine genetics; (ii) one large corporation that conducts business in the field of animal genetics; and (iii) two private equity funds, one of which focuses on agriculture and sustainable production.

First Report, paras 48, 50, & 54

10. The pre-receivership sale efforts in respect of the Prospective Purchasers included:

a. Genesus engaged in telephone, teleconference, and/or video conference calls with each of the Prospective Purchasers;

b. Beginning in October 2023, the Financial Advisor commenced discussions with various Prospective Purchasers;

c. Representatives of the Debtors travelled to the head office of two of the Prospective Purchasers for in-person negotiations;

d. Four of the five the Prospective Purchasers signed non-disclosure agreements and were subsequently provided extensive documentary disclosure regarding the Debtors; and

e. Four of the five Prospective Purchasers proceeded to the due diligence stage, and were provided sufficient time to conduct due diligence.

First Report, paras 47-54

(c) Sale Efforts with respect to the Purchaser

11. On or about March 26, 2024, former management of the Debtors initiated discussions with the Purchaser, and on or about April 8, 2024, counsel for the Purchaser contacted the Financial Advisor to discuss how a potential sale could occur prior to or after the appointment of it as the Receiver.

First Report, para 55

12. On May 14, 2024, the Purchaser submitted a term sheet which contemplated the purchase all the shares of Genesus and Can-Am.

First Report, para 56

13. Discussions and negotiations between management of the Debtors, the Financial Advisor and the Purchaser continued into June, and following the pronouncement of the Receivership Order, the Receiver continued negotiations with the Purchaser.

First Report, para 57

14. In June 2024, the Purchaser conducted further due diligence, following which the Purchaser made an offer to purchase certain of Genesus and Can-Am's Property. On June 28, 2024, the Receiver and the Purchaser agreed upon the form of the APA.

First Report, para 57

(d) The APA and Transaction

15. The Transaction provides for the sale of the following property on an *"as is, where is*" basis:

a. The Genesus Herds, which is comprised of approximately 5,423 swine;
b. The Can-Am Herds which is comprised of approximately 3,652 swine;
c. Certain intellectual property of Genesus, including:
    i. Proprietary Software / Data Handling Procedures;
    ii. Phenotypic, Genotypic and Pedigree Databases;
    iii. Trade Secrets;
    iv. Trademarks;
    v. Software and Documentation; and
    vi. Other Intellectual Property Rights;
d. Certain books and records of Genesus and/or Can-Am, including accounting records, customer and supplier lists;
e. The Oakville Property legally described on Title No. 2316076/3 as:

    PARCEL 1: LOT 4 AND THE NLY 50 FEET PERP OF LOT 5 BLOCK 1
    PLAN 226 PLTO IN NW ¼ 18-11-4 WPM

    PARCEL 2: LOTS 3 AND 5 BLOCK 1 PLAN 226 PLTO, EXC FIRSTLY: OUT OF LOT 5 THE NLY 50 FEET PERP

AND SECONDLY ALL MINES AND MINERALS VESTED IN
THE CROWN (MANITOBA)
BY THE REAL PROPERTY ACT
IN NW ¼ 18-11-4 WPM

f. The Riverdale Property legally described on Title Nos. 1848166/2 and 1892437/2, respectively as:

   i. SW ¼ 21-12-22 WPM
   EXC ROAD PLAN 1650 BLTO; and

   ii. NW ¼ 21-12-22 WPM
   EXC NLY 1320 FEET PERP.

First Report, para 58 & 60, Appendix C

16. The APA provides for the assignment of certain contracts between Genesus and third parties to the Purchaser, several of which require "*cure costs*" to be paid to contracting parties, all of which are to be assumed by the Purchaser.

First Report, para 59, Appendix C

17. The APA provides the initial deposit will occur one business day after execution of the APA (due July 2, 2024), and a second deposit will occur within five business days after execution of the APA (due July 8, 2024).

First Report, para 60 & Appendix C

18. The APA provides that the Transaction shall close the later of: (i) the third business day after the AVO is granted; (ii) the third business day following the final resolution, dismissal or withdrawal of an appeal of the AVO; or (iii) such other date as the Receiver and Purchaser may agree to in writing.

First Report, para 60 & Appendix C

19. The APA is conditional upon, *inter alia*, this Honourable Court granting the AVO.

First Report, Appendix C

20. The Receiver has determined that in the event that the Transaction is not approved, the alternative would be an orderly liquidation of the Assets, which is expected to yield lesser realizations than the consideration to be provided under the APA.

First Report, para 18(i) & 61(c)

(e) Creditors of Genesus

21. In respect of priority payables that may be owing by Genesus:

a. Genesus had 27 employees. These employees are owed approximately $68,500.00 in vacation pay and approximately $95,000.00 in termination pay. The estimated super-priority payment under the Wage Earner Protection Program for Genesus is approximately $25,000.00.

b. The Receiver is in the process of determining whether any amounts are owing by Genesus for PST, GST, HST, or any other taxes collectible by the Canada Revenue Agency or Provincial taxation authorities.

c. The Receiver is in the process of determining the amount of property taxes which may be owing on the Oakville Property.

First Report, paras 38, 42 & 43

22. The creditors with security registration against the personal property of Genesus included in the Assets:

a. BMO – Personal Property Registry ("**PPR**") Registration Nos. 201102738905 and 201805918808;

b. Farm Credit Canada ("**FCC**") – PPR Registration No. 200817992802; and

c. Masterfeeds Inc. – PPR Registration No. 202211629500.

Barrington Affidavit, Exh. CC
First Report, para 34

23. The creditors with registrations on title against the Oakville Property include:

a. BMO ("**BMO**") – Mortgage No. 1230862/3;

b. Sea Air International Forwarders Limited – Certificate of Judgment No. 1232076/3; and

c. Fermes Durand Farms Ltee. – Certificate of Judgment No. 1232212/3.

Barrington Affidavit, Exh. GG

24. Designed Genetics Inc. ("**DGI**"), leases real property to Genesus where Genesus operates a barn. DGI has claimed ownership of, or in the alternative, lien rights pursuant to *The Stable Keepers Act* of approximately 5,423 members of the Genesus Herds. On June 11, 2024, at the receivership hearing, counsel for DGI agreed on the record that Genesus may sell the swine and that the issue going forward would be of entitlement to the sale proceeds.

First Report, paras 12, 19 & 36

25. As at the date of the Receivership Order, based on the Debtors' books and records, Genesus owes approximately $10.6 million to unsecured creditors.

First Report, para 44

(f) Creditors of Can-Am

26. In respect of priority payables that may be owing by Can-Am:

a. Can-Am had seven employees which are owed approximately $6,000 in vacation pay and approximately $17,440.00 in termination pay. The estimated super-priority payment under the Wage Earner Protection for Can-Am is approximately $6,000.00;

b. The Receiver is in the process of determining any amounts are owing by Can-Am for PST, GST, HST, or any other taxes collectible by the Canada Revenue Agency or Provincial taxation authorities.

c. The Receiver is in the process of determining the amount of property taxes which may be owing on the Riverdale Property.

First Report, paras 39, 42 & 43

27. Pursuant to PPR Registration No. 201102740306, BMO has a security registration against, *inter alia*, the personal property owned by Can-Am which personal property is included in the Assets.

Barrington Affidavit, Exh. DD
First Report, para 34

28. The creditors with security over the Riverdale Property include:

a. Genesus – Mortgage No. 1219289/2;

b. BMO – Mortgage No. 1503944/2.

Barrington Affidavit, Exh. HH

29. As at the date of the Receivership Order, based on the Debtors' books and records, Can-Am owes approximately $1.4 million to unsecured creditors.

First Report, para 44

PART V. ARGUMENT

A. Should this Honourable Court grant the AVO approving the APA and the Transaction?

30. Pursuant to paragraph 3 of the Receivership Order, the Receiver is empowered to, *inter alia*:

a. Market any or all of the Property, including advertising and soliciting offers in respect of the Property or any part or parts thereof and negotiating such terms and conditions of sale as the Receiver in its discretion may deem appropriate;

b. Sell, convey, transfer, lease or assign the Property or any part or parts thereof out of the ordinary course of business,

i. In respect of the Property which is livestock, all or some of the Property to slaughter houses at market prices, without the approval of this Court;

ii. In respect of Property which is not livestock, or livestock not being sold to a slaughter house at market prices:

A. without the approval of this Court in respect of any transaction not exceeding $100,000, provided that the aggregate consideration for all such transactions does not exceed $500,000; and

B. with the approval of this Court in respect of any transaction in which the purchase price or the aggregate purchase price exceeds the applicable amount set out in the preceding clause;

and in each such case notice under subsection 59(10) of The Personal Property Security Act (Manitoba), or section 134(1) of The Real Property Act (Manitoba), as the case may be, shall not be required; and

c. Apply for a vesting order or other orders necessary to convey the Property or any part or parts thereof to a purchaser or purchasers thereof, free and clear of any liens or encumbrances affecting such Property.

Receivership Order at paras 3(k) - (m)
First Report at para 2

31. In determining whether the APA ought to be approved, this Honorable Court must consider the following factors (the "**Soundair Test**") outlined by the Ontario Court of Appeal in *Royal Bank v Soundair Corp.*:

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

***Royal Bank v Soundair Corp.*, (1991) 4 OR (3d) 1 (ONCA) ("Soundair"), para 16 [Tab 3]**
***Royal Bank of Canada v Keller & Sons Farming Ltd.*, 2016 MBQB 77 at para 14 [Tab 4]**

32. As discussed in detail in paragraphs 7-14 above, in the current matter, the Assets were exposed to the market through sale efforts made by the Debtors prior to the appointment of the Receiver. These efforts were continued by the Receiver following the pronouncement of the Receivership Order.

33. Transactions that receive Court-approval soon after the appointment of a receiver without any further marketing process have been referred to as "*pre-pack transactions*". Pre-pack transactions must still satisfy the Sound Air Test, with specific consideration to the economic realities of the business and the specific transaction in question.

***Elleway Acquisitions Ltd. v 4358376 Canada Inc.*, 2013 ONSC 7009 ("Elleway") at para 33 [Tab 5]**

(i) Sufficient effort to obtain the best price

34. The Receiver is of the view that the Purchase Price (as defined in the APA) for the Assets is fair and reasonable.

First Report, para 61(f)

35. The consideration to be provided under the APA exceeds the expected realizations from an orderly liquidation of the Assets.

First Report, para 61(c)

36. The Receiver has acted in good faith, and has not acted improvidently.

(ii) The interests of all parties

37. The Transaction is in the best interest of the Debtors and their respective stakeholders. There is significant costs to the receivership estate associated with the costs of maintaining the Livestock Herds. A timely sale of the Livestock Herds will preserve funds in the receivership estate, and may result in greater amounts available for distribution to the Debtors' creditors. It may also allow Receiver sufficient liquidity to carry out its plan in respect of realizing upon the Debtors' remaining assets.

First Report, paras 61(d) & 63

38. Additionally, the Transaction will eliminate any risks the receivership estate's associated with animal husbandry and hog production.

First Report, para 61(d)

39. BMO and FCC, the Debtors' major secured creditors with registered security interests against the Assets, have received an unredacted copy of the APA, and are supportive of the APA and Transaction.

First Report, paras 14, 34 & 61(e)

40. The APA addresses the proper priorities amongst the creditors in that the proceeds will stand in the stead and place of the Assets and that the sale is a cash sale and not a credit bid. Accordingly, no secured or unsecured creditors will be prejudiced by the Transaction.

First Report, Appendix C

41. Certain of Genesus and/or Can-Am's employees will be re-employed by the Purchaser, which will preserve jobs.

First Report, para 61(b), Appendix C

42. The Receiver, in the circumstances, recommends the APA and Transaction.

First Report, para 61

(iii) The efficacy and integrity of the process by which offers are obtained

43. The Receiver is of the view that the process (as described in paragraphs 7-14 above) by which the offer was made by the Purchaser was obtained was reasonable and fair.

First Report, para 61(f)

44. In the current matter, the closing of the Transaction is time-sensitive and urgent, as the continued maintenance of the Livestock Herds by the Receiver is costly to the Receivership Estate and accounts receivable collection has been delayed. If the Transaction is not approved it will take time to liquidate the herd.

First Report, paras 61(c) & 61(d)

45. Given the urgency in these circumstances, the sales process undertaken is the best option to maximize recovery for the creditors and to assist the stakeholders. An orderly liquidation of the assets will yield a lower realization.

First Report, para 63(c)

46. In *Elleway*, the Court noted that in particular Courts have approved of pre-pack transactions where, *inter alia*, a delay of the transaction will erode the realization of the security of the creditor in sole economic interest. In this case, the maintenance and care costs of the Livestock Herds is causing erosion to the Receivership estate, which will continue until the Livestock Herds are sold or euthanized.

Elleway at para 33 [Tab 5]
First Report, para 61(d)

47. In *Re OEL Projects Ltd*., 2020 ABQB 365 ("**OEL Projects**"), the Alberta Court of Queen's Bench approved a transaction one day after the moving party filed a Notice of Intention under the BIA. The sale was to a related party, and there had been no third party sales process. The Court made the following factors favoured the granting of the order approving the transaction, *inter alia*:

a. The secured creditors were supportive of the proposed transaction;
b. The proposed transactions would allow employees to be hired by the purchaser and keep their jobs;
c. The purchase price was more than what would be achieved in liquidation.
d. The analysis by the proposal trustee provided independent benchmarks of values and the Court was satisfied the consideration was reasonable and fair; and
e. The transaction would proceed quickly so as to avoid further erosion of value.

OEL Projects at paras 23-24 & 27 [Tab 6]

48. In the current circumstances, unlike OEL Projects, the Purchaser is an arm's length party. Additionally, an informal sale process was run prior to the appointment of a Receiver, and sale efforts and negotiations were continued by the Receiver following its appointment. Many of the factors considered by the Court in OEL Projects in its decision to grant an order approving the transaction are present in the current circumstances, including, *inter alia*:

a. BMO and FCC, the Debtors' major secured creditors, have been provided with the APA and are supportive of the Transaction;

b. The Purchaser will offer re-employment to the certain of the Debtors' employees;

c. The Receiver has obtained independent appraisals of the Oakville Property and the Riverdale Property and is of the view that the Transaction is reasonable and fair;

d. The consideration to be provided under the APA is higher than what is expected to be received in a liquidation; and

e. The Transaction will proceed quickly, and is expected to close three business days after the approval of the AVO, or three business' days after the determination of an appeal of same, to avoid further erosion of value of the receivership estate caused by the Receiver's requirement to maintain the Livestock Herds.

First Report, paras 61, Appendix C

(iv) There has been no unfairness in the working out of the process

49. There has been no unfairness in the working out of the process. The APA was negotiated in good faith with an arm's length party.

50. Based on the foregoing, the Receiver respectfully submits that in these circumstances, the Sound Air Test has been satisfied.

B. Should this Honourable Court approve the assignment of the Assigned Contracts?

51. The APA provides for the assignment of the Assigned Contracts.

52. This Honourable Court has both inherent jurisdiction to approve the assignment of the Assigned Contracts and jurisdiction pursuant to section 243(1)(c) of the BIA and section 37(1) of the KB Act.

53. Section 243(1)(c) of the BIA provides that:

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

BIA, s. 243(1)(c) [Tab 2]

54. Section 37(1) of the KB Act provides that:

> *Vesting orders*
>
> *37(1)*
>
> *The court may by order vest in a person an interest in real or personal property that the court has authority to order to be disposed of, encumbered or conveyed.*

KB Act, s. 37(1) [Tab 1]

55. In *Urbancorp*, the Ontario Superior Court of Justice confirmed it had jurisdiction to approve of the assignment of contracts by a receiver pursuant to sections 243(1)(c) of the BIA and section 100 of Ontario's *Courts of Justice Act*, which is nearly identical to section 37(1) of *The Court of King's Bench Act*, or in the alternative, it had inherent jurisdiction to do so.

***Urbancorp*, 2020 ONSC 7920 at paras 30-32 [Tab 7]**

56. A sale transaction, including one which involves the assignment of contracts must meet the Soundair Test. However, where an assignment of contracts is involved, the Court must make additional considerations including:

a. Whether the person to whom the rights and obligations are to be assigned would be able to perform the obligations; and
b. Whether it would be appropriate to assign the rights and obligations to that person.

***Urbancorp*, 2020 ONSC 7920 at para 35 [Tab 7]**

57. In these circumstances, the primary obligation of the Debtors' under the Assigned Contracts is paying for the services provided thereunder. The Purchaser has advised the Receiver that it is capable of performing the obligations under the Assigned Contracts, including paying for the services performed by the third parties thereunder and assuming any applicable cure costs.

First Report, para 59

58. The third parties to the contracts to be assigned have been provided with a copy of the First Report which includes a redacted copy of the APA and notice of the Receiver's motion seeking the AVO.

Klassen Affidavit

C. Should the Confidential Supplement be sealed?

59. Section 77(1) of the KB Act provides for the sealing of Court documents, as follows:

> The court may order that a document filed in a civil proceeding is confidential, is to be sealed and is not a part of the public record of the proceeding.

KB Act, C.C.S.M. c. C280, s. 77(1) [Tab 1]

60. In *Sherman Estate v Donovan*, the Supreme Court of Canada confirmed that three prerequisites which must be met in order for a Court to make an order limiting openness of the courts, including a sealing order. These prerequisites are:

a. Court openness poses a serious risk to a competing interest of public importance;
b. The order sought is necessary to prevent the identified risk because reasonably alternative measures will not prevent this risk; and
c. The benefits of the order restricting Court openness outweighs its negative effects.

***Sherman Estate v Donovan*, 2021 SCC 25 ("Sherman Estate") at para 38 [Tab 10]**

61. The Supreme Court in Sherman Estate confirmed that a "*general commercial interest of preserving confidential information*" can constitute an important public interest.

Sherman Estate at paras 41 and 43 [Tab 10]

62. In insolvency proceedings, Courts have frequently found that confidential and commercially sensitive information related to a proposed transaction should be sealed, as the dissemination of such information would pose a serious risk to the commercial interests of the insolvent company in the event that the transaction should not be completed. The sealing of key economic terms of a transaction is routine in insolvency proceedings on the basis that there is a broader public interest in maintaining confidentiality in such information.

***Just Energy Group Inc. et al. v Morgan Stanley Capital Group Inc.* et al, 2022 ONSC 6354 at para 72 [Tab 11]**
***Ontario Securities Commission v Bridging Finance Inc.*, 2023 ONSC 4203 at para 29 [Tab 12]**

63. The Receiver seeks an order that the Confidential Supplement be sealed until the closing of the Transaction, or until further order of this Honourable Court (the "**Sealing Order**").

64. The Confidential Supplement contains *inter alia*: (i) the unredacted APA, which contains the Purchase Price (as defined in the APA) and the allocation of the Purchase Price; (ii) a schedule of net realizations in respect of the Transaction; (iii) the appraisals of the Oakville Property and the Riverdale Property; and (iv) the estimated value of the Livestock Herds, as well as other commercially sensitive information.

65. The disclosure of the information in the Confidential Supplement would have a detrimental impact on the Debtors and their respective stakeholders, as such disclosure may undermine any future efforts to maximize the realizations from the Assets if the proposed Transaction is not approved by the Court, or if the proposed Transaction does not close, for whatever reason

66. In the circumstances, the Sealing Order provides the least restrictive manner to preserve the confidentiality of the information contained in the Confidential Supplement and to protect the Debtor and its stakeholders, and there is no reasonably alternative measures that will prevent the risks thereto.

67. The Sealing Order will only be in effect for a limited time period, until the Transaction has closed, or upon further order by this Court.

68. The Bank respectfully submits that the Sealing Order will not prejudice any of the Debtor's stakeholders. The benefits of the Sealing Order sought outweigh any negative effects.

69. The Receiver is of the view that the Confidential Supplement contains commercially sensitive information and should be sealed.

First Report, para 62

70. In these circumstances, the Receiver submits that the prerequisites outlined in Sherman Estate are met and the granting of the Sealing Order is just and appropriate.

D. Should the actions of the Receiver to date in respect of its administration of these receivership proceedings be approved, and should the First Report, including the statements of receipts and disbursements and the activities of the Receiver described therein be approved?

71. Courts have recognized that the approval of the reports of a Court officer and activities described therein is generally usual and routine.

***Target Canada Co (Re)*, 2015 ONSC 7574 at para 2 [Tab 8]**

72. In *Triple-I Capital Partners Limited v 12411300 Canada Inc.*, the Ontario Superior Court of Justice recently confirmed that that there are good policy and practical reasons for courts to approve the conduct of a Court-appointed Receiver, and that it "*should not be a novel concept that the activities of any Court officer can and should be considered by the Court as against the mandate, powers and authority of that officer*."

***Triple-I Capital Partners Limited v 12411300 Canada Inc.*, 2023 ONSC 3400 at paras 65-66 [Tab 9]**

73. The Receiver's actions and activities as described in the First Report have been carried out diligently, appropriately, and in a manner that is consistent with its mandate and powers under the Receivership Order and in accordance with the provisions of the BIA.

74. Based on the foregoing, the Receiver respectfully submits that actions of the Receiver to date in respect of its administration of these receivership proceedings be

approved, and the First Report including the statements of receipts and disbursements and the activities of the Receiver described therein be approved.

PART VI CONCLUSION

75. Based on the foregoing, the Receiver respectfully submits that this Honourable Court should grant the AVO, approve the assignment of the Assigned Contracts, seal the Confidential Supplement and approve the First Report and the Receiver's activities described therein.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 2nd DAY OF JULY, 2024.

J.J. BURNELL / ANJALI SANDHU
MLT Aikins LLP
Barristers & Solicitors
30th Floor - 360 Main Street
Winnipeg, Manitoba R3C 4G1

MANITOBA

THE COURT OF KING'S BENCH ACT

C.C.S.M. c. C280

LOI SUR LA COUR DU BANC DU ROI

c. C280 de la *C.P.L.M.*

As of 28 June 2024, this is the most current version available. It is current for the period set out in the footer below.

Le texte figurant ci-dessous constitue la codification la plus récente en date du 28 juin 2024. Son contenu était à jour pendant la période indiquée en bas de page.

(a) an Act of the Legislature or of the Parliament of Canada;

(b) an Act of the Parliament of the United Kingdom affecting the province and enacted before the coming into force of the Statute of Westminster, 1931; or

(c) a rule or order of the court.

a) une loi de la Législature ou du Parlement du Canada;

b) une loi du Parlement du Royaume-Uni visant la province et édictée avant l'entrée en vigueur du Statut de Westminster, 1931;

c) une règle ou une ordonnance de la Cour.

Rules of law and equity
33(3) The court shall administer concurrently all rules of equity and the common law.

Règles de common law et d'equity
33(3) La Cour applique simultanément les règles d'equity et de common law.

Rules of equity to prevail
33(4) Where a rule of equity conflicts with a rule of the common law, the rule of equity prevails.

Prépondérance des règles d'equity
33(4) Les règles d'equity l'emportent sur les règles incompatibles de common law.

S.M. 2012, c. 40, s. 15.

Declaratory orders
34 The court may make a binding declaration of right whether or not consequential relief is or could be claimed.

Ordonnances déclaratoires
34 Le tribunal peut rendre un jugement déclaratoire, que des mesures de redressement accessoires soient ou non réclamées ou puissent être ou non réclamées.

Relief against penalties
35 The court may grant relief against penalties and forfeitures on such terms as to compensation or otherwise as are considered just.

Pénalités
35 Le tribunal peut accorder des mesures de redressement contre les pénalités et les confiscations, selon les conditions qu'il estime justes pour les indemnisations ou pour toute autre affaire.

S.M. 2010, c. 33, s. 11.

Damages
36 The court may award damages in addition to, or in substitution for, an injunction or specific performance.

Dommages-intérêts
36 Le tribunal peut accorder des dommages-intérêts en plus d'une injonction ou d'une exécution intégrale ou au lieu de celle-ci.

Vesting orders
37(1) The court may by order vest in a person an interest in real or personal property that the court has authority to order to be disposed of, encumbered or conveyed.

Ordonnance d'envoi en possession
37(1) Le tribunal peut, par ordonnance, investir une personne d'un intérêt dans un bien réel ou personnel qu'il peut aliéner, grever ou céder par ordonnance.

PART XIII

PUBLIC ACCESS

Hearings open to public
76(1) Subject to subsection (2) or unless otherwise provided by statute or the rules, a hearing held by the court or a judge is open to the public.

Exception
76(2) The court may by order exclude the public from a hearing where the possibility of serious harm or injustice to a person justifies a departure from the general principle that hearings of the court are open to the public.

Disclosure of what transpires
76(3) Where the public is excluded from a hearing, disclosure of information relating to the hearing, including disclosure of what transpires in the hearing, is not contempt of court unless the court expressly prohibits such disclosure.

Sealing confidential documents
77(1) The court may order that a document filed in a civil proceeding is confidential, is to be sealed and is not a part of the public record of the proceeding.

Documents public
77(2) Upon payment of the prescribed fee, if any, a person may see

(a) a list of the proceedings in the court, or

(b) a document that is filed in a proceeding,

unless otherwise provided by statute, by the rules or by an order.

PARTIE XIII

DROIT D'ACCÈS DU PUBLIC

Audiences publiques
76(1) Sauf disposition contraire d'une loi ou des règles ou sous réserve du paragraphe (2), une audience que tient le tribunal ou un juge est publique.

Exception
76(2) Le tribunal peut, par ordonnance, tenir une audience à huis clos si la possibilité d'un préjudice ou d'une injustice grave à l'endroit d'une personne justifie une dérogation au principe général d'accès du public aux audiences de la Cour.

Divulgation de renseignements
76(3) Si une audience est tenue à huis clos, la divulgation de renseignements relatifs à l'audience, y compris la divulgation de faits qui se produisent durant l'audience, ne constitue pas un outrage au tribunal sauf si le tribunal interdit expressément une telle divulgation.

Documents confidentiels
77(1) Le tribunal peut ordonner qu'un document déposé dans le cadre d'une instance civile soit confidentiel, soit fermé et ne fasse pas partie du dossier public de l'instance.

Droit d'accès à certains documents
77(2) Sauf disposition contraire d'une loi, des règles ou d'une ordonnance et sur paiement, le cas échéant, du droit prescrit, une personne peut avoir accès :

a) soit à une liste des instances dont le tribunal est saisi;

b) soit à un document déposé dans le cadre d'une instance.

CANADA

CONSOLIDATION

CODIFICATION

Bankruptcy and Insolvency Act

Loi sur la faillite et l'insolvabilité

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

L.R.C. (1985), ch. B-3

Current to December 23, 2021

Last amended on November 1, 2019

À jour au 23 décembre 2021

Dernière modification le 1 novembre 2019

Published by the Minister of Justice at the following address:
http://laws-lois.justice.gc.ca

Publié par le ministre de la Justice à l'adresse suivante :
http://lois-laws.justice.gc.ca

Audit of proceedings

241 The accounts of every clerk that relate to proceedings under this Part are subject to audit in the same manner as if the accounts were the accounts of a provincial officer.

R.S., c. B-3, s. 212.

Application of this Part

242 (1) The Governor in Council shall, at the request of the lieutenant governor in council of a province, declare, by order, that this Part applies or ceases to apply, as the case may be, in respect of the province.

Automatic application

(2) Subject to an order being made under subsection (1) declaring that this Part ceases to apply in respect of a province, if this Part is in force in the province immediately before that subsection comes into force, this Part applies in respect of the province.

R.S., 1985, c. B-3, s. 242; 2002, c. 7, s. 85; 2007, c. 36, s. 57.

PART XI

Secured Creditors and Receivers

Court may appoint receiver

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.

Restriction on appointment of receiver

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

Vérification des comptes

241 Les comptes de chaque greffier, relatifs aux procédures prévues par la présente partie, sont sujets à vérification de la même manière que s'ils étaient les comptes d'un fonctionnaire provincial.

S.R., ch. B-3, art. 212.

Application

242 (1) À la demande du lieutenant-gouverneur en conseil d'une province, le gouverneur en conseil déclare par décret que la présente partie commence à s'appliquer ou cesse de s'appliquer, selon le cas, dans la province en question.

Application automatique

(2) Sous réserve d'une éventuelle déclaration faite en vertu du paragraphe (1) indiquant qu'elle cesse de s'appliquer à la province en cause, la présente partie s'applique à toute province dans laquelle elle était en vigueur à l'entrée en vigueur de ce paragraphe.

L.R. (1985), ch. B-3, art. 242; 2002, ch. 7, art. 85; 2007, ch. 36, art. 57.

PARTIE XI

Créanciers garantis et séquestres

Nomination d'un séquestre

243 (1) Sous réserve du paragraphe (1.1), sur demande d'un créancier garanti, le tribunal peut, s'il est convaincu que cela est juste ou opportun, nommer un séquestre qu'il habilite :

a) à prendre possession de la totalité ou de la quasi-totalité des biens — notamment des stocks et comptes à recevoir — qu'une personne insolvable ou un failli a acquis ou utilisés dans le cadre de ses affaires;

b) à exercer sur ces biens ainsi que sur les affaires de la personne insolvable ou du failli le degré de prise en charge qu'il estime indiqué;

c) à prendre toute autre mesure qu'il estime indiquée.

Restriction relative à la nomination d'un séquestre

(1.1) Dans le cas d'une personne insolvable dont les biens sont visés par le préavis qui doit être donné par le créancier garanti aux termes du paragraphe 244(1), le tribunal ne peut faire la nomination avant l'expiration d'un délai de dix jours après l'envoi de ce préavis, à moins :

1991 CarswellOnt 205
Ontario Court of Appeal

Royal Bank v. Soundair Corp.

1991 CarswellOnt 205, [1991] O.J. No. 1137, 27 A.C.W.S. (3d) 1178,
46 O.A.C. 321, 4 O.R. (3d) 1, 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76

ROYAL BANK OF CANADA (plaintiff/respondent) v. SOUNDAIR CORPORATION (respondent), CANADIAN PENSION CAPITAL LIMITED (appellant) and CANADIAN INSURERS' CAPITAL CORPORATION (appellant)

Goodman, McKinlay and Galligan JJ.A.

Heard: June 11, 12, 13 and 14, 1991
Judgment: July 3, 1991
Docket: Doc. CA 318/91

Counsel: *J. B. Berkow* and *S. H. Goldman* , for appellants Canadian Pension Capital Limited and Canadian Insurers' Capital Corporation.
J. T. Morin, Q.C. , for Air Canada.
L.A.J. Barnes and *L.E. Ritchie* , for plaintiff/respondent Royal Bank of Canada.
S.F. Dunphy and *G.K. Ketcheson* , for Ernst & Young Inc., receiver of respondent Soundair Corporation.
W.G. Horton , for Ontario Express Limited.
N.J. Spies , for Frontier Air Limited.

Subject: Corporate and Commercial; Insolvency
Related Abridgment Classifications
Debtors and creditors
VII Receivers
VII.6 Conduct and liability of receiver
VII.6.a General conduct of receiver
Headnote
Receivers --- Conduct and liability of receiver — General conduct of receiver
Court considering its position when approving sale recommended by receiver.
S Corp., which engaged in the air transport business, had a division known as AT. When S Corp. experienced financial difficulties, one of the secured creditors, who had an interest in the assets of AT, brought a motion for the appointment of a receiver. The receiver was ordered to operate AT and to sell it as a going concern. The receiver had two offers. It accepted the offer made by OEL and rejected an offer by 922 which contained an unacceptable condition. Subsequently, 922 obtained an order allowing it to make a second offer removing the condition. The secured creditors supported acceptance of the 922 offer. The court approved the sale to OEL and dismissed the motion to approve the 922 offer. An appeal was brought from this order.
Held:
The appeal was dismissed.
Per Galligan J.A.: 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. The court should be reluctant to second-guess, with the benefit of hindsight, the considered business decisions made by its receiver.
The conduct of the receiver should be reviewed in the light of the specific mandate given to him by the court. The order appointing the receiver did not say how the receiver was to negotiate the sale. The order obviously intended, because of the unusual nature of the asset being sold, to leave the method of sale substantially to the discretion of the receiver.

To determine whether a receiver has acted providently, the conduct of the receiver should be examined in light of the information the receiver had when it agreed to accept an offer. On the date the receiver accepted the OEL offer, it had only two offers: that of OEL, which was acceptable, and that of 922, which contained an unacceptable condition. The decision made was a sound one in the circumstances. The receiver made a sufficient effort to obtain the best price, and did not act improvidently.
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 assets to them.
Per McKinlay J.A. (concurring in the result): 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. In all cases, the court should carefully scrutinize the procedure followed by the receiver. While the procedure carried out by the receiver in this case was appropriate, given the unfolding of events and the unique nature of the asset involved, it may not be a procedure that is likely to be appropriate in many receivership sales.
Per Goodman J.A. (dissenting): 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 the receiver. The offer accepted by the receiver was improvident and unfair insofar as two creditors were concerned.

Table of Authorities

Cases considered:

Beauty Counsellors of Canada Ltd., Re (1986), 58 C.B.R. (N.S.) 237 (Ont. S.C.) — *referred to*

British Columbia Development Corp. v. Spun Cast Industries Ltd. (1977), 26 C.B.R. (N.S.) 28, 5 B.C.L.R. 94 (S.C.) — *referred to*

Cameron v. Bank of Nova Scotia (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303, 86 A.P.R. 303 (C.A.) — *referred to*

Crown Trust Co. v. Rosenburg (1986), 67 C.B.R. (N.S.) 320n, 60 O.R. (2d) 87, 22 C.P.C. (2d) 131, 39 D.L.R. (4th) 526 (H.C.) — *applied*

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

Selkirk, Re (1986), 58 C.B.R. (N.S.) 245 (Ont. S.C.) — *referred to*

Selkirk, Re (1987), 64 C.B.R. (N.S.) 140 (Ont. S.C.) — *referred to*

Statutes considered:

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

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

Appeal from order approving sale of assets by receiver.

***Galligan J.A.* :**

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

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

3 In the latter part of 1989 and the early part of 1990, Soundair was in financial difficulty. Soundair has two secured creditors who have an interest in the assets of Air Toronto. The Royal Bank of Canada (the "Royal Bank") is owed at least $65 million dollars. The appellants Canadian Pension Capital Limited and Canadian Insurers' Capital Corporation (collectively

called "CCFL") are owed approximately $9,500,000. Those creditors will have a deficiency expected to be in excess of $50 million on the winding up of Soundair.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

13 I will deal with the two issues separately.

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

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

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

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

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

2. It should consider the interests of all parties.

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

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

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

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

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

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

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

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

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

[Emphasis added.]

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

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

[Emphasis added.]

23 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 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.

24 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 10 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.

25 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.

26 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 Co. v. Rosenberg* , supra, Anderson J., at p. 113 [O.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.

27 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. S.C.) , 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.

28 The second is *Re Beauty Counsellors of Canada Ltd.* (1986), 58 C.B.R. (N.S.) 237 (Ont. S.C.) , 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.

29 In *Re Selkirk* (1987), 64 C.B.R. (N.S.) 140 (Ont. S.C.) , 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.]

30 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 approval 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.

31 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.

32 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.

33 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.

34 The 922 offer provided for $6 million cash to be paid on closing with a royalty based upon a percentage of Air Toronto profits over a period of 5 years up to a maximum of $3 million. The OEL offer provided for a payment of $2 million on closing with a royalty paid on gross revenues over a 5-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.

35 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.

36 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.

37 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.

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

2. Consideration of the Interests of all Parties

39 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* , supra (Saunders J.). 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."

40 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), supra, *Re Beauty Counsellors* , supra, *Re Selkirk* (1987), 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.

41 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

42 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.

43 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* , 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 considera tion 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:
>
> > 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. 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.

44 In *Salima Investments Ltd. v. Bank of Montreal* (1985), 59 C.B.R. (N.S.) 242, 41 Alta. L.R. (2d) 58, 65 A.R. 372, 21 D.L.R. (4th) 473 at p. 476 [D.L.R.], the Alberta Court of Appeal said that sale by tender is not necessarily the best way to sell a business as an ongoing concern. It went on to say that when some other method is used which is provident, the court should not undermine the process by refusing to confirm the sale.

45 Finally, I refer to the reasoning of Anderson J. in *Crown Trust Co. v. Rosenberg* , supra, at p. 124 [O.R.]:

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

[Emphasis added.]

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

47 Before this court, counsel for those opposing the confirmation of the sale to OEL suggested many different ways in which the receiver could have conducted the process other than the way which he did. However, the evidence does not convince me that the receiver used an improper method of attempting to sell the airline. The answer to those submissions is found in the comment of Anderson J. in *Crown Trust Co. v. Rosenberg* , supra, at p. 109 [O.R.]:

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

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

4. Was there unfairness in the process?

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

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

51 The offering memorandum had not been completed by February11, 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.

52 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.

53 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.

54 Moreover, I am not prepared to 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.

55 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 7 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, that it would have told the court that it needed more information before it would be able to make a bid.

56 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.

57 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.

58 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.]:

> 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.]:

> 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.

59 In his reasons for judgment, after discussing the circumstances leading to the 922 offer, Rosenberg J. said this:

> They created a situation as of March 8th, 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.

60 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.

61 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.

62 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.

63 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.

64 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 debtor's assets.

65 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 inter-lender 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 inter-lender 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 million 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.

66 On April 5, 1991, the Royal Bank and CCFL agreed to settle the inter-lender dispute. The settlement was that if the 922 offer was accepted by the court, CCFL would receive only $1 million, and the Royal Bank would receive $5 million 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.

67 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 inter-lender dispute that, in my opinion, its support is devoid of any objectivity. I think it has no weight.

68 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.

69 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.

70 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.

71 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-client scale. I would make no order as to the costs of any of the other parties or intervenors.

***McKinlay J.A.* :**

72 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), 67 C.B.R. (N.S.) 320n, 60 O.R. (2d) 87, 22 C.P.C. (2d) 131, 39 D.L.R. (4th) 526 (H.C.) . 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.

73 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 therefore), 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):**

74 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.

75 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 OEL and that of 922, a company incorporated for the purpose of acquiring Air Toronto. Its shares were owned equally by 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. 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.

76 In *British Columbia Developments Corp. v. Spun Cast Industries Ltd.* (1977), 26 C.B.R. (N.S.) 28, 5 B.C.L.R. 94 (S.C.) , Berger J. said at 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 have 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.

77 I agree with that statement. It is particularly apt to this case. The two secured creditors will suffer a shortfall of approximately $50 million. They have a tremendous interest in the sale of assets which form part of their security. I agree with the finding of Rosenberg J. 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:

> 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.

78 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 million to $4 million. 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 down payment on closing.

79 In *Cameron v. Bank of Nova Scotia* (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303, 86 A.P.R. 303 (C.A.) , Hart J.A., speaking for the majority of the court, said at p. 10 [C.B.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 that 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.

80 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.

81 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.

82 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.

83 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. S.C.) , 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.

84 I agree with that statement of the law. In *Re Selkirk* (1986), 58 C.B.R. (N.S.) 245 (Ont. S.C.) , Saunders J. heard an application for court approval of 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:

> 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 commercial efficacy and integrity.

85 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, 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.]:

> 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.

86 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.

87 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.

88 It is important to note at the outset that Rosenberg J. made the following statement in his reasons:

> 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 1st. 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.

89 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 his 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 "hardball," 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.

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

91 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.

92 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.

93 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.

94 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 million. 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.

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

96 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.

97 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.

98 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 million and $12 million.

99 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 million for the good will relating to certain Air Toronto routes, but did not include the purchase of any tangible assets or leasehold interests.

100 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.

101 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.

102 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.

103 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.

104 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.

105 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 that 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.

106 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.

107 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 inter-lender 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.

108 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 3 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.

109 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.

110 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.

111 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 3 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.

112 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 3 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.

113 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:

> They created a situation as of March 8, where the receiver was faced with two offers, one of which was acceptable in 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* ."

114 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 inter-lender condition removed.

115 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 con stitutes proximately 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 million to $4 million.

116 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.

117 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.

118 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 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.

119 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.

120 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.

121 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.

122 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 that it knew that CCFl was interested in purchasing Air Toronto.

123 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.

124 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.

125 For the above reasons I would allow the appeal 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-client basis. I would make no order as to costs of any of the other parties or intervenors.

Appeal dismissed.

2016 MBCA 46
Manitoba Court of Appeal

Royal Bank of Canada v. Keller & Sons Farming Ltd.

2016 CarswellMan 147, 2016 MBCA 46, 265 A.C.W.S. (3d) 664, 330
Man. R. (2d) 12, 397 D.L.R. (4th) 573, 39 C.B.R. (6th) 219, 675 W.A.C. 12

Royal Bank of Canada, (Plaintiff) Respondent and Keller & Sons Farming Ltd. and Keller Holdings Ltd., (Defendants)

Shilo Farms Ltd. and Marcus Keller, Appellants and Ernst & Young Inc., in its capacity as Receiver of the undertaking, property and assets of the Debtors, and not in its personal capacity, (Applicant) Respondent

Freda M. Steel, Diana M. Cameron, Janice L. leMaistre JJ.A.

Heard: May 2, 2016
Judgment: May 2, 2016
Docket: AI 16-30-08585

Counsel: R.W. Schwartz, for Appellant, Shilo Farms
F.J. Trippier, A.K. Anjoubault, for Appellant, M. Keller
J.M.J. Dow, for Respondent, Royal Bank of Canada
A.J. Stacey, R.A. McFadyen, for Respondent, Ernst & Young
D.E. Swayze, for Prospective Purchasers, Spud Plains Farms Ltd.

Subject: Contracts; Corporate and Commercial; Insolvency; Property

Related Abridgment Classifications

Debtors and creditors
VII Receivers
VII.6 Conduct and liability of receiver
VII.6.b Rights

Headnote

Debtors and creditors --- Receivers — Conduct and liability of receiver — Rights

Receiver accepted offer from A group over offer of S Ltd. respecting sale of debtor companies' lands, buildings and related irrigation infrastructure — Motion judge approved sale to A group — S Ltd. appealed — Appeal dismissed — Offer by S Ltd. to pay unsecured creditors over time and out of future profits was unrealistic when best possible offer would still result in shortfall to secured creditors — Secured creditors were only parties with material and direct commercial interest in proceeds of sale and it was reasonable for receiver not to take into account portion of offer by S Ltd. that dealt with unsecured creditors — Receiver had authority to deal with all assets and receivables of debtors — Receiver had authority to sell property, and it was entitled to take steps it considered necessary to carry out sale process — It was within receiver's discretion to consider pending litigation with appellant company, along with sale price of land, and conclude that it was better to take higher amount for land offered by A group and pursue outstanding claims against appellant company than to accept proposed settlement offered by appellant company — Motion judge reasonably concluded that receiver canvassed market for land in open, fair and transparent manner.

Table of Authorities

Cases considered by *Freda M. Steel J.A.*:

Business Development Bank of Canada v. Paletta & Co. Hotels Ltd. (2012), 2012 MBCA 115, 2012 CarswellMan 727, 288 Man. R. (2d) 129, 564 W.A.C. 129, 5 C.B.R. (6th) 334 (Man. C.A.) — referred to

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

Royal Bank v. Soundair Corp. (1991), 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321, 4 O.R. (3d) 1, 1991 CarswellOnt 205 (Ont. C.A.) — referred to
Shape Foods Inc. (Receiver of), Re (2009), 2009 MBQB 171, 2009 CarswellMan 312, 54 C.B.R. (5th) 224, 241 Man. R. (2d) 235 (Man. Q.B.) — referred to
Skyepharma PLC v. Hyal Pharmaceutical Corp. (2000), 2000 CarswellOnt 466, 47 O.R. (3d) 234, 130 O.A.C. 273, 15 C.B.R. (4th) 298 (Ont. C.A.) — referred to
Towers Ltd. v. Quinton's Cleaners Ltd. (2009), 2009 MBCA 81, 2009 CarswellMan 375, [2010] 1 W.W.R. 246, 245 Man. R. (2d) 70, 466 W.A.C. 70 (Man. C.A.) — referred to

APPEAL from *Royal Bank of Canada v. Keller & Sons Farming Ltd.* (2016), 2016 MBQB 77, 2016 CarswellMan 346 (Man. Q.B.), by unsecured creditor of approval of sale of debtor companies' lands, buildings and related irrigation infrastructure.

***Freda M. Steel J.A.*:**

1 This is an appeal from the decision of the motion judge approving the request of Ernst & Young Inc. (the Receiver) for the sale of Keller lands, buildings and related irrigation infrastructure equipment (the Keller Lands) to Spud Plains Farms Ltd., A&A Farms Ltd., TA Farms Ltd. and A&M Potato Growers Ltd. (collectively referred to as the Adriaansen Group).

2 Shilo Farms Ltd. (Shilo), an unsecured creditor and unsuccessful bidder, and Marcus Keller, the sole shareholder of the defendant debtor companies, an unsecured creditor, and also the general manager of Shilo, appeal from that decision.

3 Fundamentally, the appellants argue that the sale process was not fair or equitable. They argue that the integrity of the process of bidding was tainted. It is submitted that the Receiver "muddied the waters" by asking Shilo to make an offer that included a settlement offer for outstanding disputed claims.

4 At a later stage in the modified sale and investor solicitation process, the Receiver asked the Adriaansen Group and Shilo to resubmit improved offers. Specifically, the Receiver asked Shilo to make an offer that included an amount related to certain disputed claims between the Receiver and Shilo. The Adriaansen Group made an offer for the land and, as well, advised the Receiver that, if successful, it would be reselling a parcel of the Keller Lands known as Parcel 4. Depending on the amount obtained on the resale, it was possible for the Receiver to obtain further proceeds from that resale.

5 Shilo made an improved offer that included an amount of $700,000 as a settlement of the disputed claims. Shilo also indicated it would make arrangements to repay amounts owing to the defendants' unsecured creditors over time out of future profits. It is this additional amount, submitted by Shilo for settlement of the claims, that was the subject of much of Shilo's submissions opposing the sale in the Court below and in this Court.

6 While the offers were relatively close, the Receiver accepted the offer from the Adriaansen Group, explaining that the amount offered by the Adriaansen Group was higher than the offer of Shilo when the settlement amount was removed from the Shilo offer. The Adriaansen Group offer for the land alone was $300,000 higher than the Shilo offer. The Receiver decided that, upon acceptance of the Adriaansen Group offer, it could then still realize on the claims against Shilo, the claims estimated at $1,100,00 by the Receiver, even though the realization of those claims might very well include litigation and the necessity to incur additional legal fees. The Receiver also noted a potential to further increase the proceeds depending on the subsequent reselling of Parcel 4 of the Keller Lands.

7 Shilo submits that the Receiver's request to Shilo that it include an amount for settlement of the outstanding disputes created an unfair process. In other words, it was a mistake on the Receiver's part to say to Shilo that its bid would be more favourably received by the Receiver if it included an amount to settle outstanding claims by the Receiver against Shilo. As well, it is argued that the Receiver was acting outside of its authority. The Receiver only had the authority to deal with the land itself, not extraneous claims.

8 Keller argues that the Receiver did not consider the interests of all the parties, particularly those of the unsecured creditors, and the offer to pay the unsecured creditors 20 cents on the dollar over time out of future profits.

9 The appeal of Shilo and Keller must, out of necessity, also consider the question as to whether they have standing to appeal. Standing is a pre-requisite to opposing a sale approval motion. See *Skyepharma PLC v. Hyal Pharmaceutical Corp.* (2000), 130 O.A.C. 273 (Ont. C.A.); and *Shape Foods Inc. (Receiver of), Re*, 2009 MBQB 171, 241 Man. R. (2d) 235 (Man. Q.B.). At the motion, because of the exigencies of time, the Court heard from both parties on the merits of their motion and decided the matter on those merits, despite the Court's final decision that neither party had standing.

10 In this Court, the appellants argue that they have standing to challenge the decision of the Receiver and, hence the decision of the motion judge. Shilo argues that it has standing as a result of its status as an unsuccessful bidder for the property, and also as an unsecured creditor. Keller argues that he has standing as an unsecured creditor, as well as a shareholder of the defendant debtor companies.

Standard of Review

11 The motion judge owed the decision of the Receiver significant deference. While it is the duty of the court to ensure the integrity of the process, it is not appropriate for the court to go into the minutia of that process. The court's role in reviewing the sale process in receiverships is not to second guess the receiver's business decisions, but rather to critically examine the procedural fairness in negotiations and bidding so as to ensure that the integrity of the process is maintained. The court should not intervene in the decision of the receiver except in an exceptional case. See *Royal Bank v. Soundair Corp.* (1991), 46 O.A.C. 321 (Ont. C.A.); and *Crown Trust Co. v. Rosenberg* (1986), 60 O.R. (2d) 87 (Ont. H.C.) at pp 109, 111.

12 The decision of the motion judge was an exercise in judicial discretion and is entitled to deference in this Court. We will intervene only if the motion judge exercising his discretion, erred in law, misapprehended the evidence in a material way or was clearly wrong. See *Business Development Bank of Canada v. Paletta & Co. Hotels Ltd.*, 2012 MBCA 115 (Man. C.A.) at para 8, (2012), 288 Man. R. (2d) 129 (Man. C.A.); and *Towers Ltd. v. Quinton's Cleaners Ltd.*, 2009 MBCA 81 (Man. C.A.) at para 25, (2009), 245 Man. R. (2d) 70 (Man. C.A.).

Decision

13 We have some sympathy for the appellants' argument as to standing. That is, if unsecured creditors are unable to challenge the process, who will speak on their behalf? While a party must have a material interest that has been affected in order to establish standing, the question of what constitutes a material interest will vary depending on the facts of the case. It may be, as was argued, that the unfairness of the process itself prevented the party from obtaining a material interest in the sale process. In any event, this is not the case to pursue that argument because, even if we disagreed with the motion judge and felt that either or both parties should have standing, we do not see a ground for appellate intervention in the final decision.

14 When reviewing a sale by a court-appointed receiver, among other duties, the court should be concerned primarily with protecting the interests of the creditors. However, it is also an important consideration that the sale process should be fair and equitable, and the interests of all parties be taken into account; this includes the interests of the unsecured creditors. There is no question that it is the responsibility of the court to ensure the efficacy and integrity of the process by which offers are obtained, and to ensure that there has been no unfairness in the working out of that process. See *Soundair Corp.*

15 However, the offer to pay unsecured creditors over time out of future profits is not realistic when the best possible offer would nonetheless result in a shortfall to secured creditors. Given the outstanding amounts owing to the secured creditors, and the amounts that would be generated from the sale of assets, there will inevitably be a significant shortfall in this case. As a result, the secured creditors are the only parties with a material and direct commercial interest in the proceeds of the sale. Thus, it was reasonable for the Receiver not to take into account the portion of the offer dealing with unsecured creditors.

16 There is some dispute as to whether Shilo knew that there would be a shortfall to the secured creditors. Whether or not the company knew this, it also stated in its affidavit that it would not have changed the offer. We do not see how that affected the integrity of the process.

17 Second, with respect to the fairness of the sale process, the motion judge held that since the Receiver was dealing with a prospective purchaser, Shilo, with which it had outstanding claims, this was an efficient way to proceed in wrapping up other aspects of the receivership, and possibly obtaining an increased overall bid. Moreover, the amount that Shilo did offer for the Keller Lands was not as high as the offer put forward by the Adriaansen Group, if the amount proposed for settlement was taken out. The motion judge held that the Receiver was entitled to conclude that taking more money for the land, and taking the risk of suing for the entire amount owing in the disputed claims with Shilo, was a better option than taking less for the land and settling the disputed claims.

18 In addition, the Receiver had the authority to deal with all assets and receivables of Keller & Sons Farming. The Receiver was granted authority to sell property in the order granted by Schulman J on October 8, 2015. That order gave the Receiver the right to sell by negotiating such terms and conditions as it saw fit and to consider, evaluate and, if it deemed appropriate, settle claims relating to the defendants.

> THIS COURT ORDERS that the Receiver is hereby empowered and authorized, but not obligated, to act at once in respect of the Property and, without in any way limiting the generality of the foregoing, the Receiver is hereby expressly empowered and authorized to do any of the following where the Receiver considers it necessary or desirable:
>
> . . .
>
> (g) to settle, extend or compromise any indebtedness owing to or by the Defendants;
>
> . . .
>
> (j) to market any or all of the Property, including advertising and soliciting offers in respect of the Property or any part or parts thereof and negotiating such terms and conditions of sale as the Receiver in its discretion may deem appropriate.

19 We believe that Shilo's argument interprets the power of the Receiver too narrowly. The second order (February 8, 2016) allowed the Receiver to take such steps as it considered necessary in carrying out the sale process.

> THIS COURT ORDERS AND DECLARES that the Receiver is authorized and directed to continue to implement the Sales Process, subject to further order of the Court, and to take such steps as it considers necessary or desirable in carrying out the Sales Process, including entering into an auction agreement with Ritchie Bros. Auctioneers (Canada) Ltd. ("Ritchie") with respect to the equipment of Keller & Sons Farming Ltd.

20 Consequently, it was within the Receiver's discretion to consider pending litigation, along with a sale price of the land, and to ultimately conclude that it was better to take a higher amount for the land and pursue the outstanding claims against Shilo, than to accept the proposed settlement. Whether someone else would have decided differently is irrelevant. It is clearly not an improvident bargain.

21 The motion judge specifically addressed each of the relevant criteria and found on the facts that the Receiver had fully canvassed the market for the Keller Lands in an "open, fair and transparent manner to all potential interested purchasers" (at para 28). That decision was reasonable, given the evidence before him. We see no error in such a conclusion, certainly no error that is clearly wrong.

22 The appeal is dismissed with costs.

Appeal dismissed.

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

Elleway Acquisitions Ltd. v. 4358376 Canada Inc.

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

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

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

Morawetz J.

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

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

Subject: Insolvency; Civil Practice and Procedure
Related Abridgment Classifications
Bankruptcy and insolvency
IV Receivers
IV.4 Miscellaneous
Headnote
Bankruptcy and insolvency --- Receivers — Miscellaneous
Sale of Assets — On November 4, 2013, receiver was appointed over assets, property and undertaking of number of related companies — Receiver brought motion for order approving entry by receiver into three asset purchase agreements ("APAs") — APAs provided for sale of assets as going concern and retention of almost all employees — Motion granted — Court was satisfied that economic realities of business vulnerability and financial position of companies militated in favour of approval of issuance of orders — Approval of orders and consummation of sale transactions to purchasers pursuant to APAs was warranted as best way to provide recovery for senior secured lender of companies and with sole economic interest in assets — Sale process was fair and reasonable, and sale transactions was only means of providing maximum realization of purchased assets under current circumstances — Fact that purchasers may have some relationship to companies did not preclude approval of orders provided that receiver verified that process was performed in good faith — Receiver was of view that market for purchased assets was sufficiently canvassed through sales and marketing processes and that purchase prices under APAs were fair and reasonable under current circumstances.
Table of Authorities
Statutes considered:
Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

s. 65.13(5) [en. 2005, c. 47, s. 44] — considered
Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

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

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

***Morawetz J.*:**

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

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

3 The Receiver seeks the following:

(i) an order:

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

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

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

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

(ii) an order:

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

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

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

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

(iii) an order:

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

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

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

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

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

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

6 The Receiver recommends issuance of the Orders for the factual and legal bases set forth herein and in its motion record. The purchase and sale transactions contemplated under the APAs (collectively, the "Sale Transactions") are conditional upon the Orders being issued by this court.

General Background

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

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

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

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

Travelzest's Further Sales and Marketing Processes

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

12 In early 2012, an informal restructuring plan was developed, which included the sale of international companies.

13 The first management offer was received in April 2012. In addition, a sales process continued from May to October 2012, which involved 50 potential bidders within the industry. Counsel advised that 14 parties pursued the opportunity and four parties were provided with access to the data room. Four offers were ultimately made but none were deemed to be feasible, insofar as two were too low, one withdrew and the management offer was withdrawn after equity backers were lost.

14 In September 2012, a second management offer was received, which was subsequently amended in November 2012. The second management offer did not proceed.

15 In January 2013, discussions ended and the independent committee was disbanded.

16 In March and April 2013, three Canadian financial institutions were approached about a refinancing. However, no acceptable term sheet was obtained.

17 In May 2013, Travelzest entered into new discussions with a prior bidder from a previous sales process. Terms could not be reached.

18 In May 2013, a third management offer was received which was followed by a fourth management offer in July, both of which were rejected.

19 In July 2013, a press release confirmed that Barclays was not renewing its credit facilities with the result that the obligations became payable on July 12, 2013. However, Barclays agreed to support restructuring efforts until August 30, 2013.

20 In August 2013, a fifth management offer was made for the assets of itravel Canada, which included limited funding for liabilities. This offer was apparently below the consideration offered in the previous management offers. The value of the offer was also significantly lower than the Barclays' indebtedness and lower than the aggregate amount of the current offer from the Purchasers.

Barclays' Assignment of the Indebtedness to Elleway

21 On August 21, 2013, a consortium led by LDC Logistics Development Corporation ("LDC"), which included Elleway (collectively, the "Consortium") submitted an offer for Barclays debt and security, as opposed to the assets of Itravel Canada. On August 29, 2013, Elleway and Barclays finalized the assignment deal, which was concluded on September 1, 2013.

22 The consideration paid by Elleway was less than the amount owing to Barclays. Barclays determined, with the advice of KPMG London, that the sale of its debt and security, albeit at a significant discount, was the best available option at the time.

23 itravel Canada is insolvent. Elleway has agreed pursuant to the Working Capital Facility agreement to provide the necessary funding for itravel Canada up to and including the date for a court hearing to consider the within motion. However, if a sale is not approved, there is no funding commitment from Elleway.

Proposed Sale of Assets

24 The Receiver and the Purchasers have negotiated the APAs which provide for the going-concern purchase of substantially all of the itravel Canada's assets, subject to the terms and conditions therein. The purchase prices under the APAs for the Purchased Assets will be comprised of a reduction of a portion of the indebtedness owed by Elleway under the Credit Agreement and entire amount owed under the Working Capital Facility Agreement and related guarantees, and the assumption by the Purchasers of the Assumed Liabilities (as defined in each of the Purchase Agreements and which includes all priority claims) and the assumption of any indebtedness issued under any receiver's certificates issued by the Receiver pursuant to a funding agreement between the Receiver and Elleway Properties Limited. The aggregate of the purchase prices under the APA is less the amount of the obligations owed by itravel Canada to Elleway under the Credit Agreement and Working Capital Facility Agreement and related guarantees.

25 Pursuant to the APAs, the Purchasers are to make offers to 95% of the employees of itravel Canada on substantially similar terms of such employees current employment. The Purchasers will also be assuming all obligations owed to the customers of itravel Canada.

26 In reviewing the valuation reports of FTI Consulting LLP and Ernst & Young LLP and considering the current financial position of itravel Canada, the Receiver came to the following conclusions:

> (a) FTI Consulting LLP and Ernst & Young LLP concluded that under the circumstances, the itravel Canada companies' values are significantly less than the secured indebtedness owed under the Credit Agreement;
>
> (b) Barclays, in consultation with its advisor, KPMG London, sold its debt and security for an amount lower than its par value;

(c) the book value of the itravel Canada's tangible assets are significantly less than the secured indebtedness; and

(d) Elleway has the principal financial interest in the assets of itravel Canada, subject to priority claims.

27 The Receiver is of the view that the Sale Transactions with the Purchasers are the best available option as it stabilizes itravel Canada's operations, provides for additional working capital, facilitates the employment of substantially all of the employees, continues the occupation of up to three leased premises, provides for new business to itravel Canada's existing suppliers and service providers, assumes the liability associated with pre-existing gift certificates and vouchers, allows for the uninterrupted service of customer's travel arrangements and preserves the goodwill and overall enterprise value of the Companies. In addition, the Receiver believes that the purchase prices under the APAs are fair and reasonable in the circumstances, and that any further marketing efforts to sell itravel Canada's assets may be unsuccessful and could further reduce their value and have a negative effect on operations.

28 The Receiver's request for approval of the Orders raises the following issues for this court.

A. What is the legal test for approval of the Orders?

B. Does the legal test for approval change in a so-called "quick flip" scenario?

C. Does partial payment of the purchase price through a reduction of the indebtedness owed to Elleway preclude approval of the Orders?

D. Does the Purchasers' relationship to itravel Canada preclude approval of the Orders?

E. Is a sealing of the APAs until the closing of the Sale Transactions contemplated thereunder and a permanent sealing of the FTI Consulting LLP and Ernst & Young LLP valuation and the Supplemental Report Warranted?

A. What is the Legal Test for Approval of the Orders?

29 Receivers have the powers set out in the order appointing them. Receivers are consistently granted the power to sell property of a debtor, which is, indeed, the case under the Appointment Order.

30 Under Section 100 of the *Courts of Justice Act (Ontario)*, this Court has the power to vest in any person an interest in real or personal property that the Court has authority to order be conveyed.

31 It is settled law that where a Court is asked to approve a sales process and transaction in a receivership context, the Court is to consider the following principles (collectively, the "*Soundair* Principles"):

a. whether the party made a sufficient effort to obtain the best price and to not act improvidently;

b. the interests of all parties;

c. the efficacy and integrity of the process by which the party obtained offers; and

d. whether the working out of the process was unfair.

Royal Bank of Canada v. Soundair Corp. (1991), 4 O.R. (3d) 1 (Ont. C.A.); *Skyepharma PLC v. Hyal Pharmaceutical Corp.* (1999), 12 C.B.R. (4th) 87 (Ont. S.C.J.) appeal quashed, (2000), 47 O.R. (3d) 234 (Ont. C.A.)).

32 In this case, I am satisfied that evidence has been presented in the Report, the Jenkins Affidavit and the Howell Affidavit, to demonstrate that each of the *Soundair* Principles has been satisfied, and that the economic realities of the business vulnerability and financial position of itravel Canada (including that the result would be no different in a further extension of the already extensive sales process) militate in favour of approval of the issuance of the Orders.

B. Does the Legal Test for Approval Change in a So-called "Quick Flip" Scenario?

33 Where court approval is being sought for a so-called "quick flip" or immediate sale (which involves, as is the case here, an already negotiated purchase agreement sought to be approved upon or immediately after the appointment of a receiver without any further marketing process), the court is still to consider the *Soundair* Principles but with specific consideration to the economic realities of the business and the specific transactions in question. In particular, courts have approved immediate sales where:

> (a) an immediate sale is the only realistic way to provide maximum recovery for a creditor who stands in a clear priority of economic interest to all others; and
>
> (b) delay of the transaction will erode the realization of the security of the creditor in sole economic interest.

Fund 321 Ltd. Partnership v. Samsys Technologies Inc. (2006), 21 C.B.R. (5th) 1 (Ont. S.C.J.); *Bank of Montreal v. Trent Rubber Corp.* (2005), 13 C.B.R. (5th) 31 (Ont. S.C.J.).

34 In the case of *Re Tool-Plas*, I stated, in approving a "quick flip" sale that:

> A "quick flip" transaction is not the usual transaction. In certain circumstances, however, it may be the best, or the only, alternative. In considering whether to approve a "quick flip" transaction, the court should consider the impact on various parties and assess whether their respective positions and the proposed treatment that they will receive in the "quick flip" transaction would realistically be any different if an extended sales process were followed.

Tool-Plas Systems Inc., Re (2008), 48 C.B.R. (5th) 91 (Ont. S.C.J.).

35 Counsel submits that the parties would realistically be in no better position were an extended sales process undertaken, since the APAs are the culmination of an exhaustive marketing process that has already occurred, and there is no realistic indication that another such process (even if possible, which it is not, as itravel Canada lacks the resources to do so) would produce a more favourable outcome.

36 Counsel further submits that a "quick flip" transaction will be approved pursuant to the *Soundair* Principles, where, as in this case, there is evidence that the debtor has insufficient cash to engage in a further, extended marketing process, and there is no basis to expect that such a process will result in a better realization on the assets. Delaying the process puts in jeopardy the continued operation of itravel Canada.

37 I am satisfied that the approval of the Orders and the consummation of the Sale Transactions to the Purchasers pursuant to the APAs is warranted as the best way to provide recovery for Elleway, the senior secured lender of itravel Canada and with the sole economic interest in the assets. The sale process was fair and reasonable, and the Sale Transactions is the only means of providing the maximum realization of the Purchased Assets under the current circumstances.

C. Does Partial Payment of the Purchase Price Through a Reduction of the Indebtedness Owed to Elleway Preclude Approval of the Orders?

38 Partial payment of the purchase price by Elleway reducing a portion of the debt owed to it under the Credit Agreement and the entire amount owned under the Working Capital Facility Agreement does not preclude approval of the Orders. This mechanism is analogous to a credit bid by a secured lender, but with the Purchasers, instead of the secured lender, taking title to the purchased assets. As noted, the Receiver understands that following closing of the transactions contemplated under the APAs, that Elleway (or an affiliate thereof) will hold an indirect equity interest in the Purchasers. It is well-established in Canada insolvency law that a secured creditor is permitted to credit bid its debt in lieu of providing cash consideration.

Re White Birch Paper Holding Co. (2010), 72 C.B.R. (5th) 74 (Qc. C.A.); *Re Planet Organic Holding Corp*. (June 4, 2010), Toronto, Court File No. 10-86699-00CL, (S.C.J. [Commercial List]).

39 This court has previously approved sales involving credit bids in the receivership context. See *CCM Master Qualified Fund, Ltd., v. Blutip Power Technologies Ltd.* (April 26, 2012), Toronto, Court File No. CV-12-9622-00CL, (S.C.J. [Commercial List]).

40 It seems to me that, in these circumstances, no party is prejudiced by Elleway reducing a portion of the debt owed to it under the Credit Agreement and the entire amount owed under the Working Capital Facility Agreement as part of the Purchasers' payment of the purchase prices, as the Purchasers are assuming all claims secured by liens or encumbrances that rank in priority to Elleway's security. The reduction of the indebtedness owed to Elleway will be less than the total amount of indebtedness owed to Elleway under the Credit Agreement. As such, if cash was paid in lieu of a credit bid, such cash would all accrue to the benefit of Elleway.

41 Therefore, it seems to me the fact that a portion of the purchase price payable under the APAs is to be paid through a reduction in the indebtedness owed to Elleway does not preclude approval of the Orders.

D. Does the Purchasers' Relationship to itravel Canada preclude approval of the Orders?

42 Even if the Purchasers and itravel Canada were to be considered, out of an abundance of caution, related parties, given that LDC is an existing shareholder of Travelzest and part of the Consortium or otherwise, this does not itself preclude approval of the Orders.

43 Where a receiver seeks approval of a sale to a party related to the debtor, the receiver shall review and report on the activities of the debtor and the transparency of the process to provide sufficient detail to satisfy the court that the best result is being achieved. It is not sufficient for a receiver to accept information provided by the debtor where a related party is a purchaser; it must take steps to verify the information. See *Toronto Dominion Bank v. Canadian Starter Drives Inc.*, 2011 ONSC 8004 (Ont. S.C.J. [Commercial List]).

44 In addition, the 2009 amendments to the BIA relating to sales to related persons in a proposal proceedings (similar amendments were also made to the *Companies' Creditors Arrangement Act* (Canada)) are instructive. Section 65.13(5) of the BIA provides:

> If the proposed sale or disposition is to a person who is related to the insolvent person, the court may, after considering the factors referred to in subsection (4), grant the authorization only if it is satisfied that:
>
> (a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the insolvent person; and
>
> (b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

45 The above referenced jurisprudence and provisions of the BIA (Canada) demonstrate that a court will not preclude a sale to a party related to the debtor, but will subject the proposed sale to greater scrutiny to ensure a transparency and integrity in the marketing and sales process and require that the receiver verify information provided to it to ensure the process was performed in good faith. In this case, the Receiver is of the view that the market for the Purchased Assets was sufficiently canvassed through the sales and marketing processes and that the purchase prices under the APAs are fair and reasonable under the current circumstances. I agree with and accept these submissions.

46 The Receiver requests that the APAs be sealed until the closing of the Sale Transactions contemplated thereunder. It is also requesting an order permanently sealing the valuation reports prepared by Ernst & Young LLP and FIT Consulting LLP and, attached as Confidential Appendices 4 and 5 of the Report, respectively.

47 The Supreme Court of Canada in *Sierra Club of Canada v. Canada (Minister of Finance)*, held that a sealing order should only be granted when:

> (a) an order is needed to prevent serious risk to an important interest because reasonable alternative measures will not prevent the risk; and
>
> (b) the salutary effects of the order outweigh its deleterious effects, including the effects on the right to free expression, which includes public interest in open and accessible court proceedings.

Sierra Club of Canada v. Canada (Minister of Finance), 2002 SCC 41, [2002] 2 S.C.R. 522, at para. 53; *Re Nortel Networks Corporation* (2009), 56 C.B.R. (5 TH) 224, (Ont. S.C.J. [Commercial List]), at paras. 38-39.

48 In my view, the APAs subject to the sealing request contain highly sensitive commercial information of itravel Canada and their related businesses and operations, including, without limitation, the purchase price, lists of assets, and contracts. Courts have recognized that disclosure of this type of information in the context of a sale process could be harmful to stakeholders by undermining the integrity of the sale process. I am satisfied that the disclosure of the APAs prior to the closing of the Sale Transactions could pose a serious risk to the sale process in the event that the Sale Transactions do not close as it could jeopardize dealings with any future prospective purchasers or liquidators of itravel Canada's assets. There is no other reasonable alternative to preventing this information from becoming publicly available and the sealing request, which has been tailored to the closing of the Sale Transactions and the material terms of the APAs until the closing of the Sale Transactions, greatly outweighs the deleterious effects. For these same reasons, plus the additional reason that the valuations were provided to Travelzest on a confidential basis and only made available to Travelzest and the Receiver on the express condition that they remain confidential, the Receiver submits that the FTI Consulting LLP and Ernst & Young LLP valuations be subject to a permanent sealing order. Further, the Receiver submits that the information contained in the Supplemental Report also meets the foregoing test for the factual basis set forth in detail in the Supplemental Report (which has been filed on a confidential basis). I accept the Receiver's submissions regarding the permanent sealing order for the valuation materials. For these reasons, (i) the APA is to be sealed pending closing, and (ii) only the valuation material is to be permanently sealed.

Disposition

49 For the reasons set forth herein, the motion is granted. Orders have been signed to give effect to the foregoing.

Motion granted.

End of Document

2020 ABQB 365
Alberta Court of Queen's Bench

OEL Projects Ltd (Re)

2020 CarswellAlta 1155, 2020 ABQB 365, [2020] A.W.L.D. 2299,
[2020] A.W.L.D. 2300, 319 A.C.W.S. (3d) 537, 79 C.B.R. (6th) 219

In the Matter of the Bankruptcy and Insolvency Act, R.S.C. 1985, C. B-3, as amended

And In the Matter of the Notice of Intention to Make a Proposal of OEL Projects Ltd.

April D. Grosse J.

Heard: May 27, 2020
Judgment: June 19, 2020
Docket: Calgary 25-2646438

Counsel: R.S. Van de Mosselaer, K. Armstrong, for OEL Projects Ltd.
J.L. Oliver, for Trustee
J.H. Wilson, for Three Former Employees
R. Jaipargas, for CIBC

Subject: Civil Practice and Procedure; Estates and Trusts; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
VI Proposal
VI.6 Miscellaneous
Bankruptcy and insolvency
XIV Administration of estate
XIV.4 Sale of assets
Headnote
Bankruptcy and insolvency --- Administration of estate — Sale of assets — Jurisdiction of court to approve sale
Debtor filed notice of intention to make proposal (NOI) under Bankruptcy and Insolvency Act — Next day, prior to expiry of 30-day period for making proposal, debtor entered into asset and share purchase agreement with purchaser — Proposed purchaser was newly created subsidiary of debtor's parent company — Proposed sale was supported by proposal trustee and by debtor's two secured creditors, one of which was debtor's parent company — Two largest unsecured creditors were notified of proposed sale and were represented by counsel but other unsecured creditors did not get notice of proposed sale and many might not have even received NOI — Debtor brought application for approval of proposed asset sale as well as vesting and distribution orders — Application granted — Gap between valuation of debtor or its assets and secured debt was so large that there was no scenario in which unsecured creditors would be paid — Many unsecured trade creditors would be better off since their accounts would be assumed by purchaser if proposed sale went ahead — Proposed sale had potential to save 34 jobs at least in short term — Debtor's landlords had notice of application and did not oppose it — Secured creditors supported proposed sale and they were not being paid in full — Proposed purchase price was more than would be achieved in liquidation — Good faith efforts were made to consider whether sales process to try to solicit non-related party purchasers was feasible.
Bankruptcy and insolvency --- Proposal — General principles
Debtor filed notice of intention to make proposal (NOI) under Bankruptcy and Insolvency Act — Next day, prior to expiry of 30-day period for making proposal, debtor entered into asset and share purchase agreement with purchaser — Proposed purchaser was newly created subsidiary of debtor's parent company — Proposed sale was supported by proposal trustee and by debtor's two secured creditors, one of which was debtor's parent company — Two largest unsecured creditors were notified

of proposed sale and were represented by counsel but other unsecured creditors did not get notice of proposed sale and many might not have even received NOI — Debtor brought application for approval of proposed asset sale as well as vesting and distribution orders — Application granted — Gap between valuation of debtor or its assets and secured debt was so large that there was no scenario in which unsecured creditors would be paid — Many unsecured trade creditors would be better off since their accounts would be assumed by purchaser if proposed sale went ahead — Proposed sale had potential to save 34 jobs at least in short term — Debtor's landlords had notice of application and did not oppose it — Secured creditors supported proposed sale and they were not being paid in full — Proposed purchase price was more than would be achieved in liquidation — Good faith efforts were made to consider whether sales process to try to solicit non-related party purchasers was feasible.

Table of Authorities

Cases considered by *April D. Grosse J.*:

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

Komtech Inc., Re (2011), 2011 ONSC 3230, 2011 CarswellOnt 6577, 106 O.R. (3d) 654, 81 C.B.R. (5th) 256 (Ont. S.C.J.) — considered

Target Canada Co., Re (2015), 2015 ONSC 2066, 2015 CarswellOnt 5211, 30 C.B.R. (6th) 335 (Ont. S.C.J. [Commercial List]) — considered

Tool-Plas Systems Inc., Re (2008), 2008 CarswellOnt 6258, 48 C.B.R. (5th) 91 (Ont. S.C.J. [Commercial List]) — referred to

Statutes considered:

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

Generally — referred to

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

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

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

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

s. 65.13(4)(c) [en. 2007, c. 36, s. 27] — considered

s. 65.13(4)(d) [en. 2007, c. 36, s. 27] — considered

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

s. 65.13(5)(a) [en. 2007, c. 36, s. 27] — considered

s. 65.13(5)(b) [en. 2007, c. 36, s. 27] — considered

s. 81.4 [en. 2005, c. 47, s. 67] — considered

APPLICATION by debtor for approval of proposed asset sale, and vesting and distribution orders.

***April D. Grosse J.* (orally):**

Context

1 OEL Projects Ltd. filed a Notice of Intention to Make a Proposal under section 50.4 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 on May 20, 2020. BDO Canada Limited is acting as the Proposal Trustee.

2 The 30-day period for making a proposal has not yet expired; however, on May 21, 2020, OEL entered an Asset and Share Purchase Agreement with McIntosh Perry Energy Limited, which I will refer to as the Purchaser.

3 OEL now seeks approval and a vesting order in respect of that transaction, pursuant to section 65.13 of the *Bankruptcy and Insolvency Act*. OEL also seeks a distribution order with respect to the sale proceeds.

4 The Proposal Trustee supports OEL's application and recommends the transaction. OEL has two secured creditors: CIBC and its parent, McIntosh Perry Engineering Consulting Engineering Limited, which I will refer to as McIntosh Perry. Both approve of the transaction.

5 OEL's application came on for hearing before me yesterday. We adjourned to allow for some further information to be provided to the Court, and for me to have an opportunity to reflect on the submissions made by counsel. We reconvened this morning, and counsel have provided further submissions, and I have told them that I am now prepared to give an oral decision.

OEL and its Stakeholders

6 I am going to start by giving some more information about OEL and its stakeholders. OEL is an engineering services firm operating in Alberta and surrounding provinces in the energy sector. It is a private company, wholly owned by McIntosh Perry since 2017.

7 OEL has been experiencing declining revenues and operations given the downturn in the Canadian energy sector. The recent collapse in oil and gas prices, COVID-19 restrictions, and associated impacts on usual OEL clients in the energy sector have only made the situation more difficult for OEL. The record shows that OEL is projected to have negative cash flow this fiscal year without this transaction. Four years ago, OEL had approximately 115 employees. By March 15, 2020, OEL was down to about 54 employees. In preparation for filing its NOI, OEL gave notice of termination to another approximate 20 employees earlier this month. The remaining 34 employees have been offered employment by the Purchaser, if the transaction goes ahead.

8 OEL is a party to an Amended and Re-stated Credit Agreement with CIBC, along with McIntosh Perry and related companies. To my understanding, the credit facilities under the Credit Agreement are not maxed out, and are also secured by the other entities in the McIntosh Perry family. CIBC has not taken steps to enforce its security. OEL also owes net approximately $7.9 million to its parent, McIntosh Perry, pursuant to an Amended and Re-stated Promissory Note dated April 1, 2017. The debt is secured pursuant to a General Security Agreement, also dated April 1, 2017. On May 8, 2020, McIntosh Perry issued a formal demand to OEL, calling the amount owing under the Promissory Note. The Proposal Trustee has obtained a legal opinion confirming the validity of the McIntosh Perry security. I am advised that other than CIBC and McIntosh Perry, OEL has no other secured creditors.

9 In its materials, OEL identified two liabilities, or potential liabilities, in particular that pose a great difficulty to OEL moving forward in its current structure.

10 First, OEL rents two office spaces for which it pays a total of almost $1.6 million per month. The leases were entered into in 2013 and 2014, when the energy industry -- and Calgary in general -- were enjoying more prosperity. OEL's lease rates are high compared to the current market, and with its reduced staff, OEL does not need near so much space. Counsel for OEL confirmed that OEL has been in discussions with both landlords, and both were served with the notice for this application. The notice time was short, service having been affected by email on May 21, for a May 26 hearing. However, they were served to email addresses of specific representatives, not general email boxes, and the landlords did not seek to participate or contact OEL or its counsel to oppose the application. Apparently, negotiations have already commenced with one of the landlords for a new lease for continued operations if the transaction proceeds. I am satisfied that the landlords had notice and do not oppose the transaction before the Court. I understand that rent was paid up to May 1.

11 The second particular difficulty identified by OEL is that three senior employees have filed claims against OEL, based on their recent termination or lay offs. I understand that these employees have been paid their wages, but that they claim contractual severance and perhaps other relief. Their claims total approximately $491,000 at present, and are, both individually and collectively, by far the largest unsecured claims on the list of creditors attached by the Proposal Trustee to the NOI. These parties are represented by Mr. Wilson, who was notified of the application and participated in the hearing. These three gentlemen

are obviously not happy with the situation, but they neither consented nor opposed OEL's application, recognizing the reality in the numbers.

12 With respect to employees more generally, I am advised that all employees have been paid their wages up to date, and employees who have been terminated were also paid up on vacation pay. The Purchaser has agreed to pay any outstanding vacation pay for employees to whom the Purchaser has made offers of employment. The Proposal Trustee is satisfied that there are no claims that would otherwise be afforded a security interest in current assets pursuant to section 81.4 of the *Act*.

13 Because the Notice of Intention was only filed on May 20, 2020, the other unsecured creditors do not yet have effective notice of the NOI, let alone the application. The NOI was mailed to them on May 25, so they could not have received it prior to the application. In any event, the NOI itself does not mention the application. So, this is not a case where creditors have had an opportunity to file proofs of claim, and accordingly, the unsecured debt of OEL is not fully fleshed out. However, according to the list of creditors used by the Proposal Trustee, once the claims of McIntosh Perry and another related entity are removed, and then the claims of Mr. Wilson's clients are removed -- which I have already discussed -- there is approximately $91,500 in unsecured debt. Out of those amounts, all individual amounts are under $5,000, except for $27,000, and some to Beck Engineering Limited, and approximately $12,500 to M5 Engineering Inc.

14 Based on the further information provided after our adjournment yesterday, I understand that all but approximately $3,000 of those amounts are considered trade debt that will be assumed by the Purchaser, if the transaction goes ahead. That includes the larger amounts owing to the two engineering firms I have just mentioned.

15 The parties have provided me with various financial statements and the cash-flow statement for OEL. On the record, OEL is insolvent.

Section 65.13 of the Bankruptcy and Insolvency Act

16 Section 65.13 of the *BIA* precludes a person who is the subject of an NOI from selling or disposing of assets outside the ordinary course of business, without authorization of the Court. Section 65.13(4) sets out the factors the Court must consider. It is a non-exclusive list. I will not read all of the factors into the record.

17 Important in this case is section 65.13(5), which applies where a proposed sale or disposition is to a person who is related to the insolvent person. That is the case here. The Purchaser is a newly created subsidiary of McIntosh Perry.

18 Pursuant to section 65.13(5), after considering the factors that apply to all transactions under subsection (4), the Court may only grant authorization for the sale if it is satisfied that:

> (a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the insolvent person; and.
>
> (b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

19 In applying section 65.13 to the facts of this case, as I outlined to counsel during the hearing yesterday, the concern I wanted to make sure was addressed in this case was the potential combined effect of three factors.

20 First, not all of the unsecured creditors were given notice of the application. In fact, they likely do not even have notice of the NOI yet. OEL and the Proposal Trustee argue that in this particular case, the unsecured creditors really have no material interest because with or without this transaction, and regardless of whether the company is sold as a going concern to the Purchaser or any other entity, or liquidated, all the figures show that the unsecured creditors stand to be paid zero. The delta between the secured debt and available funds is so high that there is no realistic scenario where the remaining unsecured creditors get paid. That is the argument.

21 The second factor that goes into this combination is that the proposed sale is to a related party. Again, this on its own is not a disqualifying factor, and is specifically contemplated by section 61.13(5). However, it brings additional scrutiny to bear.

22 The third factor is that there was no sale process, per se. The Board of OEL hired FTI in March to do an analysis of the return that might be expected in both a going concern sale scenario and a liquidation of assets scenario. The going concern sale was expected to yield a higher return, and the Purchaser is paying at the high end of the range estimated by FTI. However, there was no bid or other sale process. There is no evidence of even approaches to potential buyers.

23 OEL's evidence is that its Board considered a sale process, and determined that it was not feasible. The company's circumstances, combined with a highly mobile clientele and workforce -- both of whom could simply go elsewhere in the face of a sales process -- meant that the Board did not consider a third-party sale process to be realistic. The Board considered that the likely departure of employees and clients would probably mean that the sale process would erode the value that OEL still had. The company also lacks the liquidity to fund a sale process, and would lose an estimated $600,000 during the process. In other words, from the Board's perspective, as I understand it, it was not just a case of having nothing to lose by giving a third-party sale process a try, even if the prospects of finding a buyer were slim. The Board considered that the sale process itself would erode the value that was left in OEL, and there would be nothing left to sell at the end.

24 In its report, the Proposal Trustee does not specifically endorse nor disagree with the Board's reasoning, per se. However, the Proposal Trustee is of the view that it is unlikely that incurring the costs of a public marketing process would yield sufficient funds to otherwise render funds available for unsecured creditors, and the Proposal Trustee also notes that OEL no longer has the ability to fund its operations, or the time available to administer a protracted public sales process, in light of the calling of the Promissory Note by McIntosh Perry.

25 I appreciate that section 65.13(3) only references notice to secured creditors. There is no specific requirement, per se, that all unsecured creditors be served. However, the *Bankruptcy and Insolvency Act* is, to a great extent, focused on addressing creditor claims and rights, when a party has become insolvent. Here, there is no realistic chance of there being a proposal if the transaction proceeds. Creditors would still have their rights in bankruptcy, but any value in OEL will be gone. It is at least fair to consider whether creditors should have an opportunity to know about the transaction, scrutinize it, and take any position that might be available to them. The extent to which creditors were consulted is an express factor for consideration under section 65.13(4)(d). In reviewing some of the reported decisions under section 65.13, it seems that in most cases, at least representatives of the unsecured creditors were notified or will be notified somewhere before a final vesting order is granted.

26 The role of the creditor takes on more potential importance in a circumstance where there is a proposed sale to a related party, with no actual third-party sale process. Their involvement would provide one more potential source of scrutiny in terms of whether the assessment by the company and the Proposal Trustee of the merits of a third-party sale process, and the merits of the proposed transaction are fair and reasonable. It is fine to say that under any scenario, the unsecured creditors will not get paid. However, perhaps they should be able to at least test that proposition.

27 On the particular facts of this case, my concern as I just outlined has been answered, and am satisfied that I can and should approve the transaction and grant the relief sought by OEL. My reasons, including my analysis of the factors and requirements of section 65.13(4) and (5) follow in bullet form:

- While not all unsecured creditors had notice of the application, the largest unsecured creditors were notified and were represented by counsel. These are not just any unsecured creditors. They are unsecured creditors whose claims are not trade debt being assumed by the Purchaser under the proposed transaction, and they are senior employees, presumably familiar with the engineering business. If anyone were in a position to critique the analysis of OEL, FTI, or the Proposal Trustee, it would be them. While they do not consent, they have raised no particular opposition. I think it would be safe to say that after analyzing the materials, they are resigned to the situation in terms of this transaction. I appreciate that they may well be pursuing whatever rights are available to them going forward. The unsecured creditors, and those not being taken on as assumed debt by the Purchaser, may never recover or may never recover their full amounts. But if that is the

case, I am satisfied on the record that it will not be as a result of this transaction, but rather, would be a result of the more general circumstances facing the company.

• OEL's landlords, who will be materially impacted by the proposed transaction, have been consulted, and had notice of the application. They did not come to Court to oppose.

• The number and value of non-served unsecured claims is relatively small. All but one such unsecured claim for just under $3,000 is being taken on as assumed trade debt by the Purchaser. So for the most part, with that one exception, the unserved unsecured creditors are not prejudiced by the transaction.

• In any event, the delta between the valuation of OEL or its assets, and the secured debt is so large that unless there have been serious errors by OEL, FTI, and the Proposal Trustee, there is no scenario where the unsecured creditors would be paid, unless their debt was assumed by a purchaser. In other words, the proposed transaction does not prejudice them. In fact, arguably, most of them are better off, given the assumption of their accounts by the Purchaser.

• The process leading to the transaction was not as robust as we would often expect to see, particularly for a related-party transaction. There was no public or even private third-party marketing process. However, I find that this was reasonable in the circumstances. The Board did have the independent advice of FTI, both on going concern and liquidation value. The Board's reasoning as to why a sales process is not feasible in this particular set of circumstances makes sense, particularly given the financial circumstances of the company, the lack of liquidity to fund the sale process, the portable nature of the employees and clients, and the circumstances in which a process would have to take place, including the very depressed price of oil, which has a direct impact on work available to engineering consultants who only work in the energy sector, like OEL, and COVID-19 restrictions.

• The Proposal Trustee's opinion is not determinative; however, the Proposal Trustee is aware of his duties to all stakeholders and sees no scenario in which a third-party sale, or a third-party sales process, leads to a better result for OEL or any of its creditors, whether secured or unsecured. The Proposal Trustee approves the process leading up to the transaction and has filed the report required by section 65.13(4)(c) of the *Act*.

• The secured creditors are supportive, and they are not being paid in full.

• As already outlined, the unsecured creditors are not being prejudiced in fact. On the other hand, the transaction is designed to at least potentially preserve 34 jobs in at least the short term. Jobs are not easy to come by for engineers working in the oil and gas sector right now, so that is a relevant consideration.

• Based on both the FTI analysis and the Proposal Trustee's analysis, the Purchaser is paying consideration at the very highest end of the possible range of value that could be recovered for either the company as a going concern, or on a liquidation basis. And in fact, the purchase price is significantly more than would be achieved in a liquidation. Even though there was no bid process, the analysis of FTI and the Proposal Trustee do provide us with some independent benchmarks of value. I am satisfied that the consideration is reasonable and fair.

• The transaction is going to proceed quickly, so as to avoid further erosion of value. It does not contemplate any interim or debt financing, which would be required for any longer sale process. Such financing may or may not be available, and if it were, it would further add to the costs to OEL.

28 The wording of section 65.13(5) has given me some pause. On its face, subparagraph (a) contemplates that there must be some actual effort made to sell or dispose of the assets to unrelated parties. Subparagraph (b) follows up on this by referring to the consideration in the proposed transaction being superior to the consideration that would be received under any other offer made in accordance with the process. Again, the contemplation seems to be that there would be some process that could at least generate other offers.

29 The question is whether the Court can approve a sale under section 65.13(5), where there has been no actual sale process. While I am of the view that the Court should be cautious in so doing, I am persuaded that the Court may do so where the particular circumstances warrant. While section 65.13(5) refers to good faith efforts being made to sell, it does not actually mandate a particular sales process, or for that matter, any sales process at all. For instance, it does not say that the Court must be satisfied that there was a good faith sales process. Rather, the wording of the provision focuses on the efforts that were made. In most cases, I expect that the efforts would have to involve some actual approaches to other purchasers. However, I am not convinced that these are strictly required in every case in a proper interpretation of the provision.

30 Time has not permitted a thorough investigation into the legislative history of section 65.13(5); however, I note that in *Komtech Inc., Re*, 2011 ONSC 3230 (Ont. S.C.J.), Justice Kane reviewed the history of section 65.13. At paragraph 31, Justice Kane cited from some Senate committee meetings that were part of the process leading up to the introduction of the bill that included section 65.13. One of the comments in those meetings was that the bill in question is designed to promote restructuring , which had been found to provide greater protection than liquidations in bankruptcy. This does not mean that anything goes. In fact, the comments at the committee also confirmed that the bill sought to increase transparency, provide better opportunities for participation, and approve checks and balances. But I must keep in mind that the provision is designed to be facilitative of restructuring. In *Komtech*, Justice Kane found that a transaction could be approved under section 65.13, even when the insolvent party would not be in a position to actually make a proposal.

31 Counsel provided me with the decision of Justice Morawetz in *Target Canada Co., Re*, 2015 ONSC 2066 (Ont. S.C.J. [Commercial List]). Justice Morawetz was considering the analogous provision to section 65.13(5) under the CCAA. While the facts in *Target* are distinguishable in many ways, Justice Morawetz's decision did approve an asset sale where there had been no marketing process for the assets in question. In so doing, he held that the Court should not take a formulaic approach to the provision, and must be satisfied overall that: (as read)

> Sufficient safeguards were adopted to ensure that the related-party transaction is in the best interests of the stakeholders of the applicants, and that the risk to the estate associated with a related-party transaction have been mitigated.

And that's from paragraph 15.

32 In that case, he was satisfied that the risk theoretically associated with a related-party transaction had been addressed through the efforts to evaluate the saleability of the assets to an unrelated party. He also considered the particular circumstances of the assets in question.

33 It would be somewhat absurd from an interpretive perspective to suggest that, for example, a party could make one call to a potential purchaser, and that would bring the party's efforts at least into consideration under section 65.13(5), but that coming to a reasoned conclusion that such a call would actually harm the value that could be achieved for stakeholders, would disqualify the insolvent person from even having the transaction considered under section 65.13(5).

34 It is also noteworthy as well that in appropriate circumstances, courts approve pre-packaged and quick-flip transactions in the receivership context, where there is no sales process. This can occur even when a related party is involved. For example, see *Tool-Plas Systems Inc., Re*, [2008] O.J. No. 4218 (Ont. S.C.J. [Commercial List]), which is a decision of the Superior Court of Justice Commercial List by Justice Morawetz. I appreciate that these cases in the receivership context do not involve the specific legislative requirements of section 65.13(5), but they provide some analogous circumstances that assist in the interpretation of section 65.13(5).

35 In this particular case, the efforts that were made that I need to consider under section 65.13(5) include retaining FTI, considering categories of potential purchasers, and then with all of the financial information and the FTI estimated values in mind, considering whether a sales process to try to solicit purchasers was feasible. The nature of the business, including the portable nature of the both employees and clients is relevant. Whether it would be enough on its own need not be decided, because other factors are at play here. This review by OEL, in consultation with its secured creditors, took place in March and April 2020, after huge drops in oil prices and unprecedented public health lock downs due to COVID-19. A sale process

would have had to unfold in those difficult circumstances. The mix of secured and unsecured creditors and the evidence that the unsecured claims are relatively small in number of relatively small values, and were not going to be paid in any scenario, unless accepted as assumed debt by the Purchaser, is also relevant to whether the company's decision not to pursue a sales process amounts, in effect, to a good faith effort to sell or otherwise dispose, as required by section 65.13(5). Of course, the lack of liquidity in the company, and the cost and risk involved in the sales process are also relevant and were accounted for. In the particular circumstances of this case, I conclude that section 65.13(5) is satisfied.

36 I have had reference to the decision in *Hypnotic Clubs Inc., Re*, 2010 ONSC 2987 (Ont. S.C.J. [Commercial List]). The circumstances are analogous to the ones at bar in many respects; however, ultimately Justice Cumming found that the related-party purchaser had, in effect, created a situation where there was no other market for the asset through its control of the sublease. There is no such lack of good faith effort in the case before me. Further, the *Hypnotic* situation was one where the value of the unsecured claims was somewhat higher, and also where there was a history of significant litigation between some of the parties involved that Justice Cumming seemed to take into account. He did note, though, that even in that case, there was unlikely to be recovery by the unsecured creditors.

37 I am satisfied that the circumstances before me are sufficiently distinguishable so as to lead to a different result in this case. Also, I note that Justice Cumming did not find that section 65.13(5)(a) could never be met without a formal third-party sale process of some sort. Rather, he simply found that in the circumstances before him, the required good faith efforts had not been made.

38 So I am granting your application, Mr. Van de Mosselaer.

Application granted.

End of Document

2020 ONSC 7920
Ontario Superior Court of Justice [Commercial List]

Urbancorp

2020 CarswellOnt 18990, 2020 ONSC 7920, 327 A.C.W.S. (3d) 17, 86 C.B.R. (6th) 125

KSV KOFMAN INC., by and on behalf of URBANCORP CUMBERLAND 1 LP, by its general partner, URBANCORP CUMBERLAND 1 GP INC. (Applicant) and URBANCORP RENEWABLE POWER INC. (Respondent)

G.B. Morawetz C.J. Ont. S.C.J.

Heard: December 11, 2020
Judgment: December 23, 2020
Docket: CV-18-600624-00CL

Counsel: Robin Schwill, Robert Nicholls, Shane Freedman, for Monitor and Receiver, KSV Restructuring Inc. (formerly KSV Kofman Inc.)
Neil Rabinovitch, for Israeli Functionary, Adv. Guy Gissin
Suzanne Murphy, Heather Meredith, Alex Steele, for Purchaser, Enwave Geo Communications LP
Jeffrey Larry, for King Towns North Inc.
Scott Bomhof, for First Capital Realty
Robert Drake, Mario Forte, for Fuller Landau Group Inc., Monitor of Urbancorp Cumberland 2 GP Inc., Urbancorp Cumberland 2 L.P., Bosvest Inc., Edge on Triangle Park Inc., Edge Residential Inc. and Westside Gallery Lofts Inc.
Maria Dimakas, for Condominium Corporations

Subject: Civil Practice and Procedure; Insolvency

APPLICATION by receiver for relief including approval of sale and assignment order as well as sealing order.

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

Introduction

1 KSV Restructuring Inc. (formerly KSV Kofman Inc.), Court-appointed receiver (the "Receiver") of Urbancorp Renewable Power Inc. ("URPI") and as Court-appointed Monitor of Urbancorp Cumberland 1 LP ("Cumberland LP"), Urbancorp Cumberland 1 GP Inc., and certain related entities (the "Monitor", and as Receiver and Monitor, the "Court Officer") for and on behalf of Urbancorp New Kings Inc. ("UNKI"), Vestaco Homes Inc. ("VHI") and 228 Queen's Quay West Limited ("QQW") seeks, among other things, approval of the sale of certain assets (the "Transaction") contemplated by an agreement of purchase and sale (the "Sale Agreement") between the Receiver and Monitor (together, also referred to as the "Vendor"), and Enwave Geo Communities LP, by way of assignment from Enwave Energy Corporation (the "Purchaser") dated November 2, 2020 and appended to the Fifth Report of the Receiver and Forty-Third Report of the Monitor dated November 30, 2020 (the "Report"), and vesting in the Purchaser URPI's, Cumberland LP's, UNKI's, VHI's and QQW's (collectively, the "Urbancorp Entities") respective rights, title and interest in and to the assets described in the Sale Agreement (the "Purchased Assets"). The geothermal assets located at three condominiums developed by entities in the Urbancorp Group of Companies (the "Geothermal Assets") make up the vast majority of the Purchased Assets.

2 The Receiver also seeks an Order sealing the Confidential Appendix to the Report (the "Sealing Order") pending further order of the Court.

3 Finally, the Receiver seeks an Order (the "Assignment Order") compelling the assignment to the Purchaser of the rights and obligations of VHI and URPI as tenants (the "Tenants"), under a lease dated July 10, 2010 (the "Berm Lease") with King Towns North Inc. ("KTNI") as landlord.

4 The Receiver recommends approval of the Transaction. Gus Gissen, First Capital Realty, The Fuller Landau Group Inc., the Condominium Corporations and the Purchasers support the Receiver.

5 KTNI is opposed to the Assignment Order.

6 The background to this matter is set out in the Report. All capitalized terms used herein and not otherwise defined have the meanings ascribed to them in the Report. The following is a summary of some of the facts central to this motion.

7 Pursuant to an order issued on December 10, 2019, the Receiver was authorized to commence a sale process (the "Sale Process") for the Geothermal Assets (the "Sale Process Order"). The bid deadline under the Sale Process was October 20, 2020 (the "Bid Deadline").

8 Following the Bid Deadline, the Sale Agreement was executed on November 2, 2020. The Purchase Price, subject to adjustments which are expected to be immaterial, is $24,000,000.

9 KTNI owns land adjacent to the condominium development. The Tenants own and operate the geothermal system.

10 KTNI entered into a long-term lease (the "Berm Lease") with the Tenants and VHI for the lease of the Berm Lands. The Berm Lease was designed to allow the Tenants to use the 82 geothermal wells on the Berm Lands for the Geothermal System.

11 The Berm Lease provides for a 50-year term (of which some 40 years remain). The Berm Lease further provides that the Tenants have a unilateral right to extend the term of the lease on the same terms and conditions (i.e., for the same $100 annual rent) in the event that the Tenants' Geothermal Supply Contracts are extended.

12 When KTNI entered into the lease, each of KTNI, URPI, and VHI was owned and controlled by Saskin family entities. KTNI takes the position that the parties were indifferent about the nominal rent that was below the fair market value for use of the lands.

13 The Berm Lease contains an assignment clause which provides that KTNI must consent to any assignment or transfer of the Berm Lease by the Tenants, and that KTNI may unreasonably withhold consent to any assignment or transfer of the Berm Lease.

14 KTNI claims its consent has not been sought.

15 The Receiver claims that issues relating to the assignment in the context of a transaction were raised a year ago and KTNI was not prepared to consent to the assignment of the Berm Lease.

16 The Purchaser has allocated $2.049 million of the Purchase Price to the Berm Lease (although KTNI does not agree with this allocation).

Law and Analysis

17 All parties agree that the Sale Process was properly conducted and produced a Purchase Price that is commercially reasonable in the circumstances. For this reason, it is not necessary, in my view, to review the principles set out in *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (Ont. C.A.), at para. 16 concerning sales by a receiver.

18 There is, however, opposition from KTNI as to whether the Assignment Order, which is critical to the Transaction, should be granted.

19 KTNI submits that since URPI, one of the Tenants, is in receivership, the Court Officer, in its capacity as Receiver, has no statutory authority to seek the Assignment Order.

20 In support of its argument that the Assignment Order should not be granted, KTNI references s. 84.1 of the *Bankruptcy and Insolvency Act* ("BIA") and s. 11.3 of the *Companies' Creditors Arrangement Act* ("CCAA") which provide the court, in bankruptcy and CCAA proceedings, with statutory jurisdiction to make an order assigning a debtor company's rights and obligations under an agreement, on notice to every party to the agreement and to the court officer.

21 Since there is no corresponding provision in Part XI of the BIA dealing with Secured Creditors and Receivers, KTNI submits there is no jurisdiction to grant the Receiver's request for the Assignment Order.

22 In addition, KTNI submits it is not "appropriate" to grant the Assignment Orders as:

a. KTNI is not being treated fairly and equitably, and

b. KTNI's consent has not been sought.

23 In response, counsel to the Receiver submits that Canadian courts have repeatedly stated that the BIA and the CCAA are to be interpreted harmoniously. *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60 (S.C.C.). While s. 84.1 of the BIA does not specifically refer to receivers, upon a purposive analysis, this policy and its underlying principles suggest an application to receivers. While the BIA is silent on when a receiver can apply for an order assigning a debtor contract, if both a trustee and a monitor may apply for such an order, the only purposive interpretation which harmonizes the Canadian insolvency regimes and prevents the loss of value from the estate of the debtor is the application of section 84.1 of the BIA to receivers.

24 The Supreme Court recently confirmed in *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10 (S.C.C.) at para. 40 that the remedial objectives of Canadian insolvency laws are to provide timely, efficient and impartial resolution of a debtor's insolvency, to preserve and maximize the value of a debtor's assets, to ensure fair and equitable treatment of the claims against a debtor, to protect the public interest, and to balance the costs and benefits of restructuring or liquidating the debtor company.

25 In *Yukon (Government of) v. Yukon Zinc Corporation*, 2020 YKSC 16 (Y.T. S.C.), at para. 46, in determining the scope of the Court's authority to authorize the actions of the receiver, the Court held that "insisting on a purposive analysis... helps to establish the scope of powers and discretion conferred by statutes on public officials, and on the court."

26 Counsel to the Receiver also submitted that an order compelling the assignment of contracts is only required where the counterparty to such contract declines to provide their consent to the assignment. The Court held in *Playdium Entertainment Corp., Re* (2001), 31 C.B.R. (4th) 302 (Ont. S.C.J. [Commercial List]), at paras. 22-23, that it had the discretion to issue an assignment order even if consent to assignment was reasonably withheld by the counterparty. While Playdium is a pre-2009 amendment example of a forced-assignment, the Receiver submits that it continues to inform courts' analyses in post-amendment cases.

27 In my view, it is necessary to take into consideration that the Purchase Price is $24,000,000. If the Transaction flounders as a result of the inability to assign the Berm Lease, the result would clearly be harmful to creditors. It is also necessary to take into account that an alternative route is available to the Receiver, specifically to take steps to bankrupt URPI and then rely on s. 84.1 of the BIA as the basis to seek the Assignment Order.

28 If the Receiver is required to take this alternative approach, it would only result in a delay in completing the Transaction and would increase the cost of completing the Transaction. This is not a desirable outcome.

29 Rather, it is preferable in my view to insist on a purposive approach to accomplish the objectives of Canadian insolvency laws.

30 Section 243(1)(c) of the BIA provides:

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

. . .

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

31 This subsection, in conjunction with the provisions of s. 100 of the *Courts of Justice Act (Ontario)* ("CJA") is broad enough to form the basis of the Receiver's request for the Assignment Order and for the court to make such order. If not, the ability of a receiver to discharge its functions would be severely restricted to the point where the objectives of Canadian insolvency laws would be frustrated in the receivership context.

32 An alternative approach is to resort to the inherent jurisdiction of the court.

33 I recently commented on this subject in *Stephen Francis Podgurski (Re)*, 2020 ONSC 2552 (Ont. S.C.J.).

[65] There is also scope to grant the requested relief using the inherent jurisdiction of the court. The inherent jurisdiction of the provincial superior courts is a broad and diverse power. It has been said that inherent jurisdiction is a power that is exercisable "in any situation where the requirements of justice demands it" (*Gillespie v. Manitoba (Atty. Gen.)*, 2000 MBCA 1, at para. 92), and that "nothing shall be intended to be out of the jurisdiction of the Superior Court, but that which is specifically appears to be so" (*Board v. Board*, [1919] A.C. 956at pp. 17-18, per Viscount Haldane).

[66] Recently, the Supreme Court of Canada reviewed the inherent jurisdiction of superior courts in *Endean v. British Columbia*, 2016 SCC 42, and described it as follows:

> [23] The inherent powers of superior courts are central to the role of those courts, which form the backbone of our judicial system. Inherent jurisdiction derives from the very nature of the court as a superior court of law and may be defined as a "reserve or fund of powers" or a "residual source of powers", which a superior court "may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them": I. H. Jacob, "The Inherent Jurisdiction of the Court" (1970), 23 *Curr. Legal Probs.* 23, at p. 51, cited with approval in, e.g., *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43, [2013] 3 S.C.R. 3, at para. 20; *R. v. Caron*, 2011 SCC 5, [2011] 1 S.C.R. 78, at para. 24; and *MacMillan Bloedel Ltd. v. Simpson*, 1995 CanLII 57 (SCC), [1995] 4 S.C.R. 725, at paras. 29-31. The Supreme Court acknowledges that the doctrine of inherent jurisdiction is amorphous in nature: *Ontario v. Ontario Criminal Lawyers Association of Ontario*, 2013 SCC 43, at para. 22. As a result, the parameters of what a Superior Court judge may do or not do under the power of inherent jurisdiction are unknown.
>
> . . .

[68] In the oft-cited *80 Wellesley St. E., Ltd. v. Fundy Bay Builders Ltd.*, [1972] 2 O.R. 280 (C.A.), the Court of Appeal for Ontario held that except where provided specifically to the contrary, the court's inherent jurisdiction is "unlimited and unrestricted in substantial law and civil matters." The Court of Appeal set out the jurisprudential basis for this holding:

In *Re-Michie Estate and City of Toronto et al.*, [1968] 1 O.R. 266 at pp. 268 - 9, Stark J, after considering the relevant provisions of the Judicature Act and the authorities, said:

> It appears clear that the Supreme Court of Ontario has broad universal jurisdiction over all matters of substantial law unless the Legislature divests from this universal jurisdiction by legislation in unequivocal terms. The rule of law relating to the jurisdiction of superior Courts was laid down at least as early as 1667 in the case of *Peacock v. Bell and Kendall* [1667], 1 Wms. Sound. 73 at p. 74, 85 E.R.84:

> ... And the rule for jurisdiction is, that nothing shall be intended to be out of the jurisdiction of a Superior Court, but that which specifically appears to be so; and, on the contrary, nothing shall be intended to be within the jurisdiction of an Inferior Court but that which is so expressly alleged.

[69] However, the doctrine is not unlimited: it is subject to both statutory and purposive limitations. The doctrine cannot be exercised so as to contradict a statute or rule. Inherent jurisdiction is also limited to exercises that fulfil the underlying purpose of the doctrine, being to regularize and protect the administration of justice. Inherent jurisdiction should be exercised "sparingly and with caution:" *R c. Caron*, 2011 SCC 5, at para. 28.

[70] In *Endean*, the Supreme Court set out that before exercising the court's inherent jurisdiction, a justice should first determine the scope of express grants of statutory powers before dipping into this "important but murky pool of residual authority" (*Endean*, at para. 24). Having done so, in my view, it is both necessary and appropriate to exercise inherent jurisdiction in responding to this motion.

34 There is no statutory provision in the BIA that prohibits a superior court from granting the requested relief. In these circumstances, I am of the view that if s. 243(1)(c) of the BIA, in conjunction of s. 100 of the CJA, does not provide the basis for considering the Assignment Order, then it is appropriate to resort to the inherent jurisdiction of the Superior Court.

35 Having determined that there is jurisdiction for the Receiver to assign the Berm Lease, it is necessary to review the criteria the Court will consider in determining whether to order an assignment. The criteria referenced in s. 84.1(4) of the BIA and s. 11.3 of the CCAA informs the analysis for an assignment by the Receiver. The criteria are as follows:

(a) whether the monitor approved the proposed assignment (only relevant to CCAA proceedings);

(b) whether the person to whom the rights and obligations are to be assigned would be able to perform the obligations; and

(c) whether it would be appropriate to assign the rights and obligations to that person.

36 KTNI accepts that the first two factors have been established in that the Monitor has approved of the assignment and the financial obligations of the proposed assignee are nominal.

37 The remaining issue is whether it would be appropriate to assign the rights and obligations to that person.

38 The Receiver submits that it is appropriate to assign the rights and obligations of the Tenants under the Berm Lease to the Purchaser for the following reasons:

(a) the Sale Process was approved by the Court;

(b) the assignment of the Berm Lease does not preclude KTNI from asserting a claim as to an allocation of a portion of the Sale Proceeds based on the value inherent in the Berm Lease;

(c) there is no prejudice to KTNI from the assignment since no amendments are being sought by the Purchaser in respect of the Berm Lease. KTNI's rights under the Berm Lease will be unaffected as a result; and

(d) the 82 boreholes located on the Berm Lands are an integral part of the Purchased Assets.

39 Further, the Receiver submits that the proposed assignment meets the "twin goals" of assisting the reorganization process by providing valuable liquidity to the estate of the Urbancorp Entities, while treating the counterparty fairly and equitably, as KTNI will be unaffected by the assignment without any prejudice to KTNI claiming that the value allocated to the Berm Lease ought to be directed to it rather than remain in the estate.

40 KTNI previously advised the Court Officer that it would not consent to the assignment of the Berm Lease without receiving a portion of the proceeds from the sale of the Geothermal Assets prior to closing. The Court Officer states that it has

been unable to obtain the consent of KTNI to the assignment of the Tenants' interests under the Berm Lease, without prejudice to KTNI's rights to subsequently advocate for its allocation entitlements, if any.

41 The Receiver also submits that if the Court has the jurisdiction to assign a contract where the counterparty reasonably withholds its consent and notwithstanding any provision to the contrary in the agreement, then this Court has the requisite jurisdiction to issue the Assignment Order, notwithstanding that KTNI has unreasonably withheld consent, as permitted under the Berm Lease.

42 KTNI takes issue with the Receiver's submission.

43 KTNI submits that s. 11.3 of the CCAA is designed to protect parties in KTNI's exact position. This is why it is necessary to treat KTNI differently from "other creditors" who are not afforded the protections under s. 11.3 of the CCAA. KTNI references *Dundee Oil and Gas Limited (Re)*, 2018 ONSC 3678 (Ont. S.C.J. [Commercial List]) at para. 27:

> Section 11.3 of the CCAA is an extraordinary power. It permits the court to require counterparties to an executory contract to accept future performance from somebody they never agreed to deal with. But for s. 11.3 of the CCAA, a counterparty in the unfortunate position of having a bankrupt or insolvent counterpart might at least console themselves with the thought of soon recovering their freedom to deal with the subject-matter of the contract. Unlike creditors, the counterparty subjected to a non-consensual assignment will be required to deal with the credit-risk of an assignee post-insolvency and potentially for a long time. Creditors, on the other hand, will generally be in a position to take their lumps and turn the page. [Emphasis added.]

44 In my view, KTNI's reliance on the foregoing passage is misdirected. The passage concerns the credit-risk of the assignee. In this case, the credit risk is for annual rent minimal. Issues relating to the environmental indemnity are addressed at [52] and [53] below.

45 KTNI also submits that the application should fail, however, on the third factor to consider — whether it is "appropriate" to assign the rights and obligations in this case. Section 11.3(3)(c) of the CCAA provides that in deciding whether to make an order, the court must consider whether it would be appropriate to assign the rights and obligations to the assignee.

46 In this case, KTNI submits that forcing an assignment of the Berm Lease, without modification of the commercially unreasonable rent or the payment of consideration to KTNI, does not treat KTNI fairly and equitably.

47 If the assignment of the Berm Lease is approved, KTNI submits that it would be stripped of the very protection that it bargained for while diverting the entire value of the Berm Lands away from KTNI. This is not a fair, equitable or appropriate result in the circumstances.

48 In my view, the arguments presented by KTNI have been addressed by the Receiver. Allocation entitlements will be addressed at a future date. As noted, the Purchaser has allocated $2.049 million for the Berm Lease, an amount that KTNI disputes. The Purchaser is clearly of the view that the Berm Lease has value.

49 KTNI is also of the view that it is not appropriate to force the assignment of the Berm Lease where KTNI's consent has not even been sought.

50 In response to this submission, I accept the explanations put forth by the Receiver at [15] and [40]. A transaction involving the Geothermal Assets has been contemplated for a considerable period of time and comes as no surprise to KTNI. The Receiver and KTNI have not been able to agree on terms and, as a result, no consent has been forthcoming.

51 Finally, in oral argument, counsel to KTNI referenced that the Sale Agreement had recently been assigned by Enwave Energy Corporation to Enwave Geo Communications LP. While KTNI was satisfied as to the financial capability of the assignor, it has no financial information about the assignee.

52 Although the annual rent is nominal, KTNI raised the subject of the Environmental Indemnity in s. 7.3 of the of the Berm Lease.

53 In my view, the existence of the Environmental Indemnity does not result in a reason to not approve the Transaction. The Sales Agreement provides for an assignment by the purchaser and there is no evidence of any environmental concerns having been raised in the first ten years of the term. The Geothermal System provides heating and air conditioning to hundreds of condominium units and consequently, the proposed Tenants have an incentive to maintain the system in proper working condition. Finally, KTNI can raise this as an allocation issue.

54 Having determined that there is jurisdiction for the Receiver to assign the Berm Lease, I conclude that, in these circumstances, the Transaction should be approved and that the Assignment Order should be granted.

55 The Court Officer also requests an order sealing the Confidential Appendix to the Report pending the closing of the Transaction. No party raised an objection to this request.

56 In my view, the Confidential Appendix contains highly sensitive commercial information including the Offer Summary, which, if made public, could detrimentally affect the price that could be obtained on a subsequent sale of the Purchased Assets should the Transaction not close.

57 Having considered the guidance set out by the Supreme Court of Canada in *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522 (S.C.C.), at para. 53, I am satisfied that the Confidential Appendix should be sealed.

Disposition

58 In the result, I am satisfied that it is both just and convenient to grant this motion and approve the Transaction and also grant the Sealing Order and the Assignment Order.

Application granted.

2015 ONSC 7574
Ontario Superior Court of Justice

Target Canada Co., Re

2015 CarswellOnt 19174, 2015 ONSC 7574, 261 A.C.W.S. (3d) 518, 31 C.B.R. (6th) 311

In the Matter of a Plan of Compromise or Arrangement of Target Canada Co., Target Canada Health Co., Target Canada Mobile GP Co., Target Canada Pharmacy (BC) Corp., Target Canada Pharmacy (Ontario) Corp., Target Canada Pharmacy Corp., Target Canada Pharmacy (SK) Corp. and Target Canada Property LLC.

Morawetz R.S.J.

Judgment: December 11, 2015
Docket: CV-15-10832-00CL

Counsel: J. Swatz, Dina Milivojevic, for Target Corporation
Jeremy Dacks, for Target Canada Entitites
Susan Philpott, for Employees
Richard Swan, S. Richard Orzy, for Rio Can Management Inc. and KingSett Capital Inc.
Jay Carfagnini, Alan Mark, for Monitor, Alvarez & Marsal
Jeff Carhart, for Ginsey Industries
Lauren Epstein, for Trustee of the Employee Trust
Lou Brzezinski, Alexandra Teodescu, for Nintendo of Canada Limited, Universal Studios, Thyssenkrupp Elevator (Canada) Limited, United Cleaning Services, RPJ Consulting Inc., Blue Vista, Farmer Brothers, East End Project, Trans Source, E One Entertainment, Foxy Originals
Linda Galessiere, for Various Landlords

Subject: Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.a Approval by court
Headnote
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by court — Miscellaneous
Approval of reports — Monitor in proceedings under Companies' Creditors Arrangement Act (CCAA) brought application for approval of reports and activities set out in reports — Application was opposed by two of applicants' landlords — Application granted in part — Monitor played integral role in balancing and protecting various interests in CCAA environment — Court specifically mandated monitor to undertake various activities — In its reports, monitor had provided helpful commentary to court and to stakeholders about progress of CCAA proceedings — In circumstances where monitor was requesting approval of its reports and activities in general sense, caution was to be exercised to avoid broad application of res judicata and related doctrines — Benefit of any approval of monitor's reports and its activities should be limited to monitor itself — Limiting effect of approval addressed concerns of objecting parties and it did not impact prior court orders.
Table of Authorities
Cases considered by *Morawetz R.S.J.*:
Bank of America Canada v. Willann Investments Ltd. (1993), 23 C.B.R. (3d) 98, 1993 CarswellOnt 249 (Ont. Gen. Div.) — referred to
Forrest v. Vriend (2015), 2015 BCSC 1878, 2015 CarswellBC 2979 (B.C. S.C.) — considered

Toronto Dominion Bank v. Preston Springs Gardens Inc. (2006), 2006 CarswellOnt 2835, 19 C.B.R. (5th) 165 (Ont. S.C.J. [Commercial List]) — referred to

Toronto Dominion Bank v. Preston Springs Gardens Inc. (2007), 2007 CarswellOnt 1182, 2007 ONCA 145, 31 C.B.R. (5th) 167 (Ont. C.A.) — referred to

Statutes considered:

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

Generally — referred to

s. 11.7 [en. 1997, c. 12, s. 124] — considered

s. 23(1) — considered

s. 23(2) — considered

APPLICATION by monitor for approval of reports and activities set out in reports.

***Morawetz R.S.J.*:**

1 Alvarez & Marsal Canada Inc., in its capacity as Monitor of the Applicants (the "Monitor") seeks approval of Monitor's Reports 3-18, together with the Monitor's activities set out in each of those Reports.

2 Such a request is not unusual. A practice has developed in proceedings under the Companies' Creditors Arrangement Act ("CCAA") whereby the Monitor will routinely bring a motion for such approval. In most cases, there is no opposition to such requests, and the relief is routinely granted.

3 Such is not the case in this matter.

4 The requested relief is opposed by Rio Can Management Inc. ("Rio Can") and KingSett Capital Inc. ("KingSett"), two landlords of the Applicants (the "Target Canada Estates"). The position of these landlords was supported by Mr. Brzezinski on behalf of his client group and as agent for Mr. Solmon, who acts for ISSI Inc., as well as Ms. Galessiere, acting on behalf of another group of landlords.

5 The essence of the opposition is that the request of the Monitor to obtain approval of its activities — particularly in these liquidation proceedings — is both premature and unnecessary and that providing such approval, in the absence of full and complete disclosure of all of the underlying facts, would be unfair to the creditors, especially if doing so might in future be asserted and relied upon by the Applicants, or any other party, seeking to limit or prejudice the rights of creditors or any steps they may wish to take.

6 Further, the objecting parties submit that the requested relief is unnecessary, as the Monitor has the full protections provided to it in the Initial Order and subsequent orders, and under the CCAA.

7 Alternatively, the objecting parties submit that if such approval is to be granted, it should be specifically limited by the following words:

> provided, however, that only the Monitor, in its personal capacity and only with respect to its own personal liability, shall be entitled to rely upon or utilize in any way such approval.

8 The CCAA mandates the appointment of a monitor to monitor the business and financial affairs of the company (section 11.7).

9 The duties and functions of the monitor are set forth in Section 23(1). Section 23(2) provides a degree of protection to the monitor. The section reads as follows:

(2) Monitor not liable — if the monitor acts in good faith and takes reasonable care in preparing the report referred to in any of paragraphs (1)(b) to (d.1), the monitor is not liable for loss or damage to any person resulting from that person's reliance on the report.

10 Paragraphs 1(b) to (d.1) primarily relate to review and reporting issues on specific business and financial affairs of the debtor.

11 In addition, paragraph 51 of the Amended and Restated Order provides that:

... in addition to the rights, and protections afforded the Monitor under the CCAA or as an officer of the Court, the Monitor shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, including for great certainty in the Monitor's capacity as Administrator of the Employee Trust, save and except for any gross negligence or wilful misconduct on its part.

12 The Monitor sets out a number of reasons why it believes that the requested relief is appropriate in these circumstances. Such approval

(a) allows the monitor and stakeholders to move forward confidently with the next step in the proceeding by fostering the orderly building-block nature of CCAA proceedings;

(b) brings the monitor's activities in issue before the court, allowing an opportunity for the concerns of the court or stakeholders to be addressed, and any problems to be rectified in a timely way;

(c) provides certainty and finality to processes in the CCAA proceedings and activities undertaken (eg., asset sales), all parties having been given an opportunity to raise specific objections and concerns;

(d) enables the court, tasked with supervising the CCAA process, to satisfy itself that the monitor's court-mandated activities have been conducted in a prudent and diligent manner;

(e) provides protection for the monitor, not otherwise provided by the CCAA; and

(f) protects creditors from the delay in distribution that would be caused by:

a. re-litigation of steps taken to date; and

b. potential indemnity claims by the monitor.

13 Counsel to the Monitor also submits that the doctrine of issue estoppel applies (as do related doctrines of collateral attack and abuse of process) in respect of approval of the Monitor's activities as described in its reports. Counsel submits that given the functions that court approval serves, the availability of the doctrine (and related doctrines) is important to the CCAA process. Counsel submits that actions mandated and authorized by the court, and the activities taken by the Monitor to carry them out, are not interim measure that ought to remain open for second guessing or re-litigating down the road and there is a need for finality in a CCAA process for the benefit of all stakeholders.

14 Prior to consideration of these arguments, it is helpful to review certain aspects of the doctrine of *res judicata* and its relationship to both issue estoppel and cause of action estoppel. The issue was recently considered in *Forrest v. Vriend*, 2015 CarswellBC 2979 (B.C. S.C.), where Ehrcke J. stated:

25. "TD and Vriend point out that the doctrine of *res judicata* is not limited to issue estoppel, but includes cause of action estoppel as well. The distinction between these two related components of *res judicata* was concisely explained by Cromwell J.A., as he then was, in *Hoque v. Montreal Trust Co. of Canada* (1997), 162 N.S.R. (2d) 321 (C.A.) at para. 21:

> 21 *Res judicata* is mainly concerned with two principles. First, there is a principle that "... prevents the contradiction of that which was determined in the previous litigation, by prohibiting the relitigation of issues already actually addressed.": see Sopinka, Lederman and Bryant, *The Law of Evidence in Canada* (1991) at p. 997. The second principle is that parties must bring forward all of the claims and defences with respect to the cause of action at issue in the first proceeding and that, if they fail to do so, they will be barred from asserting them in a subsequent action. This "... prevents fragmentation of litigation by prohibiting the litigation of matters that were never actually addressed in the previous litigation, but which properly belonged to it.": *ibid* at 998. Cause of action estoppel is usually concerned with the application of this second principle because its operation bars all of the issues properly belonging to the earlier litigation.
>
> . . . . .

30. It is salutary to keep in mind Mr. Justice Cromwell's caution against an overly broad application of cause of action estoppel. In *Hoque* at paras. 25, 30 and 37, he wrote:

> 25. The appellants submit, relying on these and similar statements, that cause of action estoppel is broad in scope and inflexible in application. With respect, I think this overstates the true position. In my view, this very broad language which suggests an inflexible application of cause of action estoppel to all matters that "could" have been raised does not fully reflect the present law.
>
> . . . . .
>
> 30. The submission that all claims that could have been dealt with in the main action are barred is not borne out by the Canadian cases. With respect to matter not actually raised and decided, the test appears to me to be that the party should have raised the matter and, in deciding whether the party should have done so, a number of factors are considered.
>
> . . . . .
>
> 37. Although many of these authorities cite with approval the broad language of *Henderson v. Henderson*, *supra*, to the effect that any matter which the parties had the opportunity to raise will be barred, I think, however, that this language is somewhat too wide. The better principle is that those issues which the parties had the opportunity to raise and, in all the circumstances, should have raised, will be barred. In determining whether the matter should have been raised, a court will consider whether proceeding constitutes a collateral attack on the earlier findings, whether it simply assets a new legal conception of facts previously litigated, whether it relies on "new" evidence that could have been discovered in the earlier proceeding with reasonable diligence, whether the two proceedings relate to separate and distinct causes of action and whether, in all the circumstances, the second proceeding constitutes an abuse of process.

15 In this case, I accept the submission of counsel to the Monitor to the effect that the Monitor plays an integral part in balancing and protecting the various interests in the CCAA environment.

16 Further, in this particular case, the court has specifically mandated the Monitor to undertake a number of activities, including in connection with the sale of the debtors assets. The Monitor has also, in its various Reports, provided helpful commentary to the court and to Stakeholders on the progress of the CCAA proceedings.

17 Turning to the issue as to whether these Reports should be approved, it is important to consider how Monitor's Reports are in fact relied upon and used by the court in arriving at certain determinations.

18 For example, if the issue before the court is to approve a sales process or to approve a sale of assets, certain findings of fact must be made before making a determination that the sale process or the sale of assets should be approved. Evidence is generally provided by way of affidavit from a representative of the applicant and supported by commentary from the monitor in its report. The approval issue is put squarely before the court and the court must, among other things conclude that the sales process or the sale of assets is, among other things, fair and reasonable in the circumstances.

19 On motions of the type, where the evidence is considered and findings of fact are made, the resulting decision affects the rights of all stakeholders. This is recognized in the jurisprudence with the acknowledgment that res judicata and related doctrines

apply to approval of a Monitor's report in these circumstances. (See: *Toronto Dominion Bank v. Preston Springs Gardens Inc.*, [2006] O.J. No. 1834 (Ont. S.C.J. [Commercial List]); *Toronto Dominion Bank v. Preston Springs Gardens Inc.*, 2007 ONCA 145 (Ont. C.A.) and *Bank of America Canada v. Willann Investments Ltd.*, [1993] O.J. No. 3039 (Ont. Gen. Div.)).

20 The foregoing must be contrasted with the current scenario, where the Monitor seeks a general approval of its Reports. The Monitor has in its various reports provided commentary, some based on its own observations and work product and some based on information provided to it by the Applicant or other stakeholders. Certain aspects of the information provided by the Monitor has not been scrutinized or challenged in any formal sense. In addition, for the most part, no fact-finding process has been undertaken by the court.

21 In circumstances where the Monitor is requesting approval of its reports and activities in a general sense, it seems to me that caution should be exercised so as to avoid a broad application of res judicata and related doctrines. The benefit of any such approval of the Monitor's reports and its activities should be limited to the Monitor itself. To the extent that approvals are provided, the effect of such approvals should not extend to the Applicant or other third parties.

22 I recognized there are good policy and practical reasons for the court to approve of Monitor's activities and providing a level of protection for Monitors during the CCAA process. These reasons are set out in paragraph [12] above. However, in my view, the protection should be limited to the Monitor in the manner suggested by counsel to Rio Can and KingSett.

23 By proceeding in this manner, Court approval serves the purposes set out by the Monitor above. Specifically, Court approval:

(a) allows the Monitor to move forward with the next steps in the CCAA proceedings;

(b) brings the Monitor's activities before the Court;

(c) allows an opportunity for the concerns of the stakeholders to be addressed, and any problems to be rectified,

(d) enables the Court to satisfy itself that the Monitor's activities have been conducted in prudent and diligent manners;

(e) provides protection for the Monitor not otherwise provided by the CCAA; and

(f) protects the creditors from the delay and distribution that would be caused by:

(i) re-litigation of steps taken to date, and

(ii) potential indemnity claims by the Monitor.

24 By limiting the effect of the approval, the concerns of the objecting parties are addressed as the approval of Monitor's activities do not constitute approval of the activities of parties other than the Monitor.

25 Further, limiting the effect of the approval does not impact on prior court orders which have approved other aspects of these CCAA proceedings, including the sales process and asset sales.

26 The Monitor's Reports 3-18 are approved, but the approval the limited by the inclusion of the wording provided by counsel to Rio Can and KingSett, referenced at paragraph [7].

Application granted in part.

End of Document

Triple-I Capital Partners Ltd. v. 12411300 Canada Inc., [2023] O.J. No. 2584

Ontario Judgments

Ontario Superior Court of Justice

Commercial List

P.J. Osborne J.

Heard: June 6, 2023.

Judgment: June 6, 2023.

Court File No.: CV-22-00684372-00CL

[2023] O.J. No. 2584 | 2023 ONSC 3400

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 RE: Triple-I Capital Partners Limited, Applicant, and 12411300 Canada Inc., Respondent / Debtor

(71 paras.)

Counsel

Kevin Sherkin and Monica Faheim, for Crow Soberman Inc., Receiver.

Hans Rizarri, for Crow Soberman Inc., Receiver.

Avi Freedland, for the Respondent / Debtor.

ENDORSEMENT

P.J. OSBORNE J.

1 Crowe Soberman Inc., in its capacity as Receiver, moves for approval of the Third Report of the Receiver dated January 4, 2023, and the activities set out therein, approval of the statement of receipts and disbursements, approval of fees and disbursements of the Receiver and its counsel, and discharge.

2 The Respondent, 12411300 Canada Inc. (the "Debtor"), does not oppose approval of the Third Report or the activities, but it does oppose approval of the fees and disbursements of the Receiver and its counsel. Neither the Lender Applicant, Triple-I Capital Partners Limited (the "Applicant"), nor the Second Mortgagees (defined below) appeared.

Chronology of This Matter

3 The Applicant advanced to the Debtor $6,400,000 in December 2021, to purchase an industrial property in Brampton, Ontario, secured by a mortgage registered against title to the property. The maturity date of the mortgage was May 1, 2022. The Debtor failed to repay the principal and interest owing, and the Applicant commenced this proceeding.

4 The Receiver was appointed by order of Cavanagh J. dated July 22, 2022 (the "Receivership Order"). It is not disputed that the primary asset of the Debtor is that piece of industrial land and a building located on that land of approximately 18,200 ft.2.

5 As of the date of the Receivership Order, the Debtor was indebted to the Applicant in the amount of $6,865,154 plus additional interest and accrued expenses.

6 Eight individuals who hold mortgages in second position subordinate to Triple-I, (collectively, the "Second Mortgagees"), were owed $2 million, although on October 10 the Debtor made a payment to them in the amount of $410,000, with the result that the principal amount owing to them was in the amount of $1,590,000. There were no other significant creditors.

7 After being appointed, the Receiver took certain steps, in accordance with the Receivership Order by which it was appointed, to prepare for the implementation of a sales process to market and sell the property.

8 The Receiver then brought a motion for approval of a sales process.

9 Following the service and filing of those motion materials, the Receiver was advised that the Debtor was in the process of finalizing an imminent refinancing of the property.

10 On October 14, 2022, Cavanagh J. issued a sale process approval order and an ancillary order, which had the effect of pausing the implementation of the sales process by the Receiver as approved, pending refinancing efforts being undertaken by the Debtor.

11 That ancillary order also approved the First Report of the Receiver dated August 8, 2022, the Second Report of the Receiver dated October 7, 2022, and the activities of the Receiver as described in both Reports.

12 On October 21, 2022, the Court extended the temporary pause for an additional four days until October 25, to permit the Debtor additional time to complete the closing of the refinancing transaction.

13 On October 28, 2022, this Court issued an order directing the payment of certain funds, by the Debtor to the Applicant and the Receiver, discharging various charges on the property, and addressing other steps to be taken in connection with the closing of the Debtor's refinancing transaction.

14 That same day, funds in the amount of $6,861,223.16 were paid by the Debtor to the Applicant and Receiver (through counsel), for the purpose of satisfying the secured debt owed by the Debtor to the Applicant.

15 The payment was made in two tranches given the dispute that underlies this motion. The first tranche of $6,464,232.96 represented the net amount owing with respect to the principal loan and interest to October 26, together with taxes owing to the municipality. The second tranche in the amount of $396,990.20 represented the portion that the Debtor disputes related to professional fees and disbursements of the Receiver, its counsel and counsel to the Applicant.

Should the Fees of the Receiver and its Counsel be Approved?

Material Filed and Positions of the Parties

16 The Receiver relies on all of its Reports, but principally the Third Report and appendices thereto, including fee affidavits of the Receiver and its counsel.

17 The Debtor relies on an affidavit from its own counsel who argued the motion sworn in support of its position. This practice is not to be preferred, particularly for matters that are contentious. Here, the Receiver submits that the

affidavit should not be relied upon. In the main, it appears to contain a summary of the chronology of certain key events and other statements that are more in the nature of argument or submissions and therefore more properly belong in a factum.

18 Today, the Receiver seeks approval of fees of $106,722.25 plus disbursements of $32,851.56 and HST in the amount of $17,364.40, together with fees for its counsel (inclusive of HST and disbursements) of $91,014.94. That would bring the total amount of fees and disbursements charged by the Receiver together with those of its counsel since its appointment to $247,953.15.

19 The Receiver submits that the fees are fair and reasonable in the circumstances and have been properly incurred in respect of activities undertaken all in accordance with the Receivership Order.

20 The Respondent submits that the fees are unreasonable, the Receiver has duties to all stakeholders, including the Debtor, and that the receivership itself was opposed by both the Debtor and the Second Mortgagees.

21 The Respondent submits that this Court ought to approve 50 percent of total fees ($53,361.13 instead of $106,722.25) and 80 percent of disbursements ($26,281.25 instead of $32,851.56), plus HST in each case. The Respondent submits that the Receiver's counsel fees and disbursements (inclusive of HST) also ought to be approved at a rate of 50 percent ($45,507.47 instead of $91,014.94). That would bring the total amount of fees and disbursements for the Receiver and its counsel to $125,149.85.

22 The Debtor notes that this motion addresses only the fees of the Receiver and its counsel, and states that the Debtor is disputing the fees of the Applicant and mortgage charges through an assessment officer.

The Test

23 The factors to be considered have been sent out by the Court of Appeal for Ontario: *Bank of Nova Scotia v. Diemer*, *2014 ONCA 851*, 327 O.A.C. 376, at para. 33:

a. the nature, extent and value of the assets;

b. the complications and difficulties encountered;

c. the degree of assistance provided by the debtor;

d. the time spent;

e. the receiver's knowledge, experience and skill;

f. the diligence and thoroughness displayed;

g. the responsibilities assumed;

h. the results of the receiver's efforts; and

    i. the cost of comparable services when performed in a prudent and economical manner.

24 The Court of Appeal noted that these factors constitute a useful guidance but are not exhaustive: *Diemer*, at para. 33, citing with approval *Confectionately Yours Inc., Re (2002), 164 O.A.C. 84* (C.A.), leave to appeal refused, *[2002] S.C.C.A. No. 460*.

25 The Court of Appeal went on to observe that the cost of legal services is highlighted in the context of a court-supervised insolvency due to its public nature. While observing that it is not for the court to tell lawyers and law firms how to bill, the Court noted that proceedings supervised by the court and particularly where the court is asked to give its *imprimatur* to legal fees, the court must ensure that the compensation sought is indeed fair and reasonable.

26 While the above factors, including time spent, should be considered, value provided should predominate over

the mathematical calculation reflected in the hours times hourly rate equation. The focus of the fair and reasonable assessment should be on what was accomplished, not on how much time it took. The measurement of accomplishment may include consideration of complications and in difficulties encountered in the receivership (*Diemer*, at para. 45).

Application of the Test to This Case

27 In this case, the Receivership Order provides that the Receiver and its counsel shall pass their accounts from time to time. For this purpose, the accounts of the Receiver and its counsel are referred to a judge of the Commercial List. Accordingly, the issue is properly before this Court.

28 The Receiver submits that its work consisted of two phases: lead up and preparatory work; and possession of the premises and preparation for the sales process.

29 The Receiver further submits and the Record reflects, that the activities of the Receiver as set out in its First and Second Reports have already been approved. The sales process approval order of Cavanagh J. dated October 14, 2022 approving the first two reports and the activities described therein, was not opposed. Moreover, there was no reservation of rights by the Debtor (or any other party such as the Second Mortgagees) to seek to challenge the fees associated with those activities in the future.

30 The Receiver submits, therefore, that the Debtor cannot challenge the fees related to those activities. In my view, that does not follow. While I agree that it is too late for the Debtor to challenge the activities that have already been approved by this Court (and therefore the fair and reasonable fees and disbursements in respect thereof), nothing in Cavanagh's J. October 14 sales process approval order approved any fees or disbursements in respect of the activities set out in the first two Reports. Indeed, there was no request for such relief and none of that material was before the Court. The issue of approval of all of the fees and disbursements of the Receiver and its counsel are now before the Court for the first time.

31 The Receiver submits that the fees and disbursements are fair and reasonable in what was a challenging receivership. Detailed invoices from the professionals involved are appended to the Third Report. Rates charged are consistent with rates charged by law firms practising in the insolvency and restructuring area in the Toronto market, and the time spent is reasonable.

32 The accounts submitted meet the technical requirements and disclose in detail the name of each professional who rendered services, the applicable rate, the total charge, and the date on which services were rendered. The accounts of both the Receiver and its counsel are verified by a sworn affidavit from and on behalf of each.

33 The Receiver submits that this receivership proceeding was not simple or straightforward, and a number of the complications arose specifically due to the conduct of the Debtor. These include, for example, what appeared to the Receiver to be a break and enter at the premises of the Debtor and the removal of locks, which ultimately turned out to have been done by the Debtor, who submitted that it was unaware that it was not entitled to show the property to prospective purchasers or investors. The Receiver was therefore obliged to arrange for a bailiff to change the locks, replace fence chains and secure equipment.

34 Most substantively, the Receiver and its counsel had to prepare a sale and marketing process to prepare for the implementation of a process to market and sell the property, and engage a commercial real estate broker. The Receiver argues that the fact that the sale process never ultimately proceeded does not make the work completed in the course of preparing for the sale, in accordance with the sales process already approved by the Court (and not challenged by the Debtor at that time), non-compensable and nor does it make the fees automatically unfair or unreasonable. That assessment must focus on the circumstances as they existed at the time the fees were incurred.

35 At that time, as submitted by the Receiver, the Debtor did not have, contrary to its promises, the "imminent refinancing", and the Receivership Order was in full force and effect.

36 The Receiver further submits that the Receiver and the Debtor, through counsel, spent significant time and effort negotiating the terms of proposed orders in advance of numerous hearings before this Court, including in particular the October 13 motion. The Debtor was to a large extent uncooperative and therefore increased the challenges of the work carried out by the Receiver which are now under attack. It submits that the Disbursements are reasonable, and included such necessary expenses as insurance premiums for the property which were necessary to preserve the asset of the value for the estate.

37 The fees claimed by the Receiver are supported by the Affidavit of Hans Rizarri sworn January 4, 2023. Mr. Rizarri is a Licensed Insolvency Trustee with the Receiver firm. His affidavit states that he has reviewed the detailed statement of account and considers the time expended and the fees charged to be reasonable in light of the services performed and the prevailing market rates for such services.

38 As Exhibit 1 to his affidavit, Mr. Rizarri sets out the Billing Worksheet Report which in turn reflects individual docket entries for all of the time spent by the Receiver.

39 The fees claimed by counsel to the Receiver are supported by the Affidavit of Monica Faheim sworn January 3, 2023. Ms. Faheim is a lawyer with the firm of counsel to the Receiver. The exhibits to her affidavit set out true copies of the detailed invoices for fees, and a schedule including a summary of the invoices, itemizing fees charged, disbursements and HST, and a further schedule summarizing billing rates, year of call, total hours and total fees charged, organized by billing professional (lawyer or law clerk), together with an estimate for remaining fees to complete all work not to exceed $5000 including HST. Ms. Faheim states that to the best of her knowledge, the rates charged are comparable for the provision of similar services to the rates charged by other law firms in the Toronto market.

40 The Debtor challenges the quantum of fees and disbursements. It relies on the affidavit of counsel sworn January 23, 2023. No other evidence is filed in support of its position on this motion. Notwithstanding that counsel who swore the affidavit appeared to argue this motion, I heard the submissions.

41 The Debtor submits, essentially, that the receivership was straightforward because the Debtor had only one major asset, being the real property and building referred to above. The value of that property is dependent upon the premises being used for the production of cannabis. That in turn required the cannabis licence referred to above.

42 Boiled down, the Debtor argues that the receivership only came about in the first place since the Debtor was unable to obtain refinancing prior to maturity of a mortgage in turn because it was in the final stages of obtaining the cannabis licence but that had not yet been issued.

43 In my view, this argument does not advance the position of the Debtor. The facts as submitted may well be accurate but do not change certain key facts. The mortgage went into default. This Court concluded that the test for the appointment of a receiver was established by the Applicant. This Court then concluded that a sale process should be approved, with a view to monetizing and maximizing the recovery in respect of the sale of the one key asset: the land and building.

44 The argument of the Debtor really amounts to another version of the argument advanced earlier in this proceeding that implementation of the Receivership Order should be delayed to permit imminent refinancing. None of that changes the fact that a receivership was appropriate, just as this Court previously concluded.

45 The Receiver submits, and I accept, that its efforts undertaken with respect to the sale process were appropriate, in accordance with Court approval, and the fact that ultimately, a refinancing was concluded such that

a sale was not necessary, does not render, retroactively, those efforts unnecessary nor the fees in respect of those efforts inappropriate and unrecoverable.

46 The Debtor submits that the receivership did not take an extended length of time, noting that the hearing for the Receivership Order took place less than two months after the mortgage default. The Debtor submits in its materials (and in argument on this motion) that given the dates in respect of which the stay period was in effect, there were a very limited number of days, or "workdays" when the receiver and its counsel could have been actually working on the file (and the amounts charged for those periods of time are excessive).

47 Counsel for the Debtor submits in his affidavit the hearsay evidence that he received advice from the broker that represents the Second Mortgagees (whom, I pause to observe again, did not take a position on this motion or file any evidence on this motion) that the Receiver's work over that period of time [late July and early August, see para. 18 of the Debtor's factum] "brought no value to the Corporation or its creditors, including the Second Mortgagees". I cannot give any weight to this submission based on that evidence.

48 The Debtor then, in the same manner, challenges as unreasonable the fees of the Receiver and its counsel charged for the period from late September until mid-October 2022 [factum, paras. 18-19], submitting that once the Health Canada licence was issued in late September, a commitment for mortgage refinancing was finalized shortly thereafter, resulting in the request by the Debtor for an extension of the stay or pause of the receivership until November 4, 2022.

49 The Debtor made vigourous submissions to the effect that the Applicant acted unreasonably in refusing to consent to extensions to the stay, to allow for the refinancing and pay out in full of the mortgage loan owing to the Applicant.

50 The position of the Debtor is in large part summed up in paragraphs 42 and 43 of its Factum, and these submissions were repeated in oral argument. The Debtor argues:

> Lastly, all hearings and preparation conducted by the Receiver and its counsel could have been avoided if the Receiver had acted reasonably and allowed for the Refinance to take place. Instead, the Receiver booked, attended and forced counsel for the Lender to attend unnecessary hearings while it knew the Refinance was imminent.
>
> The Refinance closed without any input or aid from the Receiver or Lender whose only interest, it seems, was forcing counsel for the Corporation to attend unnecessary hearings and meetings to incur expenses with respect to the Receivership, which are dubious at best.

51 The source for this submission is the lawyer's own affidavit at paragraphs 29 - 32 (CaseLines B-1-17).

52 The affidavit states at paragraph 53 that certain amounts have been charged by the Receiver and its counsel as set out in chart form. At paragraph 54, the affidavit states that: "I believe that it [attending court and reviewing court documents] brought no value to the Corporation or its creditors and was wasteful. Further, I doubt the necessity of any of ... the work ...".

53 In my view, it is not the role of the Court to attempt to undertake a lawyer by lawyer, line by line, forensic analysis of the invoices for professional fees. Nor is it the role of the Court to attempt to evaluate each docket entry and attempt to come to a determination, particularly on a record like this, as to whether each individual activity on a certain day by a certain professional added demonstrable value.

54 Rather, the Court of Appeal was clear in *Diemer* that such an item-by-item evaluation is what should not be undertaken, in favour of a more holistic review of the constellation of all relevant factors, each of which is an input into the ultimate analysis of whether the fees are fair and reasonable in the circumstances of this particular case.

55 Here, I accept that the professional fees of the Receiver and its counsel were not immaterial. Total fees and

disbursements of approximately $248,000 were significant, even considered as against the amount of the outstanding mortgage loan in default of approximately $6.5 million. However, in my view they were not unreasonable, given the circumstances and the steps that were required to be undertaken. I am not persuaded that they should be reduced as submitted by the Debtor to approximately $125,000.

56 Again, there is no issue about the loan and the default. There can be no issue about the propriety or necessity of the receivership proceeding or the sales process, both of which were approved by the Court. In the same way and as noted above, there can be no issue about the activities of the Receiver and its counsel as set out in the First and Second Reports, which were also previously approved. The issue is whether the fees and disbursements are fair and reasonable.

57 Just as it is inappropriate to consider each individual docket entry independently, I think caution should be exercised when undertaking a retrospective analysis about whether steps taken in a proceeding were reasonable, at the time they were taken. In practical terms, it is not appropriate in a receivership proceeding such as this, to effectively argue that refinancing was imminent from the outset, even prior to the Receivership Order being granted, then argue vigourously for extensions and delay throughout the proceeding because the refinancing was imminent, and then, only following a sale process order being made, actually finalize that refinancing and then submit that none of the intervening steps ought to have been necessary or reasonable at the time they were taken. The opposite is also accurate: if the refinancing had not been obtained, and the sale process and receivership continued, such facts would not automatically make the preceding steps and the fees in respect thereof necessary, fair and reasonable. In each case, all of the factors need to be considered.

58 I am satisfied that while the receivership property consisted largely of one piece of land and the building thereon, it does not follow that the issues confronting the Receiver were necessarily straightforward or uncomplicated. As admitted and indeed emphasized by the Debtor, the value of the asset reflected its unique and single-purpose: operation of a cannabis facility. That in turn required a Health Canada licence which was not issued until later in the process.

59 The chronology of Court attendances and orders does not persuade me that any of them were improper, unnecessary or duplicative. Indeed, a number of them were brought about expressly at the request of the Debtor in the course of its continued and repeated pleas, effectively, for more time within which it could arrange replacement financing and pay out the mortgage debt owing to the Applicant.

60 In oral argument, counsel for the Debtor made three main submissions: i) the Receiver has duties to all stakeholders, including the Debtor; ii) the receivership proceeding itself was opposed by the Debtor and by the Second Mortgagees; and iii) the fees charged are unreasonable.

61 As stated above, neither of the first two submissions assists the Debtor at all, in my view. The only issue on this motion is whether the fees and disbursements are fair and reasonable.

62 The Receivership Order already made provides that the reasonable fees and disbursements of the Receiver and its counsel are authorized to be paid at the applicable standard rates and charges, unless otherwise ordered.

63 As noted above, the fee affidavits and exhibits (i.e., the invoices) are sworn or affirmed statements. I am satisfied that the fees are standard and reasonable. I am satisfied that the steps taken as reflected in the detailed time entries, were reasonable and consistent with the mandate given to the Receiver and its counsel through the Receivership Order. I am unable to conclude that the fees and disbursements charged were excessive or unreasonable.

64 The fees and disbursements of the Receiver and its counsel are approved in the aggregate amount of $247,953.15.

Approval of the Third Report and Activities

65 While approval of the Third Report and the activities described therein are not challenged by the Debtor (save to the extent described above), I have reviewed them and am satisfied they are appropriate. As observed by Morawetz R.S.J. (as he then was) in *Target Canada Co. (Re)*, *2015 ONSC 7574*, *31 C.B.R. (6th) 311*, at para. 22, there are good policy and practical reasons for the Court to approve of the activities of a Monitor.

66 The same observations apply to the activities of a court-appointed Receiver. It should not be a novel concept that the activities of any Court officer can and should be considered by the Court as against the mandate, powers and authority of that officer.

67 The Third Report and the activities described in it are approved.

Costs

68 Each of the Receiver and the Debtor submitted a bill of costs, and seeks partial indemnity costs of this motion in the event it is successful. The Receiver seeks the amount of $18,569.72, inclusive of fees, disbursements and HST. The Debtor seeks the amount of $10,719.18 on the same basis.

69 Section 131 of the *Courts of Justice Act*, *R.S.O. 1990, c. C.43* provides that the costs of any step in a proceeding are in the discretion of the Court. The Receiver was successful and is entitled to its costs.

70 Having considered the factors set out in r. 57.01 of the *Rules of Civil Procedure*, *R.R.O. 1990, Reg. 194*, as they apply to this matter, in my view an appropriate award of costs is $12,500 inclusive of fees, disbursements and HST, which amount is payable by the Debtor to the Receiver within 60 days.

71 Order to go in accordance with these reasons.

P.J. OSBORNE J.

End of Document

2021 SCC 25, 2021 CSC 25
Supreme Court of Canada

Sherman Estate v. Donovan

2021 CarswellOnt 8339, 2021 CarswellOnt 8340, 2021 SCC 25, 2021 CSC 25, [2021] 2 S.C.R. 75, [2021] 2 R.C.S. 75, [2021] S.C.J. No. 25, 331 A.C.W.S. (3d) 489, 458 D.L.R. (4th) 361, 66 C.P.C. (8th) 1, 67 E.T.R. (4th) 163, 72 C.R. (7th) 223, EYB 2021-391973

Estate of Bernard Sherman and Trustees of the Estate and Estate of Honey Sherman and Trustees of the Estate (Appellants) and Kevin Donovan and Toronto Star Newspapers Ltd. (Respondents) and Attorney General of Ontario, Attorney General of British Columbia, Canadian Civil Liberties Association, Income Security Advocacy Centre, Ad IDEM/Canadian Media Lawyers Association, Postmedia Network Inc., CTV, a Division of Bell Media Inc., Global News, a division of Corus Television Limited Partnership, The Globe and Mail Inc., Citytv, a division of Rogers Media Inc., British Columbia Civil Liberties Association, HIV & AIDS Legal Clinic Ontario, HIV Legal Network and Mental Health Legal Committee (Interveners)

Wagner C.J.C., Moldaver, Karakatsanis, Brown, Rowe, Martin, Kasirer JJ.

Heard: October 6, 2020
Judgment: June 11, 2021
Docket: 38695

Proceedings: affirming *Donovan v. Sherman Estate* (2019), 56 C.P.C. (8th) 82, 47 E.T.R. (4th) 1, 2019 CarswellOnt 6867, 2019 ONCA 376, C.W. Hourigan J.A., Doherty J.A., Paul Rouleau J.A. (Ont. C.A.); reversing *Toronto Star Newspapers Ltd. v. Sherman Estate* (2018), 41 E.T.R. (4th) 126, 2018 CarswellOnt 13017, 2018 ONSC 4706, 28 C.P.C. (8th) 102, 417 C.R.R. (2d) 321, S.F. Dunphy J. (Ont. S.C.J.)

Counsel: Chantelle Cseh, Timothy Youdan, for Appellants
Iris Fischer, Skye A. Sepp, for Respondents
Peter Scrutton, for Intervener, Attorney General of Ontario
Jacqueline Hughes, for Intervener, Attorney General of British Columbia
Ryder Gilliland, for Intervener, Canadian Civil Liberties Association
Ewa Krajewska, for Intervener, Income Security Advocacy Centre
Robert S. Anderson, Q.C., for Interveners, Ad IDEM/Canadian Media Lawyers Association, Postmedia Network Inc., CTV, a Division of Bell Media Inc., Global News, a division of Corus Television Limited Partnership, The Globe and Mail Inc. and Citytv, a division of Rogers Media Inc.
Adam Goldenberg, for Intervener, British Columbia Civil Liberties Association
Khalid Janmohamed, for Interveners, HIV & AIDS Legal Clinic Ontario, the HIV Legal Network and the Mental Health Legal Committee

Subject: Civil Practice and Procedure; Criminal; Estates and Trusts
Related Abridgment Classifications
Civil practice and procedure
XXIII Practice on appeal
XXIII.13 Powers and duties of appellate court
XXIII.13.e Evidence on appeal
XXIII.13.e.i New evidence
Judges and courts

XVI Jurisdiction
XVI.11 Jurisdiction of court over own process
XVI.11.c Sealing files

Headnote

Judges and courts --- Jurisdiction — Jurisdiction of court over own process — Sealing files

Wealthy couple were found dead in their home and deaths generated intense public interest and press scrutiny — Estates and estate trustees sought to stem press scrutiny — When applications to obtain certificates of appointment of estate trustees were made, trustees sought sealing order — Application judge granted sealing order — Journalist and newspaper successfully appealed and sealing order was set aside — Trustees appealed — Appeal dismissed — Court of Appeal was right to set aside sealing order — Information in court files was not of highly sensitive character that it could be said to strike at core identity of affected persons — Trustees had failed to show how lifting of sealing orders engaged dignity of affected individuals — It could not be said that risk to privacy was sufficiently serious to overcome strong presumption of openness — Same was true of risk to physical safety.

Civil practice and procedure --- Practice on appeal — Powers and duties of appellate court — Evidence on appeal — New evidence

Juges et tribunaux --- Compétence — Compétence de la cour sur sa propre procédure — Mise sous scellés de dossiers

Couple riche et célèbre a été retrouvé sans vie dans sa résidence, et la mort du couple a suscité un vif intérêt dans le public et provoqué une attention médiatique intense — Successions ainsi que les fiduciaires des successions ont cherché à réfréner l'attention médiatique intense — Quand le temps est venu d'obtenir leurs certificats de nomination à titre de fiduciaires des successions, les fiduciaires ont sollicité une ordonnance de mise sous scellés — Juge de première instance a accordé l'ordonnance de mise sous scellés — Journaliste et journal ont eu gain de cause en appel et l'ordonnance a été annulée — Fiduciaires ont formé un pourvoi — Pourvoi rejeté — Cour d'appel a eu raison d'annuler l'ordonnance de mise sous scellés — Renseignements contenus dans les dossiers judiciaires ne revêtaient pas un caractère si sensible qu'on pourrait dire qu'ils touchaient à l'identité fondamentale des personnes concernées — Fiduciaires n'ont pas démontré en quoi la levée des ordonnances de mise sous scellés mettait en jeu la dignité des personnes touchées — On ne saurait affirmer que le risque pour la vie privée était suffisamment sérieux pour permettre de réfuter la forte présomption de publicité des débats judiciaires — Il en était de même du risque pour la sécurité physique.

Procédure civile --- Procédure en appel — Pouvoirs et obligations de la cour d'appel — Preuve en appel — Nouvelle preuve

A wealthy and prominent husband and wife were found dead in their home. Their deaths generated intense public interest and press scrutiny, and the following year the police service announced that the deaths were being investigated as homicides. The couple's estates and the estate trustees sought to stem the intense press scrutiny. When the time came to obtain certificates of appointment of estate trustees, the trustees sought a sealing order so that the trustees and beneficiaries might be spared any further intrusions into their privacy and be protected from what was alleged to be a risk to their safety. These sealing orders were granted, with the application judge sealing the orders for an initial period of two years with the possibility of renewal.

The sealing orders were challenged by a journalist, who had written a series of articles on the couple's death, and the newspaper for which he wrote. The Court of Appeal allowed the appeal and the sealing orders were lifted. The Court of Appeal concluded that the privacy interest for which the trustees sought protection lacked the quality of public interest and that there was no evidence that could warrant a finding that disclosure of the content of the estate files posed a real risk to anyone's physical safety. The trustees had failed the first stage of the test for obtaining orders sealing the probate files.

The trustees appealed, seeking to restore the sealing orders. The newspaper brought a motion to adduce new evidence on the appeal.

Held: The appeal was dismissed; the motion was dismissed as moot.

Per Kasirer J. (Wagner C.J.C., Moldaver, Karakatsanis, Brown, Rowe, Martin JJ. concurring): There is a strong presumption in favour of open courts. Notwithstanding this presumption, exceptional circumstances do arise where competing interests justified a restriction on the open court principle. Where a discretionary court order limiting constitutionally-protected openness was sought, the applicant must demonstrate as a threshold requirement that openness presents a serious risk to a competing interest of public importance. The applicant must show that the order was necessary to prevent the risk and that, as a matter of proportionality, the benefits of that order restricting openness outweighed its negative effects. For the purposes of the relevant test, an aspect of privacy was recognized as an important public interest. Proceedings in open court could lead to the

dissemination of highly sensitive personal information that would result not just in discomfort or embarrassment, but in an affront to the affected person's dignity. Where this narrower dimension of privacy, rooted in what was seen as the public interest in protecting human dignity, was shown to be at serious risk, an exception to the open court principle may be justified. It could not be said that the risk to privacy was sufficiently serious to overcome the strong presumption of openness. The same was true of the risk to physical safety. The Court of Appeal was right to set aside the sealing orders.

The broad claims of the trustees failed to focus on the elements of privacy that were deserving of public protection in the open court context. Personal information disseminated in open court could be more than a source of discomfort and may result in an affront to a person's dignity. Insofar as privacy served to protect individuals from this affront, it was an important public interest relevant under the 2002 Supreme Court of Canada judgment that set out the relevant test. This public interest would only be seriously at risk where the information in question struck at what was the core identity of the individual concerned: information so sensitive that its dissemination could be an affront to dignity that the public would not tolerate, even in service of open proceedings. The information in the court files was not of this highly sensitive character that it could be said to strike at the core identity of the affected persons. The trustees had failed to show how the lifting of the sealing orders engaged the dignity of the affected individuals.

In order to succeed, the person asking a court to exercise discretion in a way that limits the open court presumption must establish that: (1) court openness poses a serious risk to an important public interest; (2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and (3) as a matter of proportionality, the benefits of the order outweigh its negative effects. Only where all three of these prerequisites have been met can a discretionary limit on openness properly be ordered. Contrary to what the trustees argue, the matters in a probate file are not quintessentially private or fundamentally administrative. The fundamental rationale for openness applies to probate proceedings and thus to the transfer of property under court authority and other matters affected by that court action. The emphasis that the Court of Appeal placed on personal concerns as a means of deciding that the sealing orders failed to meet the necessity requirement was mistaken. It was inappropriate to dismiss the public interest in protecting privacy as merely a personal concern. The important public interest in privacy, as understood in the context of the limits on court openness, is aimed at allowing individuals to preserve control over their core identity in the public sphere to the extent necessary to preserve their dignity. The public has a stake in openness, but it also has an interest in the preservation of dignity: the administration of justice requires that where dignity is threatened in this way, measures be taken to accommodate this privacy concern. The risk to this interest would be serious only where the information that would be disseminated as a result of court openness was sufficiently sensitive such that openness could be shown to meaningfully strike at the individual's biographical core in a manner that threatens their integrity.

The failure of the application judge to assess the sensitivity of the information constituted a failure to consider a required element of the legal test, and this warranted intervention on appeal. Applying the appropriate framework to the facts of this case, it was concluded that the risk to the important public interest in the affected individuals' privacy was not serious. The information that the trustees sought to protect was not highly sensitive and this alone was sufficient to conclude that there was no serious risk to the important public interest in privacy so defined. The relevant privacy interest bearing on the dignity of the affected persons had not been shown. Merely associating the beneficiaries or trustees with the couple's unexplained deaths was not enough to constitute a serious risk to the identified important public interest in privacy, defined in reference to dignity. The trustees did not advance any specific reason why the contents of these files were more sensitive than they may seem at first glance. While some of the material in the court files may well be broadly disseminated, the nature of the information had not been shown to give rise to a serious risk to the important public interest in privacy.

There was no controversy that there was an important public interest in protecting individuals from physical harm. Direct evidence was not necessarily required to establish a serious risk to an important interest. It was not just the probability of the feared harm but also the gravity of the harm itself that was relevant to the assessment of serious risk. There was no dispute that the feared physical harm was grave, but it was agreed that the probability of this harm was speculative. The bare assertion that such a risk exists failed to meet the threshold necessary to establish a serious risk of physical harm. The application judge's conclusion to the contrary was an error warranting intervention. Even if the trustees had succeeded in showing a serious risk to the privacy interest they asserted, a publication ban would likely have been sufficient as a reasonable alternative to prevent this risk. The trustees were not entitled to any discretionary order limiting the open court principle. The Court of Appeal rightly

concluded that there was no basis for asking for redactions because the trustees had failed at this stage of the test for discretionary limits on court openness.

Les cadavres d'un homme et de sa femme, un couple riche et célèbre, ont été retrouvés dans leur résidence. Leur mort a suscité un vif intérêt dans le public et provoqué une attention médiatique intense et, au cours de l'année qui a suivi, le service de police a annoncé que les morts faisaient l'objet d'une enquête pour homicides. La succession du couple ainsi que les fiduciaires des successions ont cherché à réfréner l'attention médiatique intense. Quand le temps est venu d'obtenir leurs certificats de nomination à titre de fiduciaires des successions, les fiduciaires ont sollicité une ordonnance de mise sous scellés dans le but d'épargner aux fiduciaires des successions et aux bénéficiaires de nouvelles atteintes à leur vie privée, et de les protéger contre ce qui, selon les allégations, aurait constitué un risque pour leur sécurité. Les ordonnances de mise sous scellés ont été accordées et le juge de première instance a fait placer sous scellés les dossiers pour une période initiale de deux ans avec possibilité de renouvellement.

Les ordonnances de mise sous scellés ont été contestées par un journaliste qui avait écrit une série d'articles sur la mort du couple et par le journal pour lequel il écrivait. La Cour d'appel a accueilli l'appel et les ordonnances de mise sous scellés ont été levées. La Cour d'appel a conclu que l'intérêt en matière de vie privée à l'égard duquel les fiduciaires sollicitaient une protection ne comportait pas la qualité d'intérêt public et qu'il n'y avait aucun élément de preuve permettant de conclure que la divulgation du contenu des dossiers de succession posait un risque réel pour la sécurité physique de quiconque. Les fiduciaires n'avaient pas franchi la première étape du test relatif à l'obtention d'ordonnances de mise sous scellés des dossiers d'homologation.

Les fiduciaires ont formé un pourvoi visant à faire rétablir les ordonnances de mise sous scellés. Le journal a déposé une requête visant à introduire une nouvelle preuve dans le cadre du pourvoi.

Arrêt: Le pourvoi a été rejeté; la requête, devenue théorique, a été rejetée.

Kasirer, J. (Wagner, J.C.C., Moldaver, Karakatsanis, Brown, Rowe, Martin, JJ., souscrivant à son opinion) : Il existe une forte présomption en faveur de la publicité des débats judiciaires. Malgré cette présomption, il peut arriver des circonstances exceptionnelles où des intérêts opposés justifient de restreindre le principe de la publicité des débats judiciaires. Lorsqu'un demandeur sollicite une ordonnance judiciaire discrétionnaire limitant le principe constitutionnalisé de la publicité des procédures judiciaires, il doit démontrer, comme condition préliminaire, que la publicité des débats en cause présente un risque sérieux pour un intérêt opposé qui revêt une importance pour le public. Le demandeur doit démontrer que l'ordonnance est nécessaire pour écarter le risque et que, du point de vue de la proportionnalité, les avantages de cette ordonnance restreignant la publicité l'emportent sur ses effets négatifs. On a reconnu qu'un aspect de la vie privée constituait un intérêt public important pour l'application du test pertinent. La tenue de procédures judiciaires publiques était susceptible de mener à la diffusion de renseignements personnels très sensibles, laquelle entraînerait non seulement un désagrément ou de l'embarras pour la personne touchée, mais aussi une atteinte à sa dignité. Dans les cas où il est démontré que cette dimension plus restreinte de la vie privée, qui semble tirer son origine de l'intérêt du public à la protection de la dignité humaine, était sérieusement menacée, une exception au principe de la publicité des débats judiciaires peut être justifiée. On ne saurait affirmer que le risque pour la vie privée était suffisamment sérieux pour permettre de réfuter la forte présomption de publicité des débats judiciaires. Il en était de même du risque pour la sécurité physique. La Cour d'appel a eu raison d'annuler les ordonnances de mise sous scellés.

Les larges revendications des fiduciaires n'étaient pas axées sur les éléments de la vie privée qui méritaient une protection publique dans le contexte de la publicité des débats judiciaires. La diffusion de renseignements personnels dans le cadre de débats judiciaires publics peut être plus qu'une source de désagrément et peut aussi entraîner une atteinte à la dignité d'une personne. Dans la mesure où elle sert à protéger les personnes contre une telle atteinte, la vie privée constitue un intérêt public important qui est pertinent en vertu du critère établi par la Cour suprême du Canada dans une décision rendue en 2002. L'intérêt public ne serait sérieusement menacé que si les renseignements en question portaient atteinte à ce que l'on considère comme l'identité fondamentale de la personne concernée : des renseignements si sensibles que leur diffusion pourrait porter atteinte à la dignité de la personne d'une manière que le public ne tolérerait pas, pas même au nom du principe de la publicité des débats judiciaires. En l'espèce, les renseignements contenus dans les dossiers judiciaires ne revêtaient pas ce caractère si sensible qu'on pourrait dire qu'ils touchaient à l'identité fondamentale des personnes concernées. Les fiduciaires n'ont pas démontré en quoi la levée des ordonnances de mise sous scellés mettait en jeu la dignité des personnes touchées.

Pour obtenir gain de cause, la personne qui demande au tribunal d'exercer son pouvoir discrétionnaire de façon à limiter la présomption de publicité doit établir que : 1) la publicité des débats judiciaires pose un risque sérieux pour un intérêt public important; 2) l'ordonnance sollicitée est nécessaire pour écarter ce risque sérieux pour l'intérêt mis en évidence,

car d'autres mesures raisonnables ne permettront pas d'écarter ce risque; et 3) du point de vue de la proportionnalité, les avantages de l'ordonnance l'emportent sur ses effets négatifs. Ce n'est que lorsque ces trois conditions préalables sont remplies qu'une ordonnance discrétionnaire ayant pour effet de limiter la publicité des débats judiciaires pourra dûment être rendue. Contrairement à ce que les fiduciaires soutiennent, les questions soulevées dans un dossier d'homologation ne sont pas typiquement de nature privée ou fondamentalement de nature administrative. La raison d'être fondamentale de la publicité des débats s'applique aux procédures d'homologation et donc au transfert de biens sous l'autorité d'un tribunal ainsi qu'à d'autres questions touchées par ce recours judiciaire. La Cour d'appel a eu tort de mettre l'accent sur les préoccupations personnelles pour décider que les ordonnances de mise sous scellés ne satisfaisaient pas à l'exigence de la nécessité. Il est inapproprié de rejeter l'intérêt du public à la protection de la vie privée au motif qu'il s'agit d'une simple préoccupation personnelle. L'intérêt public important en matière de vie privée, tel qu'il est considéré dans le contexte des limites à la publicité des débats, vise à permettre aux personnes de garder un contrôle sur leur identité fondamentale dans la sphère publique dans la mesure nécessaire pour protéger leur dignité. Le public a un intérêt dans la publicité des débats, mais il a aussi un intérêt dans la protection de la dignité : l'administration de la justice exige que, lorsque la dignité est menacée de cette façon, des mesures puissent être prises pour tenir compte de cette préoccupation en matière de vie privée. Le risque pour cet intérêt ne sera sérieux que lorsque les renseignements qui seraient diffusés en raison de la publicité des débats judiciaires sont suffisamment sensibles pour que l'on puisse démontrer que la publicité porte atteinte de façon significative au coeur même des renseignements biographiques de la personne d'une manière qui menace son intégrité.

En n'examinant pas le caractère sensible des renseignements, le juge de première instance a omis de se pencher sur un élément nécessaire du test juridique, ce qui justifiait une intervention en appel. En appliquant le cadre approprié aux faits de la présente affaire, on a conclu que le risque pour l'intérêt public important à l'égard de la vie privée des personnes touchées n'était pas sérieux. Les renseignements que les fiduciaires cherchaient à protéger n'étaient pas très sensibles, ce qui suffisait en soi pour conclure qu'il n'y avait pas de risque sérieux pour l'intérêt public important en matière de vie privée tel que défini. L'intérêt pertinent en matière de vie privée se rapportant à la dignité des personnes touchées n'a pas été démontré. Le simple fait d'associer les bénéficiaires ou les fiduciaires à la mort inexpliquée du couple ne suffisait pas à constituer un risque sérieux pour l'intérêt public important en matière de dignité ayant été constaté, intérêt défini au regard de la dignité. Les fiduciaires n'ont pas fait valoir de raison précise pour laquelle le contenu de ces dossiers serait plus sensible qu'il n'y paraît à première vue. Même si certains des éléments contenus dans les dossiers judiciaires pouvaient fort bien être largement diffusés, il n'a pas été démontré que la nature des renseignements en cause entraînerait un risque sérieux pour l'intérêt public important en matière de vie privée. Nul n'a contesté l'existence d'un intérêt public important dans la protection des personnes contre un préjudice physique. Une preuve directe n'est pas nécessairement exigée pour démontrer qu'un intérêt important est sérieusement menacé. Ce n'est pas seulement la probabilité du préjudice appréhendé qui est pertinente lorsqu'il s'agit d'évaluer si un risque est sérieux, mais également la gravité du préjudice lui-même. Si nul ne contestait que le préjudice physique appréhendé fût grave, il fallait cependant reconnaître que la probabilité que ce préjudice se produise était conjecturale. Le simple fait d'affirmer qu'un tel risque existe ne permettait pas de franchir le seuil requis pour établir l'existence d'un risque sérieux de préjudice physique. La conclusion contraire tirée par le juge de première instance était une erreur justifiant l'intervention de la Cour d'appel. Même si les fiduciaires avaient réussi à démontrer l'existence d'un risque sérieux pour l'intérêt en matière de vie privée qu'ils invoquent, une interdiction de publication aurait probablement été suffisante en tant qu'autre option raisonnable pour écarter ce risque. Les fiduciaires n'ont droit à aucune ordonnance discrétionnaire limitant le principe de la publicité des débats judiciaires. La Cour d'appel a conclu à juste titre qu'il n'y avait aucune raison de demander un caviardage parce que les fiduciaires n'avaient pas franchi cette étape du test des limites discrétionnaires à la publicité des débats judiciaires.

Table of Authorities

Cases considered by *Kasirer J.*:

A. c. B. & Southam Inc. (1990), 1990 CarswellQue 2075 (C.A. Que.) — referred to

A.B. (Litigation Guardian of) v. Bragg Communications Inc. (2012), 2012 SCC 46, 2012 CarswellNS 675, 2012 CarswellNS 676, 25 C.P.C. (7th) 1, 350 D.L.R. (4th) 519, 95 C.C.L.T. (3d) 171, 1021 A.P.R. 1, 322 N.S.R. (2d) 1, (sub nom. *A.B. v. Bragg Communications Inc.)* [2012] 2 S.C.R. 567, (sub nom. *B. (A.) v. Bragg Communications Inc.)* 266 C.R.R. (2d) 185 (S.C.C.) — considered

A.B. v. Canada (Citizenship and Immigration) (2017), 2017 FC 629, 2017 CarswellNat 3046, 2017 CF 629, 2017 CarswellNat 3604 (F.C.) — considered

C. (R.) c. Gourdeau (2004), 2004 CarswellQue 1804 (C.A. Que.) — considered
Canadian Broadcasting Corp. v. New Brunswick (Attorney General) (1996), 2 C.R. (5th) 1, 110 C.C.C. (3d) 193, [1996] 3 S.C.R. 480, 139 D.L.R. (4th) 385, 182 N.B.R. (2d) 81, 463 A.P.R. 81, 39 C.R.R. (2d) 189, 203 N.R. 169, 1996 CarswellNB 462, 1996 CarswellNB 463, 2 B.H.R.C. 210 (S.C.C.) — considered
Dagenais v. Canadian Broadcasting Corp. (1994), 34 C.R. (4th) 269, 20 O.R. (3d) 816 (note), [1994] 3 S.C.R. 835, 120 D.L.R. (4th) 12, 175 N.R. 1, 94 C.C.C. (3d) 289, 76 O.A.C. 81, 25 C.R.R. (2d) 1, 1994 CarswellOnt 112, 1994 CarswellOnt 1168 (S.C.C.) — followed
Dagg v. Canada (Minister of Finance) (1997), 213 N.R. 161, 148 D.L.R. (4th) 385, 1997 CarswellNat 869, 1997 CarswellNat 870, 46 Admin. L.R. (2d) 155, [1997] 2 S.C.R. 403, 132 F.T.R. 55 (note) (S.C.C.) — considered
Douez v. Facebook, Inc. (2017), 2017 SCC 33, 2017 CSC 33, 2017 CarswellBC 1663, 2017 CarswellBC 1664, 1 C.P.C. (8th) 213, 97 B.C.L.R. (5th) 1, [2017] 7 W.W.R. 637, 3 C.P.C. (8th) 1, 411 D.L.R. (4th) 434, 71 B.L.R. (5th) 1, [2017] 1 S.C.R. 751 (S.C.C.) — considered
Edmonton Journal v. Alberta (Attorney General) (1989), [1990] 1 W.W.R. 577, [1989] 2 S.C.R. 1326, 64 D.L.R. (4th) 577, 102 N.R. 321, 71 Alta. L.R. (2d) 273, 103 A.R. 321, 41 C.P.C. (2d) 109, 45 C.R.R. 1, 1989 CarswellAlta 198, 1989 CarswellAlta 623 (S.C.C.) — considered
Fedeli v. Brown (2020), 2020 ONSC 994, 2020 CarswellOnt 1710, 60 C.P.C. (8th) 417 (Ont. S.C.J.) — referred to
Foster-Jacques v. Jacques (2012), 2012 NSCA 83, 2012 CarswellNS 591, 1014 A.P.R. 166, 320 N.S.R. (2d) 166, 353 D.L.R. (4th) 1, (sub nom. *Coltsfoot Publishing Ltd. v. Foster-Jacques)* 266 C.R.R. (2d) 1, 26 R.F.L. (7th) 259 (N.S. C.A.) — referred to
Godbout c. Longueuil (Ville) (1995), [1995] R.J.Q. 2561, 31 M.P.L.R. (2d) 130, 1995 CarswellQue 175 (C.A. Que.) — considered
Godbout c. Longueuil (Ville) (1997), 219 N.R. 1, (sub nom. *Godbout v. Longueuil (City))* 152 D.L.R. (4th) 577, 1997 CarswellQue 883, 1997 CarswellQue 884, (sub nom. *Godbout v. Longueuil (City))* 47 C.R.R. (2d) 1, 43 M.P.L.R. (2d) 1, (sub nom. *Longueuil (City) v. Godbout)* 97 C.L.L.C. 210-031, [1997] 3 S.C.R. 844 (S.C.C.) — referred to
Goulet c. Transamerica du Canada, cie d'assurance-vie (2002), 2002 SCC 21, 2002 CarswellQue 191, 2002 CarswellQue 192, (sub nom. *Goulet v. Transamerica Life Insurance Co. of Canada)* 210 D.L.R. (4th) 22, (sub nom. *Goulet v. Transamerica Life Insurance Co. of Canada)* [2002] I.L.R. I-4059, (sub nom. *Goulet v. Compagnie d'assurance-vie Transamerica du Canada)* 284 N.R. 139, 35 C.C.L.I. (3d) 204, (sub nom. *Goulet v. Transamerica Life Insurance Co. of Canada)* [2002] 1 S.C.R. 719, 2002 CSC 21 (S.C.C.) — considered
H. (M.E.) v. Williams (2012), 2012 ONCA 35, 2012 CarswellOnt 1100, 108 O.R. (3d) 321, 287 O.A.C. 133, 346 D.L.R. (4th) 668, 15 R.F.L. (7th) 37 (Ont. C.A.) — considered
Himel v. Greenberg (2010), 2010 ONSC 2325, 2010 CarswellOnt 8261, 93 R.F.L. (6th) 357 (Ont. S.C.J.) — considered
Khuja v. Times Newspapers Ltd (2017), [2019] A.C. 161, 2017 UKSC 49 (U.K. S.C.) — considered
Lac d'Amiante du Québec ltée c. 2858-0702 Québec inc. (2001), 2001 SCC 51, 2001 CarswellQue 1864, 2001 CarswellQue 1865, (sub nom. *Lac d'Amiante du Québec Ltée v. 2858-0702 Québec Inc.)* 204 D.L.R. (4th) 331, (sub nom. *Lac d'Amiante du Québec ltée v. 2858-0702 Québec inc.)* 274 N.R. 201, 14 C.P.C. (5th) 189, [2001] 2 S.C.R. 743, 2001 CSC 51 (S.C.C.) — considered
Lavigne v. Canada (Commissioner of Official Languages) (2002), 2002 SCC 53, 2002 CarswellNat 1357, 2002 CarswellNat 1358, 214 D.L.R. (4th) 1, 289 N.R. 282, 228 F.T.R. 319 (note), [2002] 2 S.C.R. 773, 2002 CSC 53 (S.C.C.) — considered
MacIntyre v. Nova Scotia (Attorney General) (1982), [1982] 1 S.C.R. 175, 49 N.S.R. (2d) 609, 40 N.R. 181, 26 C.R. (3d) 193, 96 A.P.R. 609, 132 D.L.R. (3d) 385, (sub nom. *Nova Scotia (Attorney General) v. MacIntyre)* 65 C.C.C. (2d) 129, 1982 CarswellNS 21, 1982 CarswellNS 110 (S.C.C.) — followed
N. (F.), Re (2000), 2000 SCC 35, 2000 CarswellNfld 213, 2000 CarswellNfld 214, 146 C.C.C. (3d) 1, 188 D.L.R. (4th) 1, 35 C.R. (5th) 1, [2000] 1 S.C.R. 880, 191 Nfld. & P.E.I.R. 181, 577 A.P.R. 181 (S.C.C.) — considered
Otis v. Otis (2004), 2004 CarswellOnt 1643, 7 E.T.R. (3d) 221 (Ont. S.C.J.) — referred to
R. v. Chanmany (2016), 2016 ONCA 576, 2016 CarswellOnt 11225, 338 C.C.C. (3d) 578, 352 O.A.C. 121 (Ont. C.A.) — referred to

R. v. Cole (2012), 2012 SCC 53, 2012 CarswellOnt 12684, 2012 CarswellOnt 12685, D.T.E. 2012T-731, 96 C.R. (6th) 88, 223 L.A.C. (4th) 1, 290 C.C.C. (3d) 247, 353 D.L.R. (4th) 447, 436 N.R. 102, 2012 C.L.L.C. 210-059, 297 O.A.C. 1, [2012] 3 S.C.R. 34, 269 C.R.R. (2d) 228, 128 O.R. (3d) 639 (note) (S.C.C.) — considered

R. v. Dyment (1988), 10 M.V.R. (2d) 1, 66 C.R. (3d) 348, 89 N.R. 249, [1988] 2 S.C.R. 417, 45 C.C.C. (3d) 244, 73 Nfld. & P.E.I.R. 13, 229 A.P.R. 13, 55 D.L.R. (4th) 503, 38 C.R.R. 301, 1988 CarswellPEI 7, 1988 CarswellPEI 73 (S.C.C.) — considered

R. v. Esseghaier (2017), 2017 ONCA 970, 2017 CarswellOnt 19349, 356 C.C.C. (3d) 455 (Ont. C.A.) — distinguished

R. v. Henry (2009), 2009 BCCA 86, 2009 CarswellBC 439, 244 C.C.C. (3d) 175, 270 B.C.A.C. 5, 454 W.A.C. 5, 187 C.R.R. (2d) 366 (B.C. C.A. [In Chambers]) — referred to

R. v. Mabior (2012), 2012 SCC 47, 2012 CarswellMan 509, 2012 CarswellMan 510, [2012] 11 W.W.R. 213, 96 C.R. (6th) 1, 352 D.L.R. (4th) 619, 290 C.C.C. (3d) 32, 284 Man. R. (2d) 114, 555 W.A.C. 114, [2012] 2 S.C.R. 584, 268 C.R.R. (2d) 39, 434 N.R. 341 (S.C.C.) — considered

R. v. Marakah (2017), 2017 SCC 59, 2017 CSC 59, 2017 CarswellOnt 19341, 2017 CarswellOnt 19342, 42 C.R. (7th) 1, [2017] 2 S.C.R. 608, 418 D.L.R. (4th) 313, 357 C.C.C. (3d) 281, 396 C.R.R. (2d) 247 (S.C.C.) — referred to

R. v. Mentuck (2001), 2001 SCC 76, 2001 CarswellMan 535, 2001 CarswellMan 536, 158 C.C.C. (3d) 449, 205 D.L.R. (4th) 512, 47 C.R. (5th) 63, 277 N.R. 160, [2002] 2 W.W.R. 409, 163 Man. R. (2d) 1, 269 W.A.C. 1, [2001] 3 S.C.R. 442 (S.C.C.) — followed

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

R. v. Paterson (1998), 122 C.C.C. (3d) 254, 1998 CarswellBC 122, 102 B.C.A.C. 200, 166 W.A.C. 200 (B.C. C.A.) — considered

R. v. Pickton (2010), 2010 BCSC 1198, 2010 CarswellBC 2242 (B.C. S.C.) — referred to

R. v. Plant (1993), [1993] 8 W.W.R. 287, 145 A.R. 104, 55 W.A.C. 104, 17 C.R.R. (2d) 297, 12 Alta. L.R. (3d) 305, 84 C.C.C. (3d) 203, [1993] 3 S.C.R. 281, 24 C.R. (4th) 47, 157 N.R. 321, 1993 CarswellAlta 94, 1993 CarswellAlta 566 (S.C.C.) — considered

R. v. Quesnelle (2014), 2014 SCC 46, 2014 CSC 46, 2014 CarswellOnt 9195, 2014 CarswellOnt 9196, 11 C.R. (7th) 221, 460 N.R. 27, 320 O.A.C. 38, 375 D.L.R. (4th) 71, 312 C.C.C. (3d) 187, [2014] 2 S.C.R. 390, 314 C.R.R. (2d) 283, 129 O.R. (3d) 640 (note) (S.C.C.) — referred to

R. v. Spencer (2014), 2014 SCC 43, 2014 CSC 43, 2014 CarswellSask 342, 2014 CarswellSask 343, [2014] 8 W.W.R. 209, 11 C.R. (7th) 52, 458 N.R. 249, 438 Sask. R. 230, 608 W.A.C. 230, 312 C.C.C. (3d) 215, 375 D.L.R. (4th) 255, [2014] 2 S.C.R. 212, 312 C.R.R. (2d) 349 (S.C.C.) — referred to

R. v. Tessling (2004), 2004 SCC 67, 2004 CarswellOnt 4351, 2004 CarswellOnt 4352, 244 D.L.R. (4th) 541, 189 C.C.C. (3d) 129, 23 C.R. (6th) 207, 326 N.R. 228 (Eng.), 326 N.R. 228 (Fr.), [2004] 3 S.C.R. 432, 192 O.A.C. 168, 75 O.R. (3d) 480 (note), 123 C.R.R. (2d) 257 (S.C.C.) — referred to

Reference re s. 12 (1) of the Juvenile Delinquents Act (Canada) (1983), 146 D.L.R. (3d) 408, 41 O.R. (2d) 113, 3 C.C.C. (3d) 515, (sub nom. *R. v. Southam Inc.)* 34 C.R. (3d) 27, 6 C.R.R. 1, (sub nom. *R. v. Southam Inc.)* 33 R.F.L. (2d) 279, 1983 CarswellOnt 273 (Ont. C.A.) — referred to

S. c. Lamontagne (2020), 2020 QCCA 663, 2020 CarswellQue 4349 (C.A. Que.) — considered

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

Toronto Star Newspaper Ltd. v. R. (2012), 2012 ONCJ 27, 2012 CarswellOnt 1255, (sub nom. *Toronto Star Newspaper Ltd. v. Ontario)* 255 C.R.R. (2d) 207, 289 C.C.C. (3d) 549 (Ont. C.J.) — referred to

Toronto Star Newspapers Ltd. v. Ontario (2005), 2005 SCC 41, 2005 CarswellOnt 2613, 2005 CarswellOnt 2614, 197 C.C.C. (3d) 1, 253 D.L.R. (4th) 577, 29 C.R. (6th) 251, (sub nom. *R. v. Toronto Star Newspapers Ltd.)* 200 O.A.C. 348, (sub nom. *R. v. Toronto Star Newspapers Ltd.)* 335 N.R. 201, 76 O.R. (3d) 320 (note), 132 C.R.R. (2d) 178, [2005] 2 S.C.R. 188 (S.C.C.) — referred to

UFCW, Local 401 v. Alberta (Information and Privacy Commissioner) (2013), 2013 SCC 62, 2013 CarswellAlta 2210, 2013 CarswellAlta 2211, D.T.E. 2013T-775, 365 D.L.R. (4th) 257, [2014] 2 W.W.R. 1, 60 Admin. L.R. (5th) 173, 88 Alta. L.R. (5th) 1, (sub nom. *Alberta (IPC) v. UFCW, Local 401)* 2014 C.L.L.C. 210-003, (sub nom. *United Food and Commercial Workers, Local 401 v. Privacy Commissioner (Alta.))* 451 N.R. 253, (sub nom. *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401)* [2013] 3 S.C.R. 733, (sub nom. *United Food and Commercial Workers, Local 401 v. Privacy Commissioner (Alta.))* 561 A.R. 359, (sub nom. *United Food and Commercial Workers, Local 401 v. Privacy Commissioner (Alta.))* 594 W.A.C. 359, 239 L.A.C. (4th) 317, (sub nom. *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, local 401)* 297 C.R.R. (2d) 71 (S.C.C.) — considered

Vancouver Sun, Re (2004), 2004 SCC 43, 2004 CarswellBC 1376, 2004 CarswellBC 1377, (sub nom. *R. v. Bagri)* 184 C.C.C. (3d) 515, (sub nom. *R. v. Bagri)* 240 D.L.R. (4th) 147, (sub nom. *Application Under Section 83.28 of the Criminal Code, Re)* 322 N.R. 161, 21 C.R. (6th) 142, (sub nom. *Application Under Section 83.28 of the Criminal Code, Re)* 199 B.C.A.C. 1, [2004] 2 S.C.R. 332, 33 B.C.L.R. (4th) 261, 120 C.R.R. (2d) 203, [2005] 2 W.W.R. 671 (S.C.C.) — considered

Work Safe Twerk Safe v. Her Majesty the Queen in Right of Ontario (2021), 2021 ONSC 1100, 2021 CarswellOnt 1831 (Ont. Div. Ct.) — referred to

X. v. Y. (2011), 2011 BCSC 943, 2011 CarswellBC 1874, 21 B.C.L.R. (5th) 410, [2011] 11 W.W.R. 514, 338 D.L.R. (4th) 156, 238 C.R.R. (2d) 219 (B.C. S.C.) — distinguished

Statutes considered:

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

Generally — referred to

s. 2(b) — referred to

s. 8 — considered

Charte des droits et libertés de la personne, RLRQ, c. C-12

art. 5 — referred to

Code civil du Québec, L.Q. 1991, c. 64

art. 35-41 — referred to

Code de procédure civile, RLRQ, c. C-25.01

art. 12 — considered

Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F.31

Generally — referred to

Personal Information Protection and Electronic Documents Act, S.C. 2000, c. 5

Generally — referred to

Privacy Act, R.S.C. 1985, c. P-21

Generally — referred to

APPEAL by estate trustees from judgment reported at *Donovan v. Sherman Estate* (2019), 2019 ONCA 376, 2019 CarswellOnt 6867, 47 E.T.R. (4th) 1, 56 C.P.C. (8th) 82 (Ont. C.A.), allowing appeal from judgment imposing sealing orders.

POURVOI formé par les fiduciaires d'une succession à l'encontre d'un jugement publié à *Donovan v. Sherman Estate* (2019), 2019 ONCA 376, 2019 CarswellOnt 6867, 47 E.T.R. (4th) 1, 56 C.P.C. (8th) 82 (Ont. C.A.), ayant accueilli l'appel interjeté à l'encontre d'un jugement imposant une ordonnance de mise sous scellés.

***Kasirer J.* (Wagner C.J.C. and Moldaver, Karakatsanis, Brown, Rowe and Martin JJ. concurring):**

I. Overview

1 This Court has been resolute in recognizing that the open court principle is protected by the constitutionally-entrenched right of freedom of expression and, as such, it represents a central feature of a liberal democracy. As a general rule, the public

can attend hearings and consult court files and the press — the eyes and ears of the public — is left free to inquire and comment on the workings of the courts, all of which helps make the justice system fair and accountable.

2 Accordingly, there is a strong presumption in favour of open courts. It is understood that this allows for public scrutiny which can be the source of inconvenience and even embarrassment to those who feel that their engagement in the justice system brings intrusion into their private lives. But this discomfort is not, as a general matter, enough to overturn the strong presumption that the public can attend hearings and that court files can be consulted and reported upon by the free press.

3 Notwithstanding this presumption, exceptional circumstances do arise where competing interests justify a restriction on the open court principle. Where a discretionary court order limiting constitutionally-protected openness is sought — for example, a sealing order, a publication ban, an order excluding the public from a hearing, or a redaction order — the applicant must demonstrate, as a threshold requirement, that openness presents a serious risk to a competing interest of public importance. That this requirement is considered a high bar serves to maintain the strong presumption of open courts. Moreover, the protection of open courts does not stop there. The applicant must still show that the order is necessary to prevent the risk and that, as a matter of proportionality, the benefits of that order restricting openness outweigh its negative effects.

4 This appeal turns on whether concerns advanced by persons seeking an exception to the ordinarily open court file in probate proceedings — the concerns for privacy of the affected individuals and their physical safety — amount to important public interests that are at such serious risk that the files should be sealed. The parties to this appeal agree that physical safety is an important public interest that could justify a sealing order but disagree as to whether that interest would be at serious risk, in the circumstances of this case, should the files be unsealed. They further disagree whether privacy is in itself an important interest that could justify a sealing order. The appellants say that privacy is a public interest of sufficient import that can justify limits on openness, especially in light of the threats individuals face as technology facilitates widespread dissemination of personally sensitive information. They argue that the Court of Appeal was mistaken to say that personal concerns for privacy, without more, lack the public interest component that is properly the subject-matter of a sealing order.

5 This Court has, in different settings, consistently championed privacy as a fundamental consideration in a free society. Pointing to cases decided in other contexts, the appellants contend that privacy should be recognized here as a public interest that, on the facts of this case, substantiates their plea for orders sealing the probate files. The respondents resist, recalling that privacy has generally been seen as a poor justification for an exception to openness. After all, they say, virtually every court proceeding entails some disquiet for the lives of those concerned and these intrusions on privacy must be tolerated because open courts are essential to a healthy democracy.

6 This appeal offers, then, an occasion to decide whether privacy can amount to a public interest in the open court jurisprudence and, if so, whether openness puts privacy at serious risk here so as to justify the kind of orders sought by the appellants.

7 For the reasons that follow, I propose to recognize an aspect of privacy as an important public interest for the purposes of the relevant test from *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522. Proceedings in open court can lead to the dissemination of highly sensitive personal information that would result not just in discomfort or embarrassment, but in an affront to the affected person's dignity. Where this narrower dimension of privacy, rooted in what I see as the public interest in protecting human dignity, is shown to be at serious risk, an exception to the open court principle may be justified.

8 In this case, and with this interest in mind, it cannot be said that the risk to privacy is sufficiently serious to overcome the strong presumption of openness. The same is true of the risk to physical safety here. The Court of Appeal was right in the circumstances to set aside the sealing orders and I would therefore dismiss the appeal.

II. Background

9 Prominent in business and philanthropic circles, Bernard Sherman and Honey Sherman were found dead in their Toronto home in December of 2017. Their deaths had no apparent explanation and generated intense public interest and press scrutiny.

In January of the following year, the Toronto Police Service announced that the deaths were being investigated as homicides. As the present matter came before the courts, the identity and motive of those responsible remained unknown.

10 The couple's estates and estate trustees (collectively the "Trustees") [1] sought to stem the intense press scrutiny prompted by the events. The Trustees hoped to see to the orderly transfer of the couple's property, at arm's length from what they saw as the public's morbid interest in the unexplained deaths and the curiosity around apparently great sums of money involved.

11 When the time came to obtain certificates of appointment of estate trustee from the Superior Court of Justice, the Trustees sought a sealing order so that the estate trustees and beneficiaries ("affected individuals") might be spared any further intrusions into their privacy and be protected from what was alleged to be a risk to their safety. The Trustees argued that if the information in the court files was revealed to the public, the safety of the affected individuals would be at risk and their privacy compromised as long as the deaths were unexplained and those responsible for the tragedy remained at large. In support of their request, they argued that there was a real and substantial risk that the affected individuals would suffer serious harm from the public exposure of the materials in the circumstances.

12 Initially granted, the sealing orders were challenged by Kevin Donovan, a journalist who had written a series of articles on the couple's deaths, and Toronto Star Newspapers Ltd., for which he wrote (collectively the "Toronto Star"). [2] The Toronto Star said the orders violated its constitutional rights of freedom of expression and freedom of the press, as well as the attending principle that the workings of the courts should be open to the public as a means of guaranteeing the fair and transparent administration of justice.

III. Proceedings Below

A. Ontario Superior Court of Justice, 2018 ONSC 4706, 41 E.T.R. (4th) 126 (Dunphy J.)

13 In addressing whether the circumstances warranted interference with the open court principle, the application judge relied on this Court's judgment in *Sierra Club* . He noted that a confidentiality order should only be granted when: "(1) such an order is necessary ... to prevent a serious risk to an important interest because reasonable alternative measures will not prevent the risk; and (2) the salutary effects of the confidentiality order outweigh its deleterious effects, including the effects on the right to free expression and the public interest in open and accessible court proceedings" (para. 13(d)).

14 The application judge considered whether the Trustees' interests would be served by granting the sealing orders. In his view, the Trustees had correctly identified two legitimate interests in support of making an exception to the open court principle: "protecting the privacy and dignity of victims of crime and their loved ones" and "a reasonable apprehension of risk on behalf of those known to have an interest in receiving or administering the assets of the deceased" (paras. 22-25). With respect to the first interest, the application judge found that "[t]he degree of intrusion on that privacy and dignity has already been extreme and ... excruciating" (para. 23). For the second interest, although he noted that "it would have been preferable to include objective evidence of the gravity of that risk from, for example, the police responsible for the investigation", he concluded that "the lack of such evidence is not fatal" (para. 24). Rather, the necessary inferences could be drawn from the circumstances notably the "willingness of the perpetrator(s) of the crimes to resort to extreme violence to pursue whatever motive existed" (*ibid.*). He concluded that the "current uncertainty" was the source of a reasonable apprehension of the risk of harm and, further, that the foreseeable harm was "grave" (*ibid.*).

15 The application judge ultimately accepted the Trustees' submission that these interests "very strongly outweigh" what he called the proportionately narrow public interest in the "essentially administrative files" at issue (paras. 31 and 33). He therefore concluded that the harmful effects of the sealing orders were substantially outweighed by the salutary effects on the rights and interests of the affected individuals.

16 Finally, the application judge considered what order would protect the affected individuals while infringing upon the open court principle to the minimum extent possible. He decided no meaningful part of either file could be disclosed if one were to

make the redactions necessary to protect the interests he had identified. Open-ended sealing orders did not, however, sit well with him. The application judge therefore sealed the files for an initial period of two years, with the possibility of renewal.

B. Court of Appeal for Ontario, 2019 ONCA 376, 47 E.T.R. (4th) 1 (Doherty, Rouleau and Hourigan JJ.A.)

17 The Toronto Star's appeal was allowed, unanimously, and the sealing orders were lifted.

18 The Court of Appeal considered the two interests advanced before the application judge in support of the orders to seal the probate files. As to the need to protect the privacy and dignity of the victims of violent crime and their loved ones, it recalled that the kind of interest that is properly protected by a sealing order must have a public interest component. Citing *Sierra Club*, the Court of Appeal wrote that "[p]ersonal concerns cannot, without more, justify an order sealing material that would normally be available to the public under the open court principle" (para. 10). It concluded that the privacy interest for which the Trustees sought protection lacked this quality of public interest.

19 While it recognized the personal safety of individuals as an important public interest generally, the Court of Appeal wrote that there was no evidence in this case that could warrant a finding that disclosure of the contents of the estate files posed a real risk to anyone's physical safety. The application judge had erred on this point: "the suggestion that the beneficiaries and trustees are somehow at risk because the Shermans were murdered is not an inference, but is speculation. It provides no basis for a sealing order" (para. 16).

20 The Court of Appeal concluded that the Trustees had failed the first stage of the test for obtaining orders sealing the probate files. It therefore allowed the appeal and set aside the orders.

C. Subsequent Proceedings

21 The Court of Appeal's order setting aside the sealing orders has been stayed pending the disposition of this appeal. The Toronto Star brought a motion to adduce new evidence on this appeal, comprised of land titles documents, transcripts of the cross-examination of a detective on the murder investigation, and various news articles. This evidence, it says, supports the conclusion that the sealing orders should be lifted. The motion was referred to this panel.

IV. Submissions

22 The Trustees have appealed to this Court seeking to restore the sealing orders made by the application judge. In addition to contesting the motion for new evidence, they maintain that the orders are necessary to prevent a serious risk to the privacy and physical safety of the affected individuals and that the salutary effects of sealing the court probate files outweigh the harmful effects of limiting court openness. The Trustees argue that two legal errors led the Court of Appeal to conclude otherwise.

23 First, they submit the Court of Appeal erred in holding that privacy is a personal concern that cannot, without more, constitute an important interest under *Sierra Club* . The Trustees say the application judge was right to characterize privacy and dignity as an important public interest which, as it was subject to a serious risk, justified the orders. They ask this Court to recognize that privacy in itself is an important public interest for the purposes of the analysis.

24 Second, the Trustees submit that the Court of Appeal erred in overturning the application judge's conclusion that there was a serious risk of physical harm. They argue that the Court of Appeal failed to recognize that courts have the ability to draw reasonable inferences by applying reason and logic even in the absence of specific evidence of the alleged risk.

25 The Trustees say that these errors led the Court of Appeal to mistakenly set aside the sealing orders. In answer to questions at the hearing, the Trustees acknowledged that an order redacting certain documents in the file or a publication ban could assist in addressing some of their concerns, but maintained neither is a reasonable alternative to the sealing orders in the circumstances.

26 The Trustees submit further that the protection of these interests outweighs the deleterious effects of the orders. They argue that the importance of the open court principle is attenuated by the nature of these probate proceedings. Given that it is

non-contentious and not strictly speaking necessary for the transfer of property at death, probate is a court proceeding of an "administrative" character, which diminishes the imperative of applying the open court principle here (paras. 113-14).

27 The Toronto Star takes the position that the Court of Appeal made no mistake in setting aside the sealing orders and that the appeal should be dismissed. In the Toronto Star's view, while privacy can be an important interest where it evinces a public component, the Trustees have only identified a subjective desire for the affected individuals in this case to avoid further publicity, which is not inherently harmful. According to the Toronto Star and some of the interveners, the Trustees' position would allow that measure of inconvenience and embarrassment that arises in every court proceeding to take precedence over the interest in court openness protected by the *Canadian Charter of Rights and Freedoms* in which all of society has a stake. The Toronto Star argues further that the information in the court files is not highly sensitive. On the issue of whether the sealing orders were necessary to protect the affected individuals from physical harm, the Toronto Star submits that the Court of Appeal was right to conclude that the Trustees had failed to establish a serious risk to this interest.

28 In the alternative, even if there were a serious risk to one or another important interest, the Toronto Star says the sealing orders are not necessary because the risk could be addressed by an alternative, less onerous order. Furthermore, it says the orders are not proportionate. In seeking to minimize the importance of openness in probate proceedings, the Trustees invite an inflexible approach to balancing the effects of the order that is incompatible with the principle that openness applies to all court proceedings. In any event, there is a public interest in openness specifically here, given that the certificates sought can affect the rights of third parties and that openness ensures the fairness of the proceedings, whether they are contested or not.

V. Analysis

29 The outcome of the appeal turns on whether the application judge should have made the sealing orders pursuant to the test for discretionary limits on court openness from this Court's decision in *Sierra Club* .

30 Court openness is protected by the constitutional guarantee of freedom of expression and is essential to the proper functioning of our democracy (Canadian Broadcasting Corp. v. New Brunswick (Attorney General), [1996] 3 S.C.R. 480, at para. 23; Vancouver Sun (Re), 2004 SCC 43, [2004] 2 S.C.R. 332, at paras. 23-26). Reporting on court proceedings by a free press is often said to be inseparable from the principle of open justice. "In reporting what has been said and done at a public trial, the media serve as the eyes and ears of a wider public which would be absolutely entitled to attend but for purely practical reasons cannot do so" (*Khuja v. Times Newspapers Ltd*, 2017 UKSC 49, [2019] A.C. 161 (U.K. S.C.), at para. 16, citing *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, at pp. 1339-40, per Cory J.). Limits on openness in service of other public interests have been recognized, but sparingly and always with an eye to preserving a strong presumption that justice should proceed in public view (*Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, at p. 878; R. v. Mentuck, 2001 SCC 76, [2001] 3 S.C.R. 442, at paras. 32-39; *Sierra Club*, at para. 56). The test for discretionary limits on court openness is directed at maintaining this presumption while offering sufficient flexibility for courts to protect these other public interests where they arise (*Mentuck*, at para. 33). The parties agree that this is the appropriate framework of analysis for resolving this appeal.

31 The parties and the courts below disagree, however, about how this test applies to the facts of this case and this calls for clarification of certain points of the *Sierra Club* analysis. Most centrally, there is disagreement about how an important interest in the protection of privacy could be recognized such that it would justify limits on openness, and in particular when privacy can be a matter of public concern. The parties bring two settled principles of this Court's jurisprudence to bear in support of their respective positions. First, this Court has often observed that privacy is a fundamental value necessary to the preservation of a free and democratic society (*Lavigne v. Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53, [2002] 2 S.C.R. 773, at para. 25; Dagg v. Canada (Minister of Finance), [1997] 2 S.C.R. 403, at paras. 65-66, per La Forest J. (dissenting but not on this point); *New Brunswick*, at para. 40). Courts have invoked privacy, in some instances, as the basis for an exception to openness under the *Sierra Club* test (see, e.g., R. v. Henry, 2009 BCCA 86, 270 B.C.A.C. 5, at paras. 11 and 17). At the same time, the jurisprudence acknowledges that some degree of privacy loss — resulting in inconvenience, even in upset or embarrassment — is inherent in any court proceeding open to the public (*New Brunswick*, at para. 40). Accordingly, upholding the presumption of openness has meant recognizing that neither individual sensibilities nor mere personal discomfort associated

with participating in judicial proceedings are likely to justify the exclusion of the public from court (*Attorney General of Nova Scotia v. MacIntyre*, [1982] 1 S.C.R. 175, at p. 185; *New Brunswick*, at para. 41). Determining the role of privacy in the *Sierra Club* analysis requires reconciling these two ideas, which is the nub of the disagreement between the parties. The right of privacy is not absolute; the open court principle is not without exceptions.

32 For the reasons that follow, I disagree with the Trustees that the ostensibly unbounded privacy interest they invoke qualifies as an important public interest within the meaning of *Sierra Club* . Their broad claim fails to focus on the elements of privacy that are deserving of public protection in the open court context. That is not to say, however, that privacy can never ground an exceptional measure such as the sealing orders sought in this case. While the mere embarrassment caused by the dissemination of personal information through the open court process does not rise to the level justifying a limit on court openness, circumstances do exist where an aspect of a person's private life has a plain public interest dimension.

33 Personal information disseminated in open court can be more than a source of discomfort and may result in an affront to a person's dignity. Insofar as privacy serves to protect individuals from this affront, it is an important public interest relevant under *Sierra Club* . Dignity in this sense is a related but narrower concern than privacy generally; it transcends the interests of the individual and, like other important public interests, is a matter that concerns the society at large. A court can make an exception to the open court principle, notwithstanding the strong presumption in its favour, if the interest in protecting core aspects of individuals' personal lives that bear on their dignity is at serious risk by reason of the dissemination of sufficiently sensitive information. The question is not whether the information is "personal" to the individual concerned, but whether, because of its highly sensitive character, its dissemination would occasion an affront to their dignity that society as a whole has a stake in protecting.

34 This public interest in privacy appropriately focuses the analysis on the impact of the dissemination of sensitive personal information, rather than the mere fact of this dissemination, which is frequently risked in court proceedings and is necessary in a system that privileges court openness. It is a high bar — higher and more precise than the sweeping privacy interest relied upon here by the Trustees. This public interest will only be seriously at risk where the information in question strikes at what is sometimes said to be the core identity of the individual concerned: information so sensitive that its dissemination could be an affront to dignity that the public would not tolerate, even in service of open proceedings.

35 I hasten to say that applicants for an order making exception to the open court principle cannot content themselves with an unsubstantiated claim that this public interest in dignity is compromised any more than they could by an unsubstantiated claim that their physical integrity is endangered. Under *Sierra Club*, the applicant must show on the facts of the case that, as an important interest, this dignity dimension of their privacy is at "serious risk". For the purposes of the test for discretionary limits on court openness, this requires the applicant to show that the information in the court file is sufficiently sensitive such that it can be said to strike at the biographical core of the individual and, in the broader circumstances, that there is a serious risk that, without an exceptional order, the affected individual will suffer an affront to their dignity.

36 In the present case, the information in the court files was not of this highly sensitive character that it could be said to strike at the core identity of the affected persons; the Trustees have failed to show how the lifting of the sealing orders engages the dignity of the affected individuals. I am therefore not convinced that the intrusion on their privacy raises a serious risk to an important public interest as required by *Sierra Club* . Moreover, as I shall endeavour to explain, there was no serious risk of physical harm to the affected individuals by lifting the sealing orders. Accordingly, this is not an appropriate case in which to make sealing orders, or any order limiting access to these court files. In the circumstances, the admissibility of the Toronto Star's new evidence is moot. I propose to dismiss the appeal.

A. The Test for Discretionary Limits on Court Openness

37 Court proceedings are presumptively open to the public (*MacIntyre*, at p. 189; A.B. v. Bragg Communications Inc., 2012 SCC 46, [2012] 2 S.C.R. 567, at para. 11).

38 The test for discretionary limits on presumptive court openness has been expressed as a two-step inquiry involving the necessity and proportionality of the proposed order (*Sierra Club*, at para. 53). Upon examination, however, this test rests upon three core prerequisites that a person seeking such a limit must show. Recasting the test around these three prerequisites, without altering its essence, helps to clarify the burden on an applicant seeking an exception to the open court principle. In order to succeed, the person asking a court to exercise discretion in a way that limits the open court presumption must establish that:

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

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

(3) as a matter of proportionality, the benefits of the order outweigh its negative effects.

Only where all three of these prerequisites have been met can a discretionary limit on openness — for example, a sealing order, a publication ban, an order excluding the public from a hearing, or a redaction order — properly be ordered. This test applies to all discretionary limits on court openness, subject only to valid legislative enactments (Toronto Star Newspapers Ltd. v. Ontario, 2005 SCC 41, [2005] 2 S.C.R. 188, at paras. 7 and 22).

39 The discretion is structured and controlled in this way to protect the open court principle, which is understood to be constitutionalized under the right to freedom of expression at s. 2(b) of the Charter (New Brunswick, at para. 23). Sustained by freedom of expression, the open court principle is one of the foundations of a free press given that access to courts is fundamental to newsgathering. This Court has often highlighted the importance of open judicial proceedings to maintaining the independence and impartiality of the courts, public confidence and understanding of their work and ultimately the legitimacy of the process (see, e.g., *Vancouver Sun*, at paras. 23-26). In *New Brunswick*, La Forest J. explained the presumption in favour of court openness had become "'one of the hallmarks of a democratic society'" (citing *Re Southam Inc. and The Queen (No.1)*, (1983), 41 O.R. (2d) 113 (C.A.), at p. 119), that "acts as a guarantee that justice is administered in a non-arbitrary manner, according to the rule of law ... thereby fostering public confidence in the integrity of the court system and understanding of the administration of justice" (para. 22). The centrality of this principle to the court system underlies the strong presumption — albeit one that is rebuttable — in favour of court openness (para. 40; *Mentuck*, at para. 39).

40 The test ensures that discretionary orders are subject to no lower standard than a legislative enactment limiting court openness would be (*Mentuck*, at para. 27; *Sierra Club*, at para. 45). To that end, this Court developed a scheme of analysis by analogy to the *Oakes* test, which courts use to understand whether a legislative limit on a right guaranteed under the Charter is reasonable and demonstrably justified in a free and democratic society (*Sierra Club*, at para. 40, citing *R. v. Oakes*, [1986] 1 S.C.R. 103; see also *Dagenais*, at p. 878; *Vancouver Sun*, at para. 30).

41 The recognized scope of what interests might justify a discretionary exception to open courts has broadened over time. In *Dagenais*, Lamer C.J. spoke of a requisite risk to the "fairness of the trial" (p. 878). In *Mentuck*, Iacobucci J. extended this to a risk affecting the "proper administration of justice" (para. 32). Finally, in *Sierra Club*, Iacobucci J., again writing for a unanimous Court, restated the test to capture any serious risk to an "important interest, including a commercial interest, in the context of litigation" (para. 53). He simultaneously clarified that the important interest must be expressed as a public interest. For example, on the facts of that case, a harm to a particular business interest would not have been sufficient, but the "general commercial interest of preserving confidential information" was an important interest because of its public character (para. 55). This is consistent with the fact that this test was developed in reference to the *Oakes* jurisprudence that focuses on the "pressing and substantial" objective of legislation of general application (*Oakes*, at pp. 138-39; see also Mentuck, at para. 31). The term "important interest" therefore captures a broad array of public objectives.

42 While there is no closed list of important public interests for the purposes of this test, I share Iacobucci J.'s sense, explained in *Sierra Club*, that courts must be "cautious" and "alive to the fundamental importance of the open court rule" even at the earliest stage when they are identifying important public interests (para. 56). Determining what is an important public interest can be done in the abstract at the level of general principles that extend beyond the parties to the particular dispute (para. 55).

By contrast, whether that interest is at "serious risk" is a fact-based finding that, for the judge considering the appropriateness of an order, is necessarily made in context. In this sense, the identification of, on the one hand, an important interest and, on the other, the seriousness of the risk to that interest are, theoretically at least, separate and qualitatively distinct operations. An order may therefore be refused simply because a valid important public interest is not at serious risk on the facts of a given case or, conversely, that the identified interests, regardless of whether they are at serious risk, do not have the requisite important public character as a matter of general principle.

43 The test laid out in *Sierra Club* continues to be an appropriate guide for judicial discretion in cases like this one. The breadth of the category of "important interest" transcends the interests of the parties to the dispute and provides significant flexibility to address harm to fundamental values in our society that unqualified openness could cause (see, e.g., P. M. Perell and J. W. Morden, *The Law of Civil Procedure in Ontario* (4th ed. 2020), at para. 3.185; J. Bailey and J. Burkell, "Revisiting the Open Court Principle in an Era of Online Publication: Questioning Presumptive Public Access to Parties' and Witnesses' Personal Information" (2016), 48 Ottawa L. Rev. 143, at pp. 154-55). At the same time, however, the requirement that a serious risk to an important interest be demonstrated imposes a meaningful threshold necessary to maintain the presumption of openness. Were it merely a matter of weighing the benefits of the limit on court openness against its negative effects, decision-makers confronted with concrete impacts on the individuals appearing before them may struggle to put adequate weight on the less immediate negative effects on the open court principle. Such balancing could be evasive of effective appellate review. To my mind, the structure provided by *Dagenais*, *Mentuck*, and *Sierra Club* remains appropriate and should be affirmed.

44 Finally, I recall that the open court principle is engaged by all judicial proceedings, whatever their nature (*MacIntyre* at pp. 185-86; *Vancouver Sun*, at para. 31). To the extent the Trustees suggested, in their arguments about the negative effects of the sealing orders, that probate in Ontario does not engage the open court principle or that the openness of these proceedings has no public value, I disagree. The certificates the Trustees sought from the court are issued under the seal of that court, thereby bearing the imprimatur of the court's authority. The court's decision, even if rendered in a non-contentious setting, will have an impact on third parties, for example by establishing the testamentary paper that constitutes a valid will (see *Otis v. Otis*, (2004), 7 E.T.R. (3d) 221 (Ont. S.C.), at paras. 23-24). Contrary to what the Trustees argue, the matters in a probate file are not quintessentially private or fundamentally administrative. Obtaining a certificate of appointment of estate trustee in Ontario is a court proceeding and the fundamental rationale for openness — discouraging mischief and ensuring confidence in the administration of justice through transparency — applies to probate proceedings and thus to the transfer of property under court authority and other matters affected by that court action.

45 It is true that other non-probate estate planning mechanisms may allow for the transfer of wealth outside the ordinary avenues of testate or intestate succession — that is the case, for instance, for certain insurance and pension benefits, and for certain property held in co-ownership. But this does not change the necessarily open court character of probate proceedings. That non-probate transfers keep certain information related to the administration of an estate out of public view does not mean that the Trustees here, by seeking certificates from the court, somehow do not engage this principle. The Trustees seek the benefits that flow from the public judicial probate process: transparency ensures that the probate court's authority is administered fairly and efficiently (*Vancouver Sun*, at para. 25; *New Brunswick*, at para. 22). The strong presumption in favour of openness plainly applies to probate proceedings and the Trustees must satisfy the test for discretionary limits on court openness.

B. The Public Importance of Privacy

46 As mentioned, I disagree with the Trustees that an unbounded interest in privacy qualifies as an important public interest under the test for discretionary limits on court openness. Yet in some of its manifestations, privacy does have social importance beyond the person most immediately concerned. On that basis, it cannot be excluded as an interest that could justify, in the right circumstances, a limit to court openness. Indeed, the public importance of privacy has been recognized by this Court in various settings, and this sheds light on why the narrower aspect of privacy related to the protection of dignity is an important public interest.

47 I respectfully disagree with the manner in which the Court of Appeal disposed of the claim by the Trustees that there is a serious risk to the interest in protecting personal privacy in this case. For the appellate judges, the privacy concerns raised

by the Trustees amounted to "[p]ersonal concerns" which cannot, "without more", satisfy the requirement from *Sierra Club* that an important interest be framed as a public interest (para. 10). The Court of Appeal in our case relied, at para. 10, on *H. (M.E.) v. Williams*, 2012 ONCA 35, 108 O.R. (3d) 321, in which it was held that "[p]urely personal interests cannot justify non-publication or sealing orders" (para. 25). Citing as authority judgments of this Court in *MacIntyre* and *Sierra Club*, the court continued by observing that "personal concerns of a litigant, including concerns about the very real emotional distress and embarrassment that can be occasioned to litigants when justice is done in public, will not, standing alone, satisfy the necessity branch of the test" (para. 25). Respectfully stated, the emphasis that the Court of Appeal placed on personal concerns as a means of deciding that the sealing orders failed to meet the necessity requirement in this case and in *Williams* is, I think, mistaken. Personal concerns that relate to aspects of the privacy of an individual who is before the courts can coincide with a public interest in confidentiality.

48 Like the Court of Appeal, I do agree with the view expressed particularly in the pre-*Charter* case of *MacIntyre*, that where court openness results in an intrusion on privacy which disturbs the "sensibilities of the individuals involved" (p. 185), that concern is generally insufficient to justify a sealing or like order and does not amount to an important public interest under *Sierra Club* . But I disagree with the Court of Appeal in this case and in *Williams* that this is because the intrusion only occasions "personal concerns". Certain personal concerns — even "without more" — can coincide with important public interests within the meaning of *Sierra Club* . To invoke the expression of Binnie J. in F.N. (Re), 2000 SCC 35, [2000] 1 S.C.R. 880, at para. 10, there is a "public interest in confidentiality" that is felt, first and foremost, by the person involved and is most certainly a personal concern. Even in *Williams*, the Court of Appeal was careful to note that where, without privacy protection, an individual would face "a substantial risk of serious debilitating emotional ... harm", an exception to openness should be available (paras. 29-30). The means of discerning whether a privacy interest reflects a "public interest in confidentiality" is therefore not whether the interest reflects or is rooted in "personal concerns" for the privacy of the individuals involved. Some personal concerns relating to privacy overlap with public interests in confidentiality. These interests in privacy can be, in my view, important public interests within the meaning of *Sierra Club* . It is true that an individual's privacy is pre-eminently important to that individual. But this Court has also long recognized that the protection of privacy is, in a variety of settings, in the interest of society as a whole.

49 The proposition that privacy is important, not only to the affected individual but to our society, has deep roots in the jurisprudence of this Court outside the context of the test for discretionary limits on court openness. This background helps explain why privacy cannot be rejected as a mere personal concern. However, the key differences in these contexts are such that the public importance of privacy cannot be transposed to open courts without adaptation. Only specific aspects of privacy interests can qualify as important public interests under *Sierra Club* .

50 In the context of s. 8 of the Charter and public sector privacy legislation, La Forest J. cited American privacy scholar Alan F. Westin for the proposition that privacy is a fundamental value of the modern state, first in *R. v. Dyment*, [1988] 2 S.C.R. 417, at pp. 427-28 (concurring), and then in Dagg, at para. 65 (dissenting but not on this point). In the latter case, La Forest J. wrote: "The protection of privacy is a fundamental value in modern, democratic states. An expression of an individual's unique personality or personhood, privacy is grounded on physical and moral autonomy — the freedom to engage in one's own thoughts, actions and decisions" (para. 65 (citations omitted)). That statement was endorsed unanimously by this Court in Lavigne, at para. 25.

51 Further, in Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401 2013 SCC 62, [2013] 3 S.C.R. 733 (“UFCW”), decided in the context of a statute regulating the use of information by organizations, the objective of providing an individual with some control over their information was recognized as "intimately connected to individual autonomy, dignity and privacy, self-evidently significant social values" (para. 24). The importance of privacy, its "quasi-constitutional status" and its role in protecting moral autonomy continues to find expression in our recent jurisprudence (see, e.g., Lavigne, at para. 24; *Bragg*, at para. 18, per Abella J., citing *Toronto Star Newspaper Ltd. v. R.*, 2012 ONCJ 27, 289 C.C.C. (3d) 549, at paras. 40-41 and 44; Douez v. Facebook, Inc., 2017 SCC 33, [2017] 1 S.C.R. 751, at para. 59). In *Douez*, Karakatsanis, Wagner (as he then was) and Gascon JJ. underscored this same point, adding that "the growth of the Internet, virtually timeless with pervasive reach, has exacerbated the potential harm that may flow from incursions to a person's privacy interests" (para. 59).

52 Privacy as a public interest is underlined by specific aspects of privacy protection present in legislation at the federal and provincial levels (see, e.g., Privacy Act, R.S.C. 1985, c. P-21; Personal Information Protection and Electronic Documents Act, S.C. 2000, c. 5 ("PIPEDA"); Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F.31; Charter of Human Rights and Freedoms, CQLR, c. C-12, s. 5; *Civil Code of Québec*, arts. 35 to 41). [3] Further, in assessing the constitutionality of a legislative exception to the open court principle, this Court has recognized that the protection of individual privacy can be a pressing and substantial objective (*Edmonton Journal*, at p. 1345, per Cory J.; see also the concurring reasons of Wilson J., at p. 1354, in which "the public interest in protecting the privacy of litigants generally in matrimonial cases against the public interest in an open court process" was explicitly noted). There is also continued support for the social and public importance of individual privacy in the academic literature (see, e.g., A. J. Cockfield, "Protecting the Social Value of Privacy in the Context of State Investigations Using New Technologies" (2007), 40 U.B.C. L. Rev. 41, at p. 41; K. Hughes, "A Behavioural Understanding of Privacy and its Implications for Privacy Law" (2012), 75 *Mod. L. Rev*. 806, at p. 823; P. Gewirtz, "Privacy and Speech" (2001), *Sup. Ct. Rev*. 139, at p. 139). It is therefore inappropriate, in my respectful view, to dismiss the public interest in protecting privacy as merely a personal concern. This does not mean, however, that privacy generally is an important public interest in the context of limits on court openness.

53 The fact that the case before the application judge concerned individuals who were advancing their own privacy interests, which were undeniably important to them as individuals, does not mean that there is no public interest at stake. In *F.N. (Re)*, this was the personal interest that young offenders had in remaining anonymous in court proceedings as a means of encouraging their personal rehabilitation (para. 11). All of society had a stake, according to Binnie J., in the young person's personal prospect for rehabilitation. This same idea from *F.N. (Re)* was cited in support of finding the interest in *Sierra Club* to be a public interest. That interest, rooted first in an agreement of personal concern to the contracting parties involved, was a private matter that evinced, alongside its personal interest to the parties, a "public interest in confidentiality" (*Sierra Club*, at para. 55). Similarly, while the Trustees have a personal interest in preserving their privacy, this does not mean that the public has no stake in this same interest because — as this Court has made clear — it is related to moral autonomy and dignity which are pressing and substantial concerns.

54 In this appeal, the Toronto Star suggests that legitimate privacy concerns would be effectively protected by a discretionary order where there is "something more" to elevate them beyond personal concerns and sensibilities (R.F., at para. 73). The Income Security Advocacy Centre, by way of example, submits that privacy serves the public interests of preventing harm and of ensuring individuals are not dissuaded from accessing the courts. I agree that these concepts are related, but in my view care must be taken not to conflate the public importance of privacy with that of other interests; aspects of privacy, such as dignity, may constitute important public interests in and of themselves. A risk to personal privacy may be tied to a risk to psychological harm, as it was in *Bragg* (para. 14; see also J. Rossiter, *Law of Publication Bans, Private Hearings, and Sealing Orders* (loose-leaf), s. 2.4.1). But concerns for privacy may not always coincide with a desire to avoid psychological harm, and may focus instead, for example, on protecting one's professional standing (see, e.g., R. v. Paterson(1998), 102 B.C.A.C. 200, at paras. 76, 78 and 87-88). Similarly, there may be circumstances where the prospect of surrendering the personal information necessary to pursue a legal claim may deter an individual from bringing that claim (see S. v. Lamontagne, 2020 QCCA 663, at paras. 34-35 (CanLII)). In the same way, the prospect of surrendering sensitive commercial information would have impaired the conduct of the party's defence in *Sierra Club* (at para. 71), or could pressure an individual into settling a dispute prematurely (K. Eltis, *Courts, Litigants and the Digital Age* (2nd ed. 2016), at p. 86). But this does not necessarily mean that a public interest in privacy is wholly subsumed by such concerns. I note, for example, that access to justice concerns do not apply where the privacy interest to be protected is that of a third party to the litigation, such as a witness, whose access to the courts is not at stake and who has no choice available to terminate the litigation and avoid any privacy impacts (see, e.g., Himel v. Greenberg, 2010 ONSC 2325, 93 R.F.L. (6th) 357, at para. 58; see also Rossiter, s. 2.4.2(2)). In any event, the recognition of these related and valid important public interests does not answer the question as to whether aspects of privacy in and of themselves are important public interests and does not diminish the distinctive public character of privacy, considered above.

55 Indeed, the specific harms to privacy occasioned by open courts have not gone unnoticed nor been discounted as merely personal concerns. Courts have exercised their discretion to limit court openness in order to protect personal information from

publicity, including to prevent the disclosure of sexual orientation (see, e.g., *Paterson*, at paras. 76, 78 and 87-88), HIV status (see, e.g., A.B. v. Canada (Citizenship and Immigration), 2017 FC 629, at para. 9 (CanLII)) and a history of substance abuse and criminality (see, e.g., R. v. Pickton, 2010 BCSC 1198, at paras. 11 and 20 (CanLII)). This need to reconcile the public interest in privacy with the open court principle has been highlighted by this Court (see, e.g., *Edmonton Journal*, at p. 1353, per Wilson J.). Writing extra-judicially, McLachlin C.J. explained that "[i]f we are serious about peoples' private lives, we must preserve a modicum of privacy. Equally, if we are serious about our justice system, we must have open courts. The question is how to reconcile these dual imperatives in a fair and principled way" ("Courts, Transparency and Public Confidence — To the Better Administration of Justice" (2003), 8 *Deakin L. Rev*. 1, at p. 4). In seeking that reconciliation, the question becomes whether the relevant dimension of privacy amounts to an important public interest that, when seriously at risk, would justify rebutting the strong presumption favouring open courts.

C. The Important Public Interest in Privacy Bears on the Protection of Individual Dignity

56 While the public importance of privacy has clearly been recognized by this Court in various settings, caution is required in deploying this concept in the test for discretionary limits on court openness. It is a matter of settled law that open court proceedings by their nature can be a source of discomfort and embarrassment and these intrusions on privacy are generally seen as of insufficient importance to overcome the presumption of openness. The Toronto Star has raised the concern that recognizing privacy as an important public interest will lower the burden for applicants because the privacy of litigants will, in some respects, always be at risk in court proceedings. I agree that the requirement to show a serious risk to an important interest is a key threshold component of the analysis that must be preserved in order to protect the open court principle. The recognition of a public interest in privacy could threaten the strong presumption of openness if privacy is cast too broadly without a view to its public character.

57 Privacy poses challenges in the test for discretionary limits on court openness because of the necessary dissemination of information that openness implies. It bears recalling that when Dickson J., as he then was, wrote in *MacIntyre* that "covertness is the exception and openness the rule", he was explicitly treating a privacy argument, returning to and dismissing the view, urged many times before, "that the 'privacy' of litigants *requires* that the public be excluded from court proceedings" (p. 185 (emphasis added)). Dickson J. rejected the view that personal privacy concerns require closed courtroom doors, explaining that "[a]s a general rule the sensibilities of the individuals involved are no basis for exclusion of the public from judicial proceedings" (ibid).

58 Though writing before *Dagenais*, and therefore not commenting on the specific steps of the analysis as we now understand them, to my mind, Dickson J. was right to recognize that the open court principle brings necessary limits to the right to privacy. While individuals may have an expectation that information about them will not be revealed in judicial proceedings, the open court principle stands presumptively in opposition to that expectation. For example, in *Lac d'Amiante du Québec Ltée v. 2858-0702 Québec Inc.*, 2001 SCC 51, [2001] 2 S.C.R. 743, LeBel J. held that "a party who institutes a legal proceeding waives his or her right to privacy, at least in part" (para. 42). *MacIntyre* and cases like it recognize — in stating that openness is the rule and covertness the exception — that the right to privacy, however defined, in some measure gives way to the open court ideal. I share the view that the open court principle presumes that this limit on the right to privacy is justified.

59 The Toronto Star is therefore right to say that the privacy of individuals will very often be at some risk in court proceedings. Disputes between and concerning individuals that play out in open court necessarily reveal information that may have otherwise remained out of public view. Indeed, much like the Court of Appeal in this case, courts have explicitly adverted to this concern when concluding that mere inconvenience is insufficient to cross the initial threshold of the test (see, e.g., *3834310* Canada inc. v. Chamberland2004 CanLII 4122(Que. C.A.), at para. 30). Saying that any impact on individual privacy is sufficient to establish a serious risk to an important public interest for the purposes of the test for discretionary limits on court openness could render this initial requirement moot. Many cases would turn on the balancing at the proportionality stage. Such a development would amount to a departure from *Sierra Club*, which is the appropriate framework and one which must be preserved.

60 Further, recognizing an important interest in privacy generally could prove to be too open-ended and difficult to apply. Privacy is a complex and contextual concept (*Dagg*, at para. 67; see also B. McIsaac, K. Klein and S. Brown, *The Law of Privacy in Canada* (loose-leaf), vol. 1, at pp. 1-4; D. J. Solove, "Conceptualizing Privacy" (2002), 90 Cal. L. Rev. 1087, at p. 1090).

Indeed, this Court has described the nature of limits of privacy as being in a state of "theoretical disarray" (R. v. Spencer, 2014 SCC 43, [2014] 2 S.C.R. 212, at para. 35). Much turns on the context in which privacy is invoked. I agree with the Toronto Star that a bald recognition of privacy as an important interest in the context of the test for discretionary limits on court openness, as the Trustees advance here, would invite considerable confusion. It would be difficult for courts to measure a serious risk to such an interest because of its multi-faceted nature.

61 While I acknowledge these concerns have merit, I disagree that they require that privacy never be considered in determining whether there is a serious risk to an important public interest. I reach this conclusion for two reasons. First, the problem of privacy's complexity can be attenuated by focusing on the purpose underlying the public protection of privacy as it is relevant to the judicial process, in order to fix precisely on that aspect which transcends the interests of the parties in this context. That narrower dimension of privacy is the protection of dignity, an important public interest that can be threatened by open courts. Indeed, rather than attempting to apply a single unwieldy concept of privacy in all contexts, this Court has generally fixed on more specific privacy interests tailored to the particular situation (*Spencer*, at para. 35; *Edmonton Journal*, at p. 1362, per Wilson J.). That is what must be done here, with a view to identifying the public aspect of privacy that openness might inappropriately undermine.

62 Second, I recall that in order to pass the first stage of the analysis one must not simply invoke an important interest, but must also overcome the presumption of openness by showing a serious risk to this interest. The burden of showing a risk to such an interest on the facts of a given case constitutes the true initial threshold on the person seeking to restrict openness. It is never sufficient to plead a recognized important public interest on its own. The demonstration of a serious risk to this interest is still required. What is important is that the interest be accurately defined to capture only those aspects of privacy that engage legitimate public objectives such that showing a serious risk to that interest remains a high bar. In this way, courts can effectively maintain the guarantee of presumptive openness.

63 Specifically, in order to preserve the integrity of the open court principle, an important public interest concerned with the protection of dignity should be understood to be seriously at risk only in limited cases. Nothing here displaces the principle that covertness in court proceedings must be exceptional. Neither the sensibilities of individuals nor the fact that openness is disadvantageous, embarrassing or distressing to certain individuals will generally on their own warrant interference with court openness (*MacIntyre*, at p. 185; *New Brunswick*, at para. 40; *Williams*, at para. 30; Coltsfoot Publishing Ltd. v. Foster-Jacques, 2012 NSCA 83, 320 N.S.R. (2d) 166, at para. 97). These principles do not preclude recognizing the public character of a privacy interest as important when it is related to the protection of dignity. They merely require that a serious risk be shown to exist in respect of this interest in order to justify, exceptionally, a limit on openness, as is the case with any important public interest under *Sierra Club* . As Professors Sylvette Guillemard and Séverine Menétrey explain, [TRANSLATION] "[t]he confidentiality of the proceedings may be justified, in particular, in order to protect the parties' privacy .... However, the jurisprudence indicates that embarrassment or shame is not a sufficient reason to order that proceedings be held *in camera* or to impose a publication ban" (*Comprendre la procédure civile québécoise* (2nd ed. 2017), at p. 57).

64 How should the privacy interest at issue be understood as raising an important public interest relevant to the test for discretionary limits on court openness in this context? It is helpful to recall that the orders below were sought to limit access to documents and information in the court files. The Trustees' argument on this point focused squarely on the risk of immediate and widespread dissemination of the personally identifying and other sensitive information contained in the sealed materials by the Toronto Star. The Trustees submit that this dissemination would constitute an unwarranted intrusion into the privacy of the affected individuals beyond the upset they have already suffered as a result of the publicity associated with the death of the Shermans.

65 In my view, there is value in leaving individuals free to restrict when, how and to what extent highly sensitive information about them is communicated to others in the public sphere, because choosing how we present ourselves in public preserves our moral autonomy and dignity as individuals. This Court has had occasion to underscore the connection between the privacy interest engaged by open courts and the protection of dignity specifically. For example, in *Edmonton Journal*, Wilson J. noted that the impugned provision which would limit publication about matrimonial proceedings addressed "a somewhat different aspect of privacy, one more closely related to the protection of one's dignity ... namely the personal anguish and loss of dignity

that may result from having embarrassing details of one's private life printed in the newspapers" (pp. 1363-64). In *Bragg*, as a further example, the protection of a young person's ability to control sensitive information was said to foster respect for "dignity, personal integrity and autonomy" (para. 18, citing Toronto Star Newspaper Ltd., at para. 44).

66 Consistent with this jurisprudence, I note by way of example that the Quebec legislature expressly highlighted the preservation of dignity when the *Sierra Club* test was codified in the Code of Civil Procedure, CQLR, c. C-25.01 ("C.C.P."), art. 12 (see also Ministère de la Justice, *Commentaires de la ministre de la Justice: Code de procédure civile*, *chapitre C-25.01* (2015), art. 12). Under art. 12 *C.C.P.*, a discretionary exception to the open court principle can be made by the court if "public order, in particular the preservation of the dignity of the persons involved or the protection of substantial and legitimate interests", requires it.

67 The concept of public order evidences flexibility analogous to the concept of an important public interest under *Sierra Club* yet it recalls that the interest invoked transcends, in importance and consequence, the purely subjective sensibilities of the persons affected. Like the "important public interest" that must be at serious risk to justify the sealing orders in the present appeal, public order encompasses a wide array of general principles and imperative norms identified by a legislature and the courts as fundamental to a given society (see Goulet v. Transamerica Life Insurance Co. of Canada, 2002 SCC 21, [2002] 1 S.C.R. 719, at paras. 42-44, citing *Godbout v. Longueuil (Ville de)*, [1995] R.J.Q. 2561 (C.A.), at p. 2570, aff'd [1997] 3 S.C.R. 844). As one Quebec judge wrote, referring to *Sierra Club* prior to the enactment of art. 12 *C.C.P.*, the interest must be understood as defined [TRANSLATION] "in terms of a public interest in confidentiality" (see *3834310 Canada inc.*, at para. 24, per Gendreau J.A. for the Court of appeal). From among the various considerations that make up the concept of public order and other legitimate interests to which art. 12 *C.C.P.* alludes, it is significant that dignity, and not an untailored reference to either privacy, harm or access to justice, was given pride of place. Indeed, it is that narrow aspect of privacy considered to be a fundamental right that courts had fixed upon before the enactment of art. 12 *C.C.P.* — [TRANSLATION] "what is part of one's personal life, in short, what constitutes a minimum personal sphere" (*Godbout*, at p. 2569, per Baudouin J.A.; see also A. v. B.1990 CanLII 3132(Que. C.A.), at para. 20, per Rothman J.A.).

68 The "preservation of the dignity of the persons involved" is now consecrated as the archetypal public order interest in art. 12 *C.C.P.* It is the exemplar of the *Sierra Club* important public interest in confidentiality that stands as justification for an exception to openness (S. Rochette and J.-F. Côté, "Article 12", in L. Chamberland, ed., *Le grand collectif: Code de procédure civile — Commentaires et annotations* (5th ed. 2020), vol. 1, at p. 102; D. Ferland and B. Emery, *Précis de procédure civile du Québec* (6th ed. 2020), vol. 1, at para. 1-111). Dignity gives concrete expression to this public order interest because all of society has a stake in its preservation, notwithstanding its personal connections to the individuals concerned. This codification of *Sierra Club* 's notion of important public interest highlights the superordinate importance of human dignity and the appropriateness of limiting court openness on this basis as against an overbroad understanding of privacy that might be otherwise unsuitable to the open court context.

69 Consistent with this idea, understanding privacy as predicated on dignity has been advanced as useful in connection with challenges brought by digital communications (K. Eltis, "The Judicial System in the Digital Age: Revisiting the Relationship between Privacy and Accessibility in the Cyber Context" (2011), 56 McGill L.J. 289, at p. 314).

70 It is also significant, in my view, that the application judge in this case explicitly recognized, in response to the relevant arguments from the Trustees, an interest in "protecting the privacy *and dignity* of victims of crime and their loved ones" (para. 23 (emphasis added)). This elucidates that the central concern for the affected individuals on this point is not merely protecting their privacy for its own sake but privacy where it coincides with the public character of the dignity interests of these individuals.

71 Violations of privacy that cause a loss of control over fundamental personal information about oneself are damaging to dignity because they erode one's ability to present aspects of oneself to others in a selective manner (D. Matheson, "Dignity and Selective Self-Presentation", in I. Kerr, V. Steeves and C. Lucock, eds., *Lessons from the Identity Trail: Anonymity, Privacy and Identity in a Networked Society* (2009), 319, at pp. 327-28; L. M. Austin, "Re-reading Westin" (2019), 20 *Theor. Inq. L.* 53, at pp. 66-68; Eltis (2016), at p. 13). Dignity, used in this context, is a social concept that involves presenting core aspects of oneself to others in a considered and controlled manner (see generally Matheson, at pp. 327-28; Austin, at pp. 66-68). Dignity

is eroded where individuals lose control over this core identity-giving information about themselves, because a highly sensitive aspect of who they are that they did not consciously decide to share is now available to others and may shape how they are seen in public. This was even alluded to by La Forest J., dissenting but not on this point, in *Dagg*, where he referred to privacy as "[a]n expression of an individual's unique personality or personhood" (para. 65).

72 Where dignity is impaired, the impact on the individual is not theoretical but could engender real human consequences, including psychological distress (see generally Bragg, at para. 23). La Forest J., concurring, observed in *Dyment* that privacy is essential to the well-being of individuals (p. 427). Viewed in this way, a privacy interest, where it shields the core information associated with dignity necessary to individual well-being, begins to look much like the physical safety interest also raised in this case, the important and public nature of which is neither debated, nor, in my view, seriously debatable. The administration of justice suffers when the operation of courts threatens physical well-being because a responsible court system is attuned to the physical harm it inflicts on individuals and works to avoid such effects. Similarly, in my view, a responsible court must be attuned and responsive to the harm it causes to other core elements of individual well-being, including individual dignity. This parallel helps to understand dignity as a more limited dimension of privacy relevant as an important public interest in the open court context.

73 I am accordingly of the view that protecting individuals from the threat to their dignity that arises when information revealing core aspects of their private lives is disseminated through open court proceedings is an important public interest for the purposes of the test.

74 Focusing on the underlying value of privacy in protecting individual dignity from the exposure of private information in open court overcomes the criticisms that privacy will always be at risk in open court proceedings and is theoretically complex. Openness brings intrusions on personal privacy in virtually all cases, but dignity as a public interest in protecting an individual's core sensibility is more rarely in play. Specifically, and consistent with the cautious approach to the recognition of important public interests, this privacy interest, while determined in reference to the broader factual setting, will be at serious risk only where the sensitivity of the information strikes at the subject's more intimate self.

75 If the interest is ultimately about safeguarding a person's dignity, that interest will be undermined when the information reveals something sensitive about them as an individual, as opposed to generic information that reveals little if anything about who they are as a person. Therefore the information that will be revealed by court openness must consist of intimate or personal details about an individual — what this Court has described in its jurisprudence on s. 8 of the Charter as the "biographical core" — if a serious risk to an important public interest is to be recognized in this context (*R. v. Plant*, [1993] 3 S.C.R. 281, at p. 293; R. v. Tessling, 2004 SCC 67, [2004] 3 S.C.R. 432, at para. 60; *R. v. Cole*, 2012 SCC 53, [2012] 3 S.C.R. 34, at para. 46). Dignity transcends personal inconvenience by reason of the highly sensitive nature of the information that might be revealed. This Court in *Cole* drew a similar line between the sensitivity of personal information and the public interest in protecting that information in reference to the biographical core. It held that "reasonable and informed Canadians" would be more willing to recognize the existence of a privacy interest where the relevant information cuts to the "biographical core" or, "[p]ut another way, the more personal and confidential the information" (para. 46). The presumption of openness means that mere discomfort associated with lesser intrusions of privacy will generally be tolerated. But there is a public interest in ensuring that openness does not unduly entail the dissemination of this core information that threatens dignity — even if it is "personal" to the affected person.

76 The test for discretionary limits on court openness imposes on the applicant the burden to show that the important public interest is at serious risk. Recognizing that privacy, understood in reference to dignity, is only at serious risk where the information in the court file is sufficiently sensitive erects a threshold consistent with the presumption of openness. This threshold is fact specific. It addresses the concern, noted above, that personal information can frequently be found in court files and yet finding this sufficient to pass the serious risk threshold in every case would undermine the structure of the test. By requiring the applicant to demonstrate the sensitivity of the information as a necessary condition to the finding of a serious risk to this interest, the scope of the interest is limited to only those cases where the rationale for not revealing core aspects of a person's private life, namely protecting individual dignity, is most actively engaged.

77 There is no need here to provide an exhaustive catalogue of the range of sensitive personal information that, if exposed, could give rise to a serious risk. It is enough to say that courts have demonstrated a willingness to recognize the sensitivity of information related to stigmatized medical conditions (see, e.g., *A.B.*, at para. 9), stigmatized work (see, e.g., Work Safe Twerk Safe v. Her Majesty the Queen in Right of Ontario, 2021 ONSC 1100, at para. 28 (CanLII)), sexual orientation (see, e.g., *Paterson*, at paras. 76, 78 and 87-88), and subjection to sexual assault or harassment (see, e.g., Fedeli v. Brown, 2020 ONSC 994, at para. 9 (CanLII)). I would also note the submission of the intervener the Income Security Advocacy Centre, that detailed information about family structure and work history could in some circumstances constitute sensitive information. The question in every case is whether the information reveals something intimate and personal about the individual, their lifestyle or their experiences.

78 I pause here to note that I refer to cases on s. 8 of the Charter above for the limited purpose of providing insight into types of information that are more or less personal and therefore deserving of public protection. If the impact on dignity as a result of disclosure is to be accurately measured, it is critical that the analysis differentiate between information in this way. Helpfully, one factor in determining whether an applicant's subjective expectation of privacy is objectively reasonable in the s. 8 jurisprudence focuses on the degree to which information is private (see, e.g., *R. v.* Marakah, 2017 SCC 59, [2017] 2 S.C.R. 608, at para. 31; *Cole*, at paras. 44-46). But while these decisions may assist for this limited purpose, this is not to say that the remainder of the s. 8 analysis has any relevance to the application of the test for discretionary limits on court openness. For example, asking what the Trustees' reasonable expectation of privacy was here could invite a circular analysis of whether they reasonably expected their court files to be open to the public or whether they reasonably expected to be successful in having them sealed. Therefore, it is only for the limited purpose described above that the s. 8 jurisprudence is useful.

79 In cases where the information is sufficiently sensitive to strike at an individual's biographical core, a court must then ask whether a serious risk to the interest is made out in the full factual context of the case. While this is obviously a fact-specific determination, some general observations may be made here to guide this assessment.

80 I note that the seriousness of the risk may be affected by the extent to which information would be disseminated without an exception to the open court principle. If the applicant raises a risk that the personal information will come to be known by a large segment of the public in the absence of an order, this is a plainly more serious risk than if the result will be that a handful of people become aware of the same information, all else being equal. In the past, the requirement that one be physically present to acquire information in open court or from a court record meant that information was, to some extent, protected because it was "practically obscure" (D. S. Ardia, “Privacy and Court Records: Online Access and the Loss of Practical Obscurity”(2017), 4 U. Ill. L. Rev. 1385, at p. 1396). However, today, courts should be sensitive to the information technology context, which has increased the ease with which information can be communicated and cross-referenced (see Bailey and Burkell, at pp. 169-70; Ardia, at pp. 1450-51). In this context, it may well be difficult for courts to be sure that information will not be broadly disseminated in the absence of an order.

81 It will be appropriate, of course, to consider the extent to which information is already in the public domain. If court openness will simply make available what is already broadly and easily accessible, it will be difficult to show that revealing the information in open court will actually result in a meaningful loss of that aspect of privacy relating to the dignity interest to which I refer here. However, just because information is already accessible to some segment of the public does not mean that making it available through the court process will not exacerbate the risk to privacy. Privacy is not a binary concept, that is, information is not simply either private or public, especially because, by reason of technology in particular, absolute confidentiality is best thought of as elusive (see generally *R. v.* Quesnelle, 2014 SCC 46, [2014] 2 S.C.R. 390, at para. 37; *UFCW*, at para. 27). The fact that certain information is already available somewhere in the public sphere does not preclude further harm to the privacy interest by additional dissemination, particularly if the feared dissemination of highly sensitive information is broader or more easily accessible (see generally Solove, at p. 1152; Ardia, at p. 1393-94; E. Paton-Simpson, "Privacy and the Reasonable Paranoid: The Protection of Privacy in Public Places” (2000), 50 U.T.L.J. 305, at p. 346).

82 Further, the seriousness of the risk is also affected by the probability that the dissemination the applicant suggests will occur actually occurs. I hasten to say that implicit in the notion of risk is that the applicant need not establish that the feared

dissemination will certainly occur. However, the risk to the privacy interest related to the protection of dignity will be more serious the more likely it is that the information will be disseminated. While decided in a different context, this Court has held that the magnitude of risk is a product of both the gravity of the feared harm and its probability (R. v. Mabior, 2012 SCC 47, [2012] 2 S.C.R. 584, at para. 86).

83 That said, the likelihood that an individual's highly sensitive personal information will be disseminated in the absence of privacy protection will be difficult to quantify precisely. It is best to note as well that probability in this context need not be identified in mathematical or numerical terms. Rather, courts may merely discern probability in light of the totality of the circumstances and balance this one factor alongside other relevant factors.

84 Finally, and as discussed above, individual sensitivities alone, even if they can be notionally associated with "privacy", are generally insufficient to justify a restriction on court openness where they do not rise above those inconveniences and discomforts that are inherent to court openness (*MacIntyre*, at p. 185). An applicant will only be able to establish that the risk is sufficient to justify a limit on openness in exceptional cases, where the threatened loss of control over information about oneself is so fundamental that it strikes meaningfully at individual dignity. These circumstances engage "social values of superordinate importance" beyond the more ordinary intrusions inherent to participating in the judicial process that Dickson J. acknowledged could justify curtailing public openness (pp. 186-87).

85 To summarize, the important public interest in privacy, as understood in the context of the limits on court openness, is aimed at allowing individuals to preserve control over their core identity in the public sphere to the extent necessary to preserve their dignity. The public has a stake in openness, to be sure, but it also has an interest in the preservation of dignity: the administration of justice requires that where dignity is threatened in this way, measures be taken to accommodate this privacy concern. Although measured by reference to the facts of each case, the risk to this interest will be serious only where the information that would be disseminated as a result of court openness is sufficiently sensitive such that openness can be shown to meaningfully strike at the individual's biographical core in a manner that threatens their integrity. Recognizing this interest is consistent with this Court's emphasis on the importance of privacy and the underlying value of individual dignity, but is also tailored to preserve the strong presumption of openness.

D. The Trustees Have Failed to Establish a Serious Risk to an Important Public Interest

86 As *Sierra Club* made plain, a discretionary order limiting court openness can only be made where there is a serious risk to an important public interest. The arguments on this appeal concerned whether privacy is an important public interest and whether the facts here disclose the existence of serious risks to privacy and safety. While the broad privacy interest invoked by the Trustees cannot be relied on to justify a limit on openness, the narrower concept of privacy understood in relation to dignity is an important public interest for the purposes of the test. I also recognize that a risk to physical safety is an important public interest, a point on which there is no dispute here. Accordingly, the relevant question at the first step is whether there is a serious risk to one or both of these interests. For reasons that follow, the Trustees have failed to establish a serious risk to either. This alone is sufficient to conclude that the sealing orders should not have been issued.

(1) The Risk to Privacy Alleged in this Case Is Not Serious

87 As I have said, the important public interest in privacy must be understood as one tailored to the protection of individual dignity and not the broadly defined interest the Trustees have asked this Court to recognize. In order to establish a serious risk to this interest, the information in the court files about which the Trustees are concerned must be sufficiently sensitive in that it strikes at the biographical core of the affected individuals. If it is not, there is no serious risk that would justify an exception to openness. If it is, the question becomes whether a serious risk is made out in light of the facts of this case.

88 The application judge never explicitly identified a serious risk to the privacy interest he identified but, to the extent he implicitly reached this conclusion, I respectfully do not share his view. His finding was limited to the observation that "[t]he degree of intrusion on that privacy and dignity [i.e., that of the victims and their loved ones] has already been extreme and, I am sure, excruciating" (para. 23). But the intense scrutiny faced by the Shermans up to the time of the application is only part of the

equation. As the sealing orders can only protect against the disclosure of the information in these court files relating to probate, the application judge was required to consider the sensitivity of the specific information they contained. He made no such measure. His conclusion about the seriousness of the risk then focused entirely on the risk of physical harm, with no indication that he found that the Trustees met their burden as to the serious risk to the privacy interest. Said very respectfully and with the knowledge that the application judge did not have the benefit of the above framework, the failure to assess the sensitivity of the information constituted a failure to consider a required element of the legal test. This warranted intervention on appeal.

89 Applying the appropriate framework to the facts of this case, I conclude that the risk to the important public interest in the affected individuals' privacy, as I have defined it above in reference to dignity, is not serious. The information the Trustees seek to protect is not highly sensitive and this alone is sufficient to conclude that there is no serious risk to the important public interest in privacy so defined.

90 There is little controversy in this case about the likelihood and extent of dissemination of the information contained in the estate files. There is near certainty that the Toronto Star will publish at least some aspects of the estate files if it is provided access. Given the breadth of the audience of its media organization, and the high-profile nature of the events surrounding the death of the Shermans, I have no difficulty in concluding that the affected individuals would lose control over this information to a significant extent should the files be open.

91 With regard to the sensitivity of the information, however, the information contained in these files does not reveal anything particularly private about the affected individuals. What would be revealed might well cause inconvenience and perhaps embarrassment, but it has not been shown that it would strike at their biographical core in a way that would undermine their control over the expression of their identities. Their privacy would be troubled, to be sure, but the relevant privacy interest bearing on the dignity of the affected persons has not been shown to be at serious risk. At its highest, the information in these files will reveal something about the relationship between the deceased and the affected individuals, in that it may reveal to whom the deceased entrusted the administration of their estates and those who they wished or were deemed to wish to be beneficiaries of their property at death. It may also reveal some basic personal information, such as addresses. Some of the beneficiaries might well, it may fairly be presumed, bear family names other than Sherman. I am mindful that the deaths are being investigated as homicides by the Toronto Police Service. However, even in this context, none of this information provides significant insight into who they are as individuals, nor would it provoke a fundamental change in their ability to control how they are perceived by others. The fact of being linked through estate documents to victims of an unsolved murder is not in itself highly sensitive. It may be the source of discomfort but has not been shown to constitute an affront to dignity in that it does not probe deeply into the biographical core of these individuals. As a result, the Trustees have failed to establish a serious risk to an important public interest as required by *Sierra Club* .

92 The fact that some of the affected individuals may be minors is also insufficient to cross the seriousness threshold. While the law recognizes that minors are especially vulnerable to intrusions of privacy (see Bragg, at para. 17), the mere fact that information concerns minors does not displace the generally applicable analysis (see, e.g., Bragg, at para. 11). Even taking into account the increased vulnerability of minors who may be affected individuals in the probate files, there is no evidence that they would lose control of information about themselves that reveals something close to the core of their identities. Merely associating the beneficiaries or trustees with the Shermans' unexplained deaths is not enough to constitute a serious risk to the identified important public interest in privacy, defined in reference to dignity.

93 Further, while the intense media scrutiny on the family following the deaths suggests that the information would likely be widely disseminated, it is not in itself indicative of the sensitivity of the information contained in the probate files.

94 Showing that the information that would be revealed by court openness is sufficiently sensitive and private such that it goes to the biographical core of the affected individual is a necessary prerequisite to showing a serious risk to the relevant public interest aspect of privacy. The Trustees did not advance any specific reason why the contents of these files are more sensitive than they may seem at first glance. When asserting a privacy risk, it is essential to show not only that information about individuals will escape the control of the person concerned — which will be true in every case — but that this particular information concerns who the individuals are as people in a manner that undermines their dignity. This the Trustees have not done.

95 Therefore, while some of the material in the court files may well be broadly disseminated, the nature of the information has not been shown to give rise to a serious risk to the important public interest in privacy, as appropriately defined in this context in reference to dignity. For that reason alone, I conclude that the Trustees have failed to show a serious risk to this interest.

(2) The Risk to Physical Safety Alleged in this Case is Not Serious

96 Unlike the privacy interest raised in this case, there was no controversy that there is an important public interest in protecting individuals from physical harm. It is worth underscoring that the application judge correctly treated the protection from physical harm as a distinct important interest from that of the protection of privacy and found that this risk of harm was "foreseeable" and "grave" (paras. 22-24). The issue is whether the Trustees have established a serious risk to this interest for the purpose of the test for discretionary limits on court openness. The application judge observed that it would have been preferable to include objective evidence of the seriousness of the risk from the police service conducting the homicide investigation. He nevertheless concluded there was sufficient proof of risk to the physical safety of the affected individuals to meet the test. The Court of Appeal says that was a misreading of the evidence, and the Toronto Star agrees that the application judge's conclusion as to the existence of a serious risk to safety was mere speculation.

97 At the outset, I note that direct evidence is not necessarily required to establish a serious risk to an important interest. This Court has held that it is possible to identify objectively discernable harm on the basis of logical inferences (*Bragg*, at paras. 15-16). But this process of inferential reasoning is not a licence to engage in impermissible speculation. An inference must still be grounded in objective circumstantial facts that reasonably allow the finding to be made inferentially. Where the inference cannot reasonably be drawn from the circumstances, it amounts to speculation (*R. v.* Chanmany, 2016 ONCA 576, 352 O.A.C. 121, at para. 45).

98 As the Trustees correctly argue, it is not just the probability of the feared harm, but also the gravity of the harm itself that is relevant to the assessment of serious risk. Where the feared harm is particularly serious, the probability that this harm materialize need not be shown to be likely, but must still be more than negligible, fanciful or speculative. The question is ultimately whether this record allowed the application judge to objectively discern a serious risk of physical harm.

99 This conclusion was not open to the application judge on this record. There is no dispute that the feared physical harm is grave. I agree with the Toronto Star, however, that the probability of this harm occurring was speculative. The application judge's conclusion as to the seriousness of the risk of physical harm was grounded on what he called "the degree of mystery that persists regarding both the perpetrator and the motives" associated with the deaths of the Shermans and his supposition that this motive might be "transported" to the trustees and beneficiaries (para. 5; see also paras. 19 and 23). The further step in reasoning that the unsealed estate files would lead to the perpetrator's next crime, to be visited upon someone mentioned in the files, is based on speculation, not the available affidavit evidence, and cannot be said to be a proper inference or some kind of objectively discerned harm or risk thereof. If that were the case, the estate files of every victim of an unsolved murder would pass the initial threshold of the test for a sealing order.

100 Further, I recall that what is at issue here is not whether the affected individuals face a safety risk in general, but rather whether they face such a risk as a result of the openness of these court files. In light of the contents of these files, the Trustees had to point to some further reason why the risk posed by this information becoming publicly available was more than negligible.

101 The speculative character of the chain of reasoning leading to the conclusion that a serious risk of physical harm exists in this case is underlined by differences between these facts and those cases relied on by the Trustees. In *X. v. Y.*, 2011 BCSC 943, 21 B.C.L.R. (5th) 410, the risk of physical harm was inferred on the basis that the plaintiff was a police officer who had investigated "cases involving gang violence and dangerous firearms" and wrote sentencing reports for such offenders which identified him by full name (para. 6). In *R. v. Esseghaier*, 2017 ONCA 970, 356 C.C.C. (3d) 455, Watt J.A. considered it "self-evident" that the disclosure of identifiers of an undercover operative working in counter-terrorism would compromise the safety of the operative (para. 41). In both cases, the danger flowed from facts establishing that the applicants were in antagonistic relationships with alleged criminal or terrorist organizations. But in this case, the Trustees asked the application judge to infer not only the fact

that harm would befall the affected individuals, but also that a person or persons exist who wish to harm them. To infer all this on the basis of the Shermans' deaths and the association of the affected individuals with the deceased is not reasonably possible on this record. It is not a reasonable inference but, as the Court of Appeal noted, a conclusion resting on speculation.

102 Were the mere assertion of grave physical harm sufficient to show a serious risk to an important interest, there would be no meaningful threshold in the analysis. Instead, the test requires the serious risk asserted to be well grounded in the record or the circumstances of the particular case (*Sierra Club*, at para. 54; *Bragg*, at para. 15). This contributes to maintaining the strong presumption of openness.

103 Again, in other cases, circumstantial facts may allow a court to infer the existence of a serious risk of physical harm. Applicants do not necessarily need to retain experts who will attest to the physical or psychological risk related to the disclosure. But on this record, the bare assertion that such a risk exists fails to meet the threshold necessary to establish a serious risk of physical harm. The application judge's conclusion to the contrary was an error warranting the intervention of the Court of Appeal.

E. There Would Be Additional Barriers to a Sealing Order on the Basis of the Alleged Risk to Privacy

104 While not necessary to dispose of the appeal, it bears mention that the Trustees would have faced additional barriers in seeking the sealing orders on the basis of the privacy interest they advanced. I recall that to meet the test for discretionary limits on court openness, a person must show, in addition to a serious risk to an important interest, that the particular order sought is necessary to address the risk and that the benefits of the order outweigh its negative effects as a matter of proportionality (*Sierra Club*, at para. 53).

105 Even if the Trustees had succeeded in showing a serious risk to the privacy interest they assert, a publication ban — less constraining on openness than the sealing orders — would have likely been sufficient as a reasonable alternative to prevent this risk. The condition that the order be necessary requires the court to consider whether there are alternatives to the order sought and to restrict the order as much as reasonably possible to prevent the serious risk (*Sierra Club*, at para. 57). An order imposing a publication ban could restrict the dissemination of personal information to only those persons consulting the court record for themselves and prohibit those individuals from spreading the information any further. As I have noted, the likelihood and extent of dissemination may be relevant factors in determining the seriousness of a risk to privacy in this context. While the Toronto Star would be able to consult the files subject to a publication ban, for example, which may assist it in its investigations, it would not be able to publish and thereby broadly disseminate the contents of the files. A publication ban would seem to protect against this latter harm, which has been the focus of the Trustees' argument, while allowing some access to the file, which is not possible under the sealing orders. Therefore, even if a serious risk to the privacy interest had been made out, it would likely not have justified a sealing order, because a less onerous order would have likely been sufficient to mitigate this risk effectively. I hasten to add, however, that a publication ban is not available here since, as noted, the seriousness of the risk to the privacy interest at play has not been made out.

106 Further, the Trustees would have had to show that the benefits of any order necessary to protect from a serious risk to the important public interest outweighed the harmful effects of the order, including the negative impact on the open court principle (*Sierra Club*, at para. 53). In balancing the privacy interests against the open court principle, it is important to consider whether the information the order seeks to protect is peripheral or central to the judicial process (paras. 78 and 86; *Bragg*, at paras. 28-29). There will doubtless be cases where the information that poses a serious risk to privacy, bearing as it does on individual dignity, will be central to the case. But the interest in important and legally relevant information being aired in open court may well overcome any concern for the privacy interests in that same information. This contextual balancing, informed by the importance of the open court principle, presents a final barrier to those seeking a discretionary limit on court openness for the purposes of privacy protection.

VI. Conclusion

107 The conclusion that the Trustees have failed to establish a serious risk to an important public interest ends the analysis. In such circumstances, the Trustees are not entitled to any discretionary order limiting the open court principle, including the sealing orders they initially obtained. The Court of Appeal rightly concluded that there was no basis for asking for redactions because the Trustees had failed at this stage of the test for discretionary limits on court openness. This is dispositive of the appeal. The decision to set aside the sealing orders rendered by the application judge should be affirmed. Given that I propose to dismiss the appeal on the existing record, I would dismiss the Toronto Star's motion for new evidence as being moot.

108 For the foregoing reasons, I would dismiss the appeal. The Toronto Star requests no costs given the important public issues in dispute. As such, there will be no order as to costs.

Appeal dismissed.

Pourvoi rejeté.

Footnotes

1 As noted in the title of proceedings, the appellants in this matter have been referred to consistently as the "Estate of Bernard Sherman and Trustees of the Estate and Estate of Honey Sherman and Trustees of the Estate." In these reasons the appellants are referred to throughout as the "Trustees" for convenience.

2 The use of "Toronto Star" as a collective term referring to both respondents should not be taken to suggest that only Toronto Star Newspapers Ltd. is participating in this appeal. Mr. Donovan is the only respondent to have been a party throughout. Toronto Star Newspapers Ltd. was a party in first instance, but was removed as a party on consent at the Court of Appeal. By order of Karakatsanis J. dated March 25, 2020, Toronto Star Newspapers Ltd. was added as a respondent in this Court.

3 At the time of writing the House of Commons is considering a bill that would replace part one of *PIPEDA*: Bill C-11, *An Act to enact the Consumer Privacy Protection Act and the Personal Information and Data Protection Tribunal Act and to make consequential and related amendments to other Acts*, 2nd Sess., 43rd Parl., 2020.

2022 ONSC 6354
Ontario Superior Court of Justice

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

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

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

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

McEwen J.

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

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

Subject: Corporate and Commercial; Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency

XIX Companies' Creditors Arrangement Act

XIX.3 Arrangements

XIX.3.a Approval by court

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by court — Discretion of court

Applicants were group of energy companies, who were forced to file for protection under Companies' Creditors Arrangement Act — Applicants reached agreement for transaction — Applicants provided court with reverse vesting order and monitor's order in support of transaction — Applicants applied for approval of transaction — Application granted — Monitor's actions were necessary to implement required steps and provisions of vesting order — Stay extension was also necessary, so that needed steps could be undertaken — Monitor's fees were fair and reasonable — Reverse vesting order was necessary, so that necessary licenses and authorizations for ongoing business operations of applicants could be preserved — Relief was time-sensitive so that vesting order was to be granted immediately — Transaction was fair and reasonable, with proper process being followed — Transaction was more beneficial to creditors, than sale or disposition in bankruptcy would have been — Criteria for transaction had been met, including effort to obtain best price and interests of parties being considered.

Table of Authorities

Cases considered by *McEwen J.*:

Arrangement relatif à Blackrock Metals Inc. (2022), 2022 QCCS 2828, 2022 CarswellQue 10503, 2 C.B.R. (7th) 214 (C.S. Que.) — considered

Arrangement relatif à Blackrock Metals Inc. (2022), 2022 QCCA 1073, 2022 CarswellQue 11443 (C.A. Que.) — considered

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

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

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

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

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

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

Statutes considered:

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

Generally — referred to

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

Generally — referred to

s. 173 — referred to

s. 176(1)(b) — referred to

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

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

s. 191(2) — referred to

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

Generally — considered

s. 11 — referred to

s. 36 — referred to

s. 36(3) — referred to

s. 36(4) — referred to

Wage Earner Protection Program Act, S.C. 2005, c. 47, s. 1

Generally — referred to

APPLICATION by group of energy companies for approval of reverse vesting order and transaction in bankruptcy proceedings.

***McEwen J.*:**

1 The Applicants (collectively the "Just Energy Entities") bring a motion seeking approval of a going-concern sale transaction (the "Transaction") for their business. They seek to implement the Transaction through a proposed draft reverse vesting order (the "RVO") and other related relief.

2 The Just Energy Entities provided the court with two draft orders in furtherance of their position. The first is the RVO for the Transaction. The second is an order (the "Monitor's Order") giving FTI Consulting Canada Inc. (the "Monitor") enhanced powers to implement the RVO and other related relief, including a stay extension, approval of the Monitor's reports and fees and a sealing order.

3 I granted the two orders with reasons to follow. I am now providing those reasons.

BACKGROUND

4 Just Energy Group Inc. ("Just Energy") and its subsidiaries collectively form the Just Energy Entities. Just Energy is primarily a holding company that operates subsidiaries in Canada and the U.S.

5 Just Energy is incorporated under the*Canada*Business Corporations Act, R.S.C. 1985, c. C–44 (“CBCA”) . It maintains dual headquarters in Ontario and Texas. Just Energy's shares are listed on the Toronto Stock Exchange and the New York Stock Exchange.

6 The Just Energy Entities are a retail energy provider. Their principal line of business consists of purchasing retail energy and natural gas commodities from large energy suppliers and reselling them to residential and commercial customers. The Just Energy Entities service over 950,000 residential and commercial customers across Canada and the U.S. and employ over 1,000 employees.

7 The Just Energy Entities' business is highly regulated. This is because of its nature. The business depends on many licenses, authorizations and permits across multiple jurisdictions in both Canada and the U.S. Without these approvals the Just Energy Entities cannot market or sell energy to its customers.

8 On March 9, 2022, the Just Energy Entities obtained protection under the Companies' Creditors Arrangement Act,R.S.C. 1985, c.C–36 (the "*CCAA*") pursuant to anInitial Order under the *CCAA*.

9 The Just Energy Entities were forced to file for protection under the *CCAA* after an extreme winter storm in Texas. The February 2021 storm, together with Texas regulators' response to the storm, posed a significant liquidity challenge that precipitated the filing. In or about the time of the filing, the Just Energy Entities held an aggregate book value of approximately CDN $1.069 billion, with an aggregate book value of liabilities around CDN $1.28 billion.

10 There is a complicated array of secured creditors. Insofar as the Transaction is concerned, the Pacific Investment Management Company LLC ("PIMCO") manages a number of funds which comprise a portion of the secured creditors and/or the DIP Lenders. These entities constitute the purchaser in the Transaction (the "Purchaser").

11 There are also several other secured creditors, including the Credit Facility Lenders and secured suppliers. They have reached an agreement with the Just Energy Entities and the Purchaser with respect to the Transaction.

12 In September 2021, this court granted aClaims Process Order to establish a process to determine the nature, quantum and validity of the claims against the Just Energy Entities.

13 In May 2022, the Just Energy Entities brought a motion (the "Meetings Order Motion") seeking, amongst other things, authorization to hold a creditors' meeting to vote on their proposed Plan of Compromise and Arrangement.

14 Some unsecured litigation claimants opposed the Meetings Order Motion: primarily, two uncertified U.S. class actions (together the "U.S. Class Actions"), a certified Ontario class action (the "Omarali Class Action") and plaintiffs in four actions brought in Texas by approximately 250 claimants (the "Mass Tort Claims").

15 Following my June 10, 2022 Endorsement, the Plan Sponsor — that consisted of the DIP Lenders, one of their affiliates and other stakeholders — withdrew their support for the proposed Plan of Compromise and Arrangement.

16 Thereafter, the Just Energy Entities, the Plan Sponsor and other supporting stakeholders pivoted to implementing a sales and investment solicitation process (the "SISP") in accordance with the new Support Agreement dated August 4, 2022 (the "SISP Support Agreement"). The SISP included a stalking-horse bid by the Purchaser.

17 On August 18, 2022, I granted an order (the "SISP Approval Order") that, amongst other things, approved the SISP and SISP Support Agreement with modest modifications.

18 The SISP was conducted over a 10-week period. It was conducted in accordance with the SISP Approval Order and was well-publicized. The Just Energy Entities negotiated non-disclosure agreements with potential bidders, facilitated access to the data room for those parties, responded to numerous due diligence requests and offered management presentation meetings. Four written notices of intention to bid ("NOIs") were received. Ultimately, however, no bids were received; therefore, the Transaction was declared the successful bid, subject to court approval.

19 It bears noting that, in addition to the SISP, the business of the Just Energy Entities was broadly and extensively marketed over the past approximately three years. No meaningful proposals were ever received.

20 Also, at the time of the SISP ApprovalOrder, the Just Energy Entities had been negotiating with their key stakeholders for roughly 1.5 years.

21 Further, U.S. Class Actions were involved in the SISP but ultimately did not file a NOI or engage in further discussions with the Just Energy Entities in the SISP.

22 The value that the Purchaser is paying for the Just Energy Entities is approximately U.S. $444 million plus the assumption of several liabilities, all of which provides recovery for the approximately CDN $1 billion in secured claims.

23 Last, all equity interests of Just Energy and Just Energy (U.S.) Corp. ("JEUS") that exist prior to the proposed implementation of the RVO will be deemed to be terminated, cancelled or redeemed following the closing. The Purchaser will

own all the issued and outstanding shares of JEUS. In turn, JEUS will own all of the issued and outstanding shares of Just Energy and the other acquired entities. The Just Energy Entities will continue to control their own assets, other than the excluded assets, and will remain liable for their respective assumed liabilities.

THE ISSUES

24 There are two issues on this motion:

- whether the Transaction should be approved, including the RVO and related relief; and
- whether the Monitor should receive the enhanced powers requested in the Monitor's Order with respect to the implementation of the RVO and the related relief, including the stay extension, approval of the Monitor's reports and fees and a sealing order.

25 The secured creditors consent to the relief sought. Neither the U.S. Class Actions, the Omarali Class Action nor the Mass Tort Claims opposed the relief sought. The only opposition comes from Mr. Ganesh Yadav, a shareholder, and Mr. Mohammad Jaafari, a former employee of Just Energy who is pursuing a claim in the Tokyo District Court of Japan alleging wrongful termination.

26 I will first deal with the issues surrounding the RVO and the Monitor's Order. Thereafter I will outline the two specific claims of Mr. Yadav and Mr. Jaafari and explain why I do not believe their claims affect the relief sought by the Just Energy Entities.

REVERSE VESTING ORDERS

27 A reverse vesting order generally involves a series of steps, whereby:

(a) the purchaser becomes the sole shareholder of the debtor company;

(b) the debtor company retains its assets, including key contracts and permits; and

(c) the liabilities not assumed by the purchaser are vested out and transferred, together with any excluded assets, into a newly incorporated entity or entities. [1]

The assets and liabilities are vested out in the separate entity or entities (which are referred to in the RVO as "Residual Cos.") which may then be addressed through a bankruptcy or similar process. The reverse vesting order is therefore contrasted with a traditional vesting order in which the assets of a debtor company that the purchaser acquires are vested in the purchaser free and clear of any encumbrances or claims, other than those assumed by the purchaser, as contemplated by s. 36(4) of the CCAA. The purchase price stands in place of the assets and is available to satisfy creditor claims, in whole or in part, in accordance with their pre-existing priority.

The Law relating to Reverse Vesting Orders

28 I begin my analysis with a general review of the law.

29 The jurisdiction to approve a transaction through a reverse vesting order is found in s. 11 of the CCAA. Section 11 gives this court broad powers to make orders that it sees fit, subject to the restrictions set out in the statute. There is no provision in the *CCAA* that prohibits a reverse vesting order structure: see QuestUniversity (Re), 2020 BCSC 1883, at para. 157.

30 Some courts have also held that s. 36*o*f the CCAA confers jurisdiction. Section 36 contemplates court approval for the sale of a debtor company's assets out of the ordinary course of business: see *Black Rock Metals Inc.*; *Quest University (Re)*, at para. 40.

31 In any event, it is settled law that courts have jurisdiction to approve a transaction involving a reverse vesting order. Moreover, courts agree that the factors set out in s. 36(3) of the CCAA should also be considered on a motion to approve a sale, including one involving a reverse vesting order. Section 36(3) stipulates that the court is to consider, among other things,

> (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
>
> (b) whether the monitor approved the process leading to the proposed sale or disposition;
>
> (c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
>
> (d) the extent to which the creditors were consulted;
>
> (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
>
> (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

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

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

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

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

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

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

The RVO should be granted

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

37 As set out in the affidavit of Mr. Michael Carter, the Chief Financial Officer to the Just Energy Entities (at para. 57), the value of the Just Energy Entities' business arises predominantly from the gross margin in their customer contracts. The business

is wholly dependent on the Just Energy Entities holding several non-transferable licenses and authorizations that permit their operation in Canada and the U.S. and in their agreements with over 100 public utilities, which allow the Just Energy Entities to provide natural gas and electricity in certain markets to their customers.

38 Currently the Just Energy Entities hold at least:

- Seventeen separate licenses and authorizations in five provinces in Canada which allows them to market natural gas and electricity in the applicable provincial markets, eight of which are non-transferrable and non-assignable, with the remaining nine only assignable with leave of the regulator.

- Five separate import and export orders issued by the Canadian Energy Regulator ("CER"), all of which are non-transferrable and non-assignable.

- Three separate registrations with the Alberta Electricity System Operator (the "AESO") in Alberta and with the Independent Electricity System Operator ("IESO") in Ontario, all of which are either non-transferrable or only assignable with leave.

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

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

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

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

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

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

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

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

41 Additionally, Mr. Carter (at para. 60) deposes that the Just Energy Entities are party to a myriad of hedging transactions. This includes hedge transactions with commodity suppliers to minimize commodity and volume risk, foreign exchange hedge transactions and hedges for renewal energy credits, many of which are fundamental to the Just Energy Entities' ability to effectively operate their business and non-transferrable. Moreover, any U.S. tax attributes resident in the Just Energy Entities

would generally be unable to be utilized in the go-forward business where the Transaction structure has a traditional asset sale vesting order.

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

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

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

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

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

The Transaction is fair and reasonable

The process leading to the proposed sale was reasonable

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

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

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

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

The Monitor has approved the process

51 As noted, the Monitor approved the process that lead to the Transaction. The Monitor concluded that the RVO is the only efficient means to ensure that all the licenses, authorizations and agreements remain in place. The Monitor is also of the view that any potential prejudice to the individual creditors is far outweighed by the overall benefit of the Transaction. Importantly,

the Monitor also believes that the RVO represents the only viable alternative to implement the Transaction for the benefit of the Just Energy Entities' stakeholders.

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

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

The creditors were consulted

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

The effect of the Transaction on creditors and other interested parties

54 I am of the belief that the RVO is the only viable option for a going-concern exit from the *CCAA* proceedings.

55 No other offers have been obtained, not only during the SISP but also in the past three years when the Just Energy Entities' business was being broadly and extensively marketed. No other plan or proposal has been put forward.

56 The Transaction, in my view, provides a number of positive benefits, including:

- preserving the going-concern value of the business for the benefit of stakeholders;
- maintaining the Just Energy Entities' relationships with the majority of its commodity suppliers, vendors, trade creditors and other counter-parties;
- providing for the continued operation of the Just Energy Entities across Canada and the U.S.;
- continuing to supply uninterrupted energy to the Just Energies Entities approximately 950,000 customers;
- preserving the ongoing employment of most of the more than 1,000 employees of the Just Energy Entities;
- maintaining the aforementioned regulatory and licensing relationships across Canada and the U.S.;
- satisfying or assuming in full all secured claims and priority payables;
- preserving U.S. tax attributes and tax pools; and
- permitting the Just Energy Entities to exit these proceedings with a significantly deleveraged balance sheet and a U.S. $250 million new credit facility bringing an end to the *CCAA* proceedings aside from the limited matters related to the Residual Cos.

57 As discussed, the Transaction does not provide any recovery for unsecured creditors or shareholders. I accept the submissions of the Just Energy Entities, however, that this is not a result of the RVO structure. Rather, this reflects the fact that the Just Energy Entities' value, as tested through the market through the SISP and through previous marketing attempts over three years, is not high enough to generate value for the unsecured creditors and shareholders. This was also the situation in *Black Rock Metals Inc.* (see paras. 109, 120). I agree with the comments in *Black Rock Metals Inc.* wherein Chief Justice Paquette stated that the unsecured creditors and shareholders are therefore not in a worse position with the reverse vesting order

than they would have been under a traditional asset sale. Either way, they have no economic interest because the purchase price would not generate any value for the unsecured creditors and shareholders.

58 There is no other viable option being presented to this court. Further, it bears noting that the shareholders' interests amount to claims in equity. As noted in *Harte Gold Corp. (Re)* , at para. 64, shareholders have no economic interest in an insolvent enterprise and therefore they are not entitled to a vote in any plan. The portion of the order requested relating to the cancellation of the existing shares is, therefore, justified in the circumstances.

59 The consideration to be received for the assets is fair and reasonable. The Just Energy Entities' business was extensively marketed both prior to and during the *CCAA*. There have been no offers, except that put forth by the Purchaser. Therefore, I accept that the consideration is fair and reasonable.

60 While it is unfortunate that there is no recovery for unsecured creditors or shareholders, this is a function of the market. In this regard, it is noteworthy that PIMCO holds over U.S. $250 million in unsecured debt that it will not recover.

61 There is also evidence above that the purchaser is paying more than the Just Energy Entities would be worth in a bankruptcy. Furthermore, the Monitor is satisfied that the consideration is fair in the circumstances.

Other considerations

62 Based on the foregoing analysis of the s. 36(3) provisions, I am also satisfied that the criteria set out above in *Soundair* have been met: there has been a sufficient effort to obtain the best price; the debtor has not acted improvidently; the interests of the parties have been properly considered; the process has been carried out with efficacy and integrity; and there is no unfairness in the circumstances.

63 The Transaction will provide for a fair and reasonable resolution of the Just Energy Entities' insolvency and obtain the best value for its assets. In sum, employment is preserved for most employees and energy will continued to be provided for approximately 950,000 customers.

Related relief

64 With respect to the shareholdings in the Just Energy Entities, it is reasonable to cancel the existing shares and issue new common shares to the Purchaser via JEUS. Similar approaches have been used in other reverse vesting order transactions: see *Black Rock Metals Inc.*, at para. 122; *Harte Gold Corp. (Re)* , at paras. 59-64. Since the existing shareholders have no economic interest in the company, there is no entitlement to recovery unless all creditors are paid in full: *Canwest Global Communications Corp. (Re)*, 2010 ONSC 4209, 70 C.B.R. (5th) 1.

65 The *CBCA* provides that the share conditions of a *CBCA* corporation under *CCAA* protection can be changed by articles of reorganization. Section 191(1) of the CBCA recognizes that a "reorganization" includes a court order made under any Act of Parliament that affects the rights among the corporation, its shareholders and other creditors (see s. 191(1)(c)). This includes the *CCAA*: see *Canwest*, at para. 34; *Black Rock Metals Inc.*, at para. 122; *Harte Gold Corp. (Re)* , at para. 61 (dealing with the equivalent provision of Ontario's Business Corporations Act, R.S.O. 1990, c.B.16. (*OBCA*)).

66 Pursuant to ss. 173, 176(1)(b) and191(2) of the *CBCA* , courts have accepted that, under a *CCAA* proceeding, they can approve the cancellation of outstanding shares as part of a corporate reorganization that gives effect to a *CCAA* restructuring transaction and that the shareholders are not entitled to vote: see *Harte Gold Corp. (Re)*, at para. 62; *Black Rock Metals Inc.*, at para. 122; *Canwest*, at para. 34.

67 There are also a number of other orders requested in the RVO that I have approved. I will briefly deal with the noteworthy ones below, as follows:

- It is appropriate that the RVO provides that all former employees of the Just Energy Entities be transferred to the Canadian Residual Cos. This will assist these former employees in relation to their entitlements under the Wage Earner Protection

Program Act,S.C. 2005, c.47, s.1. Similar relief was granted in *Quest University (Re)*, which also involved a reverse vesting order.

• The releases sought are proportional in scope and consistent with releases granted in other similar *CCAA* proceedings. I have analyzed the factors set out by Penny J. in *Harte Gold Corp. (Re)* , at paras. 81-86. As in that case, the releases are rationally connected to the purposes of the restructuring; the releasees contributed to the restructuring; the releases are not overly broad; the releases will enhance the certainty and finality of the Transaction; the releases benefit the Just Energy Entities, its creditors and other stakeholders by reducing the potential for the released parties to seek indemnification; and all creditors on the service list were made aware of the releases sought and the nature and effect of the release.

• The specific relief in the RVO concerning the ongoing litigation with the Electric Reliability Council of Texas Inc. ("ERCOT") is fair and reasonable. The wording was negotiated with ERCOT and preserves the Just Energy Entities' and ERCOT's rights in the ongoing litigation between them as set out para. 11.

• Similarly, the paragraphs of the RVO concerning the Omarali Class Action are fair and reasonable and have been negotiated with the Omarali Class Action solicitors and are not prejudicial to the insurers noted therein.

• All remaining ancillary relief is fair and reasonable. I have simply touched upon the most significant ancillary relief above.

THE MONITOR'S ORDER

68 As outlined, I granted the Monitor'sOrder.

69 First, it is necessary that the Monitor carry on in order to implement the steps required with respect to the Residual Cos. in Canada and the U.S. and to implement the provisions of the RVO.

70 Second, the stay extension to January 31, 2023 is also necessary given the steps that must be undertaken.

71 I have reviewed the activities of the Monitor's reports and fees and they are fair and reasonable.

72 Last, I agree that a sealing order should be issued with respect to confidential Exhibit "F" of Mr. Caiger's affidavit. Exhibit "F" is comprised of the four NOIs received by the Just Energy Entities. The NOIs contain confidential, commercially sensitive information regarding the identities of the four participants and their respective corporate, operational and financial information disclosed in support of the requirement of each NOI. Additionally, the NOIs contain confidential and commercially sensitive information regarding the scope and subject matter of each proposed bid. Dissemination of this information at this time, would pose a legitimate risk to the commercial interests of the SISP participants and the Just Energy Entities and their stakeholders should the Transaction fail to close. Thus, the public's interest in maintaining the confidentiality of this commercially sensitive information creates an important commercial interest. Accordingly, I am satisfied that the test set out in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522, at para. 53, as recast in *Sherman Estate v. Donovan*, 2021 SCC 25, 458 D.L.R. (4th) 361, at para. 38, has been met. The sealing order is being made on an interim basis pending further order of the court.

CLAIMS OF BP ENERGY COMPANY

73 At the request of the Just Energy Entities and the BP Energy Company, I will now turn to agreed-upon terms as between the Just Energy Entities and the BP Energy Company.

74 The Just Energy Entities and BP Energy Company and certain of its affiliates (collectively "BP") and the Just Energy Entities have reached an agreement, which is not opposed by any other stakeholders, that BP, being beneficiaries of the Priority Commodity/ISO Charge in these proceedings, are not opposing this motion on the basis that the New Intercreditor Agreement will be on terms consistent with those set forth in the term sheet included in Exhibit "I" to the Affidavit of Mr. Carter sworn August 4, 2022 (the "ICA Term Sheet").

75 To the extent that the terms of the New Intercreditor Agreement are inconsistent with the ICA Term Sheet or contain material changes to the current Intercreditor Agreement that are not specifically set forth in the ICA Term Sheet, BP is reserving its rights to return to this Court to (a) oppose the future release of the Priority Commodity/ISO Charge contemplated by the Reverse Vesting Order and (b) take such action as it reasonably deems necessary to assure its future extensions and credit and accommodations are terminated.

76 I have reviewed this agreement with counsel and find it to be fair and reasonable in the circumstances of the Transaction.

THE OPPOSING STAKEHOLDERS

77 As noted, two stakeholders raised objections to the orders sought by the Just Energy Entities. I will deal with each in turn.

Ganesh Yadav

78 Mr. Yadav is a shareholder.

79 Mr. Yadav did not file any affidavit evidence or any other evidence in a proper form. Rather, he filed what he described as a "motion record" in which he attached various documents relating to the Just Energy Entities' financial performances and outlined his objections.

80 Essentially, he submits that the Just Energy Entities have significant liquidity, far in excess of the stalking-horse bid and the calculations performed by the Just Energy Entities and the Monitor. He primarily submits that the Just Energy Entities have significant future equity in its hedges, that energy prices are increasing and that the hedges are placed at very attractive prices. To support this argument, he relies upon the Just Energy Entities' 2022 annual report describing the derivative instruments. Mr. Yadav stresses that there are significant cash flows and that the future value of the Just Energy Entities is very promising.

81 The difficulty with Mr. Yadav's submissions, however, is the fact that there is no evidentiary basis for these submissions other than a loose connection of documents that, in and of themselves, do not support his argument.

82 More importantly, the Just Energy Entities' business was marketed for over three years and was widely canvassed during the SISP. During this entire time period there has not been a single offer in excess of the stalking-horse offer. Further, Mr. Yadav's submissions concerning value run contrary to the Just Energy Entities and the Monitor's valuation of the company and are unsupported by any other stakeholder.

83 Based on the foregoing, there is no cogent evidence in the record to support Mr. Yadav's submissions, nor has he adduced proper evidence to this court by way of affidavit or expert's report.

84 As a shareholder, he has an equity claim for which there is no recovery in the Transaction.

Mohammad Jaafari

85 Mr. Jaafari also did not file any affidavit evidence at this motion. He, too, simply provided a number of documents. [2]

86 Mr. Jaafari is a former Director and Representative Director of Just Energy Japan Kabushiki Kaisha ("JEJKK"), a former subsidiary of Just Energy. JEJKK operated the Just Energy Entities' businesses in Japan.

87 Mr. Jaafari was terminated from his position in August 2018, allegedly for cause.

88 In November 2018, he commenced litigation in the Tokyo District Court against Just Energy and JEJKK.

89 In April 2020, the Just Energy Entities sold their Japanese business. Mr. Jaafari submitted a Proof of Claim in the *CCAA* proceeding that was disallowed by the Monitor.

90 Mr. Jaafari apparently has continued his litigation in Tokyo. As noted above, although there is no affidavit evidence, the documentation that he has filed with this court includes apparent endorsements by the Tokyo District Court which, if accurate, accept that Mr. Jaafari was an employee of Just Energy.

91 Mr. Jaafari submits that as part of the RVO, I should order that money be paid in trust until the litigation in Tokyo is resolved. As I understand it, he is seeking a payment of approximately CDN $2 million.

92 The Just Energy Entities submit that Mr. Jaafari's ongoing litigation is in violation of the Initial Order and that he was never an employee of Just Energy. Counsel also advises that they recently heard from their former Japanese counsel (although there is no evidence to support this) that Mr. Jaafari's action against Just Energy was dismissed.

93 In any event, the Just Energy Entities submit that, at best, Mr. Jaafari has an unsecured claim that is incapable of recovery since unsecured creditors are receiving no money as a result of the Transaction. Therefore, even if he is successful, there is no recovery.

94 The Monitor, in support of the Just Energy Entities' submissions, confirms that there is no recovery for Mr. Jaafari even if he is successful. The Monitor further submits that a payment into court or into some sort of trust would constitute a preference, which is inappropriate where other unsecured creditors are not receiving any money as a result of the Transaction.

95 Based on the incomplete record in front of me, there is no meaningful way to determine the status and legitimacy of Mr. Jaafari's claim for wrongful dismissal.

96 In any event, I accept the submissions of the Just Energy Entities, supported by the Monitor, that Mr. Jaafari's claim constitutes an unsecured claim for which there will be no recovery in the circumstances of this case.

97 As the Monitor points out, Just Energy no longer has any assets or operations in Japan and no longer owns JEJKK. The stay of proceedings does not extend to JEJKK, which is now owned by another corporation. The Monitor submits that Mr. Jaafari is free to pursue such claims in Japan without the involvement of the Just Energy Entities. To allow Mr. Jaafari's claim to continue against the Just Energy Entities in Japan would require the Just Energy Entities to incur expenses, perhaps make a payment into court or into trust and would deplete the Just Energy Entities' estate to the detriment of the other stakeholders with no foreseeable benefits to Mr. Jaafari.

98 I therefore accept the Monitor's submission that this court order that Mr. Jaafari's claim can be addressed by the Just Energy Entities, in consultation with the Monitor, in accordance with the terms of the Claims Procedure Order. I am specifically not making an order that any money be paid into court or into a trust account.

CONCLUSION

99 For the reasons above, the RVO and theMonitor's Order should be approved. A reverse vesting order is permitted pursuant to the above provisions of the *CCAA*. Given the nature of the Just Energy Entities' business, the RVO structure is necessary and appropriate to preserve the going-concern value of the business. The Transaction is the only viable transaction that has emerged in the 19 months since the *CCAA* filing. It is currently the only option for a going-concern exit from the *CCAA* proceedings. The Transaction is the product of months of negotiations between the Just Energy Entities' key stakeholders as well as a robust court-approved SISP.

100 Overall, the Transaction provides tangible benefits to the Just Energy Entities and their stakeholders. The fact that the Transaction provides no recovery for the general unsecured creditors or shareholders is a function of the market, not the RVO structure.

DISPOSITION

101 For the reasons above, I grant both the RVO and the Monitor's Order.

Application granted.

Footnotes

1 Arrangement relatif à BlackRock Metals Inc., 2022 QCCS 2828, at para. 85, leave to appeal to QCCA refused, 2022 QCCA 1073.

2 Mr. Jaafari continued to improperly send documents directly to me, after I signed the two orders, which I have not considered in preparing these reasons.

2023 ONCA 769
Ontario Court of Appeal

Ontario Securities Commission v. Bridging Finance Inc.

2023 CarswellOnt 17967, 2023 ONCA 769, 169 O.R. (3d) 109,
2023 A.C.W.S. 5778, 489 D.L.R. (4th) 607, 9 C.B.R. (7th) 207

Ontario Securities Commission (Applicant) and Bridging Finance Inc., Bridging Income Fund LP, Bridging Mid-Market Debt Fund LP, SB Fund GP Inc., Bridging Finance GP Inc., Bridging Income RSP Fund, Bridging Mid-Market Debt RSP Fund, Bridging Private Debt Institutional LP, Bridging Real Estate Lending Fund LP, Bridging SMA 1 LP, Bridging Infrastructure Fund LP, Bridging MJ GP Inc., Bridging Indigenous Impact Fund, Bridging Fern Alternative Credit Fund, Bridging SMA 2 LP, Bridging SMA 2 GP Inc., and Bridging Private Debt Institutional RSP Fund (Respondents)

K. van Rensburg, C.W. Hourigan, L. Favreau JJ.A.

Heard: October 18, 2023
Judgment: November 17, 2023
Docket: CA COA-23-CV-0514, COA-23-CV-0559, COA-23-CV-0560

Proceedings: reversing in part *Ontario Securities Commission v. Bridging Finance Inc.* (2023), 7 C.B.R. (7th) 324, 2023 CarswellOnt 7929, 2023 ONSC 715, G.B. Morawetz C.J. Ont. S.C.J. (Ont. S.C.J.)

Counsel: Robert Staley, Douglas Fenton, for Appellant, General Unitholders (COA-23-CV-0559) and Respondent, General Unitholders (COA-23-CV-0560 and COA-23-CV-0514)
Gavin H. Finlayson, Matthew G. Smith, for Respondent, Outside Quebec Misrepresentation Claimants (COA-23-CV-0559)
Sylvain Rigaud, Eric Bédard, Émilie St-Pierre, Joshua Bouzaglou, for Respondent, Quebec Misrepresentation Claimants (COA-23-CV-0559) and Appellant, Quebec Redemption Claimants (COA-23-CV-0560)
Robb English, Mark J. van Zandvoort, for Appellant, Outside Quebec Redemption Claimants (COA-23-CV-0514)
John L. Finnigan, Grant B. Moffat, Adam Driedger, for Respondent, PricewaterhouseCoopers Inc. (COA-23-CV-0514 and COA-23-CV-0560)

Subject: Civil Practice and Procedure; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
IV Receivers
IV.3 Powers, duties and liabilities
Bankruptcy and insolvency
X Priorities of claims
X.7 Unsecured claims
Headnote
Bankruptcy and insolvency --- Receivers — Powers, duties and liabilities
Respondent management firm was subject of investigation by applicant provincial securities commission (Commission) — Commission successfully obtained order to place funds held by firm under receivership — Receiver was appointed over funds — Following appointment, some unitholders and their advisors informed receiver of wish to pursue rights of action related to alleged misrepresentations — Receivers sought order, declaring that redemption and rescission claims did not have priority, over those of general unitholders — Order was granted in part; rescission claims were given priority, but not redemption claims — Redemption claimants appealed denial of priority claim, while general unitholders appealed granting of priority to rescission

claimants — Redemption claimants' appeal dismissed; general unitholders' appeal allowed — Neither redemption nor rescission claims had priority, over those of general unitholders — Proper standard of review was correctness — Contract was to be interpreted as whole, and in accordance with commercial and business principles — Motion judge did not err in interpreting contract against redemption claimants — Firm properly had discretion to stop or delay redemption payments — Subject requests had not been valued, keeping them within firm's discretion.

Bankruptcy and insolvency --- Priorities of claims — Unsecured claims

Respondent management firm was subject of investigation by applicant provincial securities commission (Commission) — Commission successfully obtained order to place funds held by firm under receivership — Receiver was appointed over funds — Following appointment, some unitholders and their advisors informed receiver of wish to pursue rights of action related to alleged misrepresentations — Receivers sought order declaring that redemption and rescission claims did not have priority over those of general unitholders — Order was granted in part; rescission claims were given priority, but not redemption claims — Redemption claimants appealed denial of priority claim, while general unitholders appealed granting of priority to rescission claimants — Redemption claimants' appeal dismissed; general unitholders' appeal allowed — Neither redemption nor rescission claims had priority over those of general unitholders — Motion judge's granting of priority to rescission claimants was based on unclear reasoning — Intention of legislature in enacting applicable law was not consistent with granting of priority — General unitholders' claims included common law claims to rescission — Rescission claimants could not be granted priority in this situation — Unitholders were to share pari passu.

Table of Authorities

Cases considered by *C.W. Hourigan J.A.*:

Creston Moly Corp. v. Sattva Capital Corp. (2014), 2014 SCC 53, 2014 CSC 53, 2014 CarswellBC 2267, 2014 CarswellBC 2268, 373 D.L.R. (4th) 393, 59 B.C.L.R. (5th) 1, [2014] 9 W.W.R. 427, 461 N.R. 335, 25 B.L.R. (5th) 1, 358 B.C.A.C. 1, 614 W.A.C. 1, (sub nom. *Sattva Capital Corp. v. Creston Moly Corp.)* [2014] 2 S.C.R. 633 (S.C.C.) — considered

Hamilton (City) v. Equitable Trust Co. (2013), 2013 ONCA 143, 2013 CarswellOnt 2504, 8 M.P.L.R. (5th) 1, 114 O.R. (3d) 602, 303 O.A.C. 147, 30 R.P.R. (5th) 1, 361 D.L.R. (4th) 114 (Ont. C.A.) — considered

Harvey v. Talon International Inc. (2017), 2017 ONCA 267, 2017 CarswellOnt 4549, 412 D.L.R. (4th) 553, 81 R.P.R. (5th) 1, 137 O.R. (3d) 184 (Ont. C.A.) — referred to

Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co. (2016), 2016 SCC 37, 2016 CSC 37, 2016 CarswellAlta 1699, 2016 CarswellAlta 1700, [2016] 10 W.W.R. 419, 54 B.L.R. (5th) 1, 59 C.C.L.I. (5th) 173, 56 C.L.R. (4th) 1, 487 N.R. 1, [2016] I.L.R. I-5917, 404 D.L.R. (4th) 258, [2016] 2 S.C.R. 23, 19 Admin. L.R. (6th) 1 (S.C.C.) — considered

MacDonald v. Chicago Title Insurance Co. of Canada (2015), 2015 ONCA 842, 2015 CarswellOnt 18332, 127 O.R. (3d) 663, 61 R.P.R. (5th) 1, 392 D.L.R. (4th) 463, 341 O.A.C. 299, [2016] I.L.R. I-5826, 56 C.C.L.I. (5th) 267, 52 B.L.R. (5th) 26 (Ont. C.A.) — considered

Mikelsteins v. Morrison Hershfield Limited (2019), 2019 ONCA 515, 2019 CarswellOnt 10058, 47 C.C.P.B. (2nd) 167, 56 C.C.E.L. (4th) 1, 94 B.L.R. (5th) 173, 2019 C.L.L.C. 201-057 (Ont. C.A.) — referred to

Oakville (Town) v. Clublink Corporation ULC (2019), 2019 ONCA 826, 2019 CarswellOnt 17136, 93 M.P.L.R. (5th) 1, 440 D.L.R. (4th) 680, (sub nom. *Clublink Corporation ULC v. Oakville (Town))* 148 O.R. (3d) 513, 68 Admin. L.R. (6th) 69 (Ont. C.A.) — referred to

Rizzo & Rizzo Shoes Ltd., Re (1998), 1998 CarswellOnt 1, 1998 CarswellOnt 2, 154 D.L.R. (4th) 193, 36 O.R. (3d) 418 (headnote only), (sub nom. *Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re)* 221 N.R. 241, (sub nom. *Adrien v. Ontario Ministry of Labour)* 98 C.L.L.C. 210-006, 50 C.B.R. (3d) 163, (sub nom. *Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re)* 106 O.A.C. 1, [1998] 1 S.C.R. 27, 33 C.C.E.L. (2d) 173 (S.C.C.) — referred to

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

Ventas Inc. v. Sunrise Senior Living Real Estate Investment Trust (2007), 2007 CarswellOnt 1705, 222 O.A.C. 102, 2007 ONCA 205, 29 B.L.R. (4th) 312, 56 R.P.R. (4th) 163, 85 O.R. (3d) 254 (Ont. C.A.) — referred to

Statutes considered:

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

Generally — considered

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

s. 67(3) — considered

s. 136 — considered

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

s. 221(1) — referred to

s. 222 — considered

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

Generally — considered

s. 11.8(8)(b) [en. 1997, c. 12, s. 124] — considered

s. 18.3(2) [en. 1997, c. 12, s. 125] — considered

Limited Partnerships Act, R.S.O. 1990, c. L.16

s. 24 — referred to

Personal Property Security Act, R.S.O. 1990, c. P.10

ss. 30-35 — considered

Residential Tenancies Act, 2006, S.O. 2006, c. 17

Generally — considered

Securities Act, R.S.O. 1990, c. S.5

Generally — considered

s. 129 — referred to

s. 130.1 [en. 1999, c. 9, s. 218] — referred to

s. 130.1(1) [en. 1999, c. 9, s. 218]

s. 130.1(2) [en. 1999, c. 9, s. 218] — referred to

s. 130.1(3) [en. 1999, c. 9, s. 218]

s. 130.1(6) [en. 1999, c. 9, s. 218]

s. 130.1(7) [en. 1999, c. 9, s. 218]

Valeurs mobilières, Loi sur les, RLRQ, c. V-1.1

art. 217 — referred to

art. 221 — referred to

art. 225.0.2 [ad. 2007, c. 15, art. 10] — referred to

Wages Act, R.S.O. 1990, c. W.1

ss. 2-5 — considered

APPEAL by redemption and rescission creditors from order reported at *Ontario Securities Commission v. Bridging Finance Inc.* (2023), 2023 ONSC 715, 2023 CarswellOnt 7929, 7 C.B.R. (7th) 324 (Ont. S.C.J.), on issue of priority.

***C.W. Hourigan J.A.*:**

I. OVERVIEW

1 Bridging Finance Inc. ("Bridging") is a privately held investment management firm, which offered alternative investment options to retail and institutional investors through its investment vehicles (referred to collectively herein as the "Bridging Funds"). Bridging raised capital from investors through the sale of units ("Units"). Depending on the Bridging Fund, the Units were either limited partnership units or trust units. There is an aggregate of approximately 25,900 investors ("Unitholders") across the 13 Bridging Funds.

2 Serious issues arose regarding the operations of Bridging. On April 30, 2021, the Ontario Securities Commission issued an application requesting an order pursuant to s. 129 of the Ontario Securities Act, R.S.O. 1990, c. S.5 ("OSA") to place the Bridging Funds into receivership. PricewaterhouseCoopers Inc. was appointed by order of the Superior Court on that date (the "Appointment Order") as receiver and manager (the "Receiver"), without security, of all of the assets, undertakings, and properties of most Bridging Funds.

3 Pursuant to para. 9 of the Appointment Order, Bridging was ordered not to redeem existing Units in any of the Bridging Funds. In addition, also on April 30, 2021, the Ontario Securities Commission issued a temporary order (the "Temporary Order") to cease trading the securities of most of the Bridging Funds. No redemptions have been accepted, completed, or paid since these orders were issued. Other court orders were made, including an order appointing Bennett Jones LLP as counsel for the General Unitholders. For the purpose of this proceeding, the "General Unitholders" are those Unitholders that have not opted out of representation by the Representative Counsel for the General Unitholders, and are neither Statutory Rescission Claimants nor Redemption Claimants, as those terms are defined below.

4 Following the appointment of the Receiver, certain Unitholders and their advisors informed the Receiver that they may wish to pursue and/or preserve certain rights of rescission or rights of action for damages that arose before the Appointment Order as a result of alleged misrepresentations contained in the offering memoranda. Those potential claimants included Unitholders who intended to bring a claim for rescission under s. 130.1 of the OSA (or equivalent securities legislation) or who had statutory rescission rights granted to them in their contracts (the "Statutory Rescission Claims"). These investors (the "Statutory Rescission Claimants" [1]) assert that they should have a priority claim on the assets of the Bridging Funds.

5 Certain other Unitholders had provided notice of their intention to redeem Units in the Bridging Funds prior to the Date of Appointment and the Temporary Order and had redemption dates on or before April 30, 2021. However, due to the Temporary Order and the Appointment Order, such redemptions were not completed (the "Redemption Claims"). Those investors (the "Redemption Claimants" [2]) also submit that they should have a priority claim over the assets of the Bridging Funds.

6 The Receiver brought a motion seeking an order declaring that the Redemption Claims and the Statutory Rescission Claims have no priority over the claims of the General Unitholders (the "General Unitholders' Claims") and an order that all Unitholders shall rank *pari passu* with respect to the distribution of the proceeds of the Bridging Funds. The motion judge ordered that the Statutory Rescission Claims had priority over the General Unitholders' Claims and that the Redemption Claims do not have priority over the General Unitholders' Claims. He further ordered that the Redemption Claims and the General Unitholders' Claims shall rank *pari passu* with respect to the distribution of the proceeds of the Bridging Funds.

7 Appeals were commenced by the Redemption Claimants regarding the denial of their priority claim and by the General Unitholders about the priority granted to the Statutory Rescission Claims. The issues raised by these appeals and my conclusion on each issue may be summarized as follows:

1. *What is the appropriate standard of review?* The standard of review is correctness. The constating documents are contracts of adhesion and there is no relevant factual matrix that forms part of the contractual analysis. Further, the interpretation of the *OSA*, as a statute of general application, must be reviewed on a correctness standard.

2. *Did the motion judge err in finding that the Redemption Claims are not entitled to any priority over the General Unitholders' Claims?* No. The motion judge correctly determined that these claims had not crystallized as at the time of the Appointment Order and that they were still subject to Bridging's discretion to refuse to honour or postpone the redemption requests. That discretion was designed to ensure that Bridging avoided situations where it would be financially prejudicial to payout redemption requests. To properly exercise its discretion and make an informed business judgment about paying out redemptions, Bridging needed to be able to consider the precise quantum of the liability for redemptions in the context of its current financial position. Therefore, until the Redemption Claims were quantified, they were subject to Bridging's discretion. Otherwise, the utility of the discretion clauses would be compromised. Accordingly, the motion judge made no error in concluding that the Redemption Claims were not entitled to any priority.

3. *Did the motion judge err in finding that the Rescission Claims are entitled to priority over the General Unitholders' Claims?* Yes. While it is unclear from the reasons, it would appear that the motion judge found the priority based on s. 130.1 of the OSA or in the nature of the rescission remedy itself. The priority cannot be grounded in the *OSA*, as there is nothing in the language of the statute that suggests that the legislature intended to grant a priority. When legislatures grant priorities, they do so in clear and unambiguous terms. They do not leave open the possibility of a priority by implication, because the whole purpose of statutorily created priorities is to clarify the relative standing of competing claims in a manner that is clear and easily applicable. The nature of the remedy also cannot be the basis for a priority. The motion judge found that the Statutory Rescission Claims stand in priority to the General Unitholders' Claims. However, the General Unitholders' Claims include claims for common law rescission. If the priority for Statutory Rescission Claimants is based on the nature of the remedy, they cannot stand in priority to common law rescission claimants because, regardless of how the right to rescission is established, the nature of the remedy is the same. Therefore, there is no basis to find that the Statutory Rescission Claimants are entitled to a priority.

4. *Should all Unitholders rank pari passu with respect to the distribution of proceeds of the Bridging Funds?* Yes. There is no basis to find a priority for either the Redemption Claims or the Statutory Rescission Claims. Therefore, the Unitholders should share *pari passu*. This is consistent with the constating documents of the Bridging Funds, which provided that holders of Units had the same rights and obligations as all other holders of the same class or series of Units.

II. ANALYSIS

(1) Standard of Review

8 A central component of the motion judge's analysis was his consideration of the constating documents to determine which claimants, if any, have a priority. The standard of review of a decision interpreting a contract depends on the nature of the contract. In *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, the Supreme Court of Canada held that contractual interpretation is a matter of mixed fact and law because the words of a contract are interpreted in light of its factual matrix.

9 After *Sattva* was released, questions arose regarding the precise scope of the ruling. For example, many commercial and consumer contracts are standard form documents presented on a take it or leave it basis. These are not situations where the parties sat across a table and hammered out a bargain. There is no relevant factual matrix for such contracts. There were also concerns regarding the precedential value of appellate decisions interpreting standard form contracts. For example, in MacDonald v. Chicago Title Insurance Co. of Canada, 2015 ONCA 842, 127 O.R. (3d) 663, at para. 40, this court held that it would be unacceptable to have two different interpretations of the same clause in a standard form insurance policy. A correctness standard of review therefore "best ensures that provincial appellate courts are able to fulfill their responsibility of ensuring consistency in the law": *MacDonald* , at para. 41.

10 The Supreme Court clarified the scope of *Sattva* in *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, [2016] 2 S.C.R. 23. At para. 24, Wagner J. (as he then was), writing for the majority, found an exception to the

rule in *Sattva* and outlined three relevant factors to determine the appropriate appellate standard of review of standard form contracts, as follows:

> I would recognize an exception to this Court's holding in *Sattva* that contractual interpretation is a question of mixed fact and law subject to deferential review on appeal. In my view, where an appeal involves the interpretation of a standard form contract, the interpretation at issue is of precedential value, and there is no meaningful factual matrix that is specific to the parties to assist the interpretation process, this interpretation is better characterized as a question of law subject to correctness review.

11 I have no difficulty in concluding that the constating documents are standard form agreements, otherwise known as contracts of adhesion. These were take it or leave it contracts and there is no suggestion that the more than 25,000 Unitholders were able to negotiate their agreements with Bridging: see e.g., Mikelsteins v. Morrison Hershfield Limited, 2019 ONCA 515, at paras. 11-12. There is also no suggestion that there is a relevant factual matrix that informed the motion judge's contractual analysis.

12 The remaining *Ledcor* factor is the issue of precedential value. Counsel for the Receiver submits that the correctness standard of review does not apply because there is no precedential value in this case given that Bridging is in receivership and there will be no future claims against it. I accept this submission and agree that there likely will be no future litigation against Bridging requiring the interpretation of the constating documents. In addition, I also appreciate that the Supreme Court in *Ledcor* found that the presence of all three factors resulted in the imposition of the correctness standard of review.

13 The issue that remains open — and which has been raised in this case — is what happens in a situation with a standard form contract executed by tens of thousands of people where there is no relevant factual matrix, but there is little or no chance of future litigation involving the same contract. Usually, standard form contracts automatically have precedential value because there are other potential litigants who executed the same contract. However, the case at bar is a unique situation because Bridging will not be extant in the future and all claims are being resolved in this proceeding. Does the fact that there is no precedential value mean that the motion judge's analysis must be reviewed on a deferential standard of review? In the circumstances of this case, the answer to that question is no. Given that there are no factual findings and, indeed, scant reference to the facts underlying the creation of the constating documents, there is no basis for this court to defer to the motion judge.

14 In my view, the absence of one of the *Ledcor* factors should not automatically lead to the imposition of a deferential standard of review. In the case at bar, the motion judge was engaged in a purely legal analysis about contracts that will potentially impact thousands of people. This court is in as good a position as the motion judge to analyze the constating documents and reach a conclusion as to their legal meaning. There is no reason to take a deferential approach. Therefore, I find that the standard of review of the motion judge's contractual analysis is correctness.

15 The other significant issue in the motion judge's analysis is his interpretation of s. 130.1 of the OSA. The interpretation of a statute on appeal is also reviewed on a standard of correctness: see e.g., Harvey v. Talon International Inc., 2017 ONCA 267, 137 O.R. (3d) 184, at para. 32; Oakville (Town) v. Clublink Corporation ULC, 2019 ONCA 826, 148 O.R. (3d) 513, at para. 35.

(2) Redemption Claims

16 It is not disputed that there was no market for the trading or selling of the Units in the Bridging Funds as between investors. Thus, to effectively "cash out", in whole or in part, of an investment in the Bridging Funds, a Unitholder redeemed their Units. In effect, they sold their Units back to Bridging in accordance with the redemption process prescribed by the constating documents. To properly evaluate the priority asserted by the Redemption Claimants, it is first necessary to understand, in broad strokes, how the redemption process worked. The following is a summary of the process, as outlined in the Agreed Statement of Facts filed by the parties on the motion (the "Agreed Statement of Facts"):

> a) a Unitholder submits a notice to redeem some or all of its Units during a particular month. This triggers a 30 or 90 day notice period (the "Redemption Notice Period");

b) the last day of the month in which the Redemption Notice Period expires is the Valuation Date;

c) redemptions could only be made effective as of the applicable Valuation Date following the receipt of a redemption notice. This was generally defined to be the "Redemption Date" under the applicable constating documents;

d) the constating documents permitted the appointment of a fund administrator (the "Fund Administrator"). The redemption procedures that were generally followed by the Fund Administrator were not described in the constating documents;

e) the Redemption would not be priced or considered by the Fund Administrator to be accepted and "contracted" until the Net Asset Value was calculated for the applicable Valuation Date. This was typically done three to four weeks following the Valuation Date. The Fund Administrator would record the redemption request as "uncontracted" until this calculation occurred; and

f) the constating documents of the Bridging Funds provide that redemption proceeds must be paid out not later than 30 days following the applicable Valuation Date (60 days if such date was the Bridging Fund's fiscal year-end).

17 The constating documents grant Bridging the discretion to accept, reject, or suspend a redemption request. Nothing in those documents places a temporal limit on when the discretion must be exercised. The precise wording of these clauses varies by fund. Below is a list of some of the language used, along with its location within the constating documents:

• Amended and Restated Confidential Offering Memorandum, Bridging Mid-Market Debt RSP Fund (January 1, 2021): "The Manager has the sole discretion to accept or reject redemption requests. The Manager intends to accept redemption requests in circumstances where, in the view of the Manager, it would not be prejudicial to the Fund to do so."

• Confidential Offering Memorandum, Bridging Fern Alternative Credit Fund (April 1, 2020): "The Manager may suspend the right of Unitholders to require the Fund to redeem Units held by them and the concurrent payment for Units tendered for redemption for any period not exceeding 120 days during which the Manager determines that conditions exist which render impractical the sale of the assets of the Fund or which impair the ability of the Fund to determine the value of the assets of the Fund. A suspension may apply to all Redemption Notices received prior to the suspension, but as for which payment has not been made, as well as to all Redemption Notices received while the suspension is in effect."

• Second Amended and Restated Trust Agreement Between Bridging Finance Inc. and Odyssey Trust Company (January 1, 2021): "Notwithstanding any other provision herein, the Manager has the sole discretion to accept or reject redemption requests and the Manager intends to accept redemption requests in circumstances where, in the view of the Manager, it would not be prejudicial to the Fund to do so."

18 The motion judge identified that the Redemption Claimants' core argument is that the constating documents created an enforceable liability pursuant to which they are required to be paid within 30 days of the applicable Valuation Date. He concluded that the "fatal problem with this argument is that the redemption requests of these Redemption Claimants had not been completed." The motion judge reasoned that the Unitholders who provided a notice to redeem but whose payments had not been issued by Bridging at the time of the Appointment Order had incomplete redemption requests because they were not priced, contracted, or paid out. In addition, the motion judge found that the redemption was subject to Bridging's overall discretion to refuse or postpone a redemption request.

19 The Redemption Claimants make two primary submissions on appeal. First, they argue that the motion judge did not take into consideration the clear language of all the redemption provisions, including the language that provides that a redemption request becomes an enforceable liability on the Redemption Date. According to these appellants, the motion judge failed to recognize that they are not seeking a return of capital invested but have distinct contractual claims, which constitute an enforceable liability of the Bridging Funds that are senior to the claims of General Unitholders pursuant to s. 24 of the Limited Partnerships Act, R.S.O. 1990, c. L.16.

20 Second, the Redemption Claimants argue that the motion judge further erred in considering post-contractual internal practices of the Fund Administrator as evidence supporting his derogation from the parties' constating documents. They submit that the motion judge's reliance on whether redemption requests were subsequently priced, contracted, or paid out by the Fund Administrator is irrelevant for the purposes of determining whether the Redemption Claimants have priority over General Unitholders' Claims.

21 I do not accede to these submissions. Contracts are to be interpreted as a whole, in a manner that gives meaning to all of their terms and avoids an interpretation that would render one or more of the terms ineffective. They are also to be interpreted in a fashion that accords with sound commercial principles and good business sense, and that avoids a commercial absurdity: Ventas, Inc. v. Sunrise Senior Living Real Estate Investment Trust, 2007 ONCA 205, 85 O.R. (3d) 254, at para. 24.

22 As noted, the wording of the discretion clauses varies, but, at their essence, they all achieve the same result. They reserve to Bridging the power to prevent or delay redemptions in circumstances where it would be prejudicial to pay out the redemption requests. This is a failsafe provision, which allows Bridging to make a business decision to stop or delay a redemption depending on the financial circumstances of the particular fund. In order for Bridging to make an informed decision about whether to exercise this discretion, it would need to have available certain essential information. This would include the total amount payable for the redemption requests.

23 This is not a matter concerning the post-contractual internal practices of the Fund Administrator. Rather, the constating documents anticipated that a calculation would have to be completed after the Valuation Date. That amount would be considered in the context of the financial situation of the fund at the time of payment. A business judgment would then be made regarding whether it would be prejudicial to approve the redemptions. It follows that for the discretion provisions to be effective, they must be available up to and until the payment of the Redemption Price. This explains why there is no time limit on the use of the discretion clauses.

24 Based on the foregoing, it is my view that the trial judge was correct in his analysis of the Redemption Claims. He was right to focus on the fact that the requests had not been valued and were still subject to Bridging's discretion. Therefore, I would dismiss the Redemption Claimants' appeal.

(3) Statutory Rescission Claims

25 As noted, the motion judge found that the Statutory Rescission Claims are entitled to priority over the General Unitholders' Claims. He also stated that the remedy for the Statutory Rescission Claimants must be meaningful and concluded that it was appropriate to impose a constructive trust.

26 It is unclear from the reasons how the motion judge arrived at this conclusion. In his analysis, the motion judge made the following statements without referring to any specific authorities. He stated that "the nature of rescission as a remedy creates a *de facto* priority." The motion judge also found that "statutory rescission is a remedy conferred by the *OSA* and its application is non-discretionary." It would appear, therefore, that there are two possible sources for the priority granted by the motion judge to the Statutory Rescission Claims: (a) the wording of s. 130.1 of the OSA, and (b) the nature of the rescission remedy. Below, I will consider each source in turn.

(a) Section 130.1 of the OSA

27 The relevant subsections of s. 130.1 of the OSA provide:

> **130.1**(1) Where an offering memorandum contains a misrepresentation, a purchaser who purchases a security offered by the offering memorandum during the period of distribution has, without regard to whether the purchaser relied on the misrepresentation, the following rights:
>
> 1. The purchaser has a right of action for damages against the issuer and a selling security holder on whose behalf the distribution is made.

> 2. If the purchaser purchased the security from a person or company referred to in paragraph 1, the purchaser may elect to exercise a right of rescission against the person or company. If the purchaser exercises this right, the purchaser ceases to have a right of action for damages against the person or company. 2004, c. 31, Sched. 34, s. 7.
>
> **Defence**
>
> (2) No person or company is liable under subsection (1) if he, she or it proves that the purchaser purchased the securities with knowledge of the misrepresentation. 1999, c. 9, s. 218.
>
> **Limitation in action for damages**
>
> (3) In an action for damages pursuant to subsection (1), the defendant is not liable for all or any portion of the damages that the defendant proves do not represent the depreciation in value of the security as a result of the misrepresentation relied upon. 1999, c. 9, s. 218.
>
> . . . . .
>
> **Limitation re amount recoverable**
>
> (6) In no case shall the amount recoverable under this section exceed the price at which the securities were offered. 1999, c. 9, s. 218.
>
> **No derogation of rights**
>
> (7) The right of action for rescission or damages conferred by this section is in addition to and without derogation from any other right the purchaser may have at law. 1999, c. 9, s. 218. [3]

28 Given the motion judge's comments about s. 130.1 being "non-discretionary," it is essential to consider what the section actually provides. It is clear on the face of s. 130.1 that the legislature has made it easier to assert a claim for either rescission or damages based on a misrepresentation in an offering memorandum by obviating the need to prove reliance. The legislature also took the decision regarding choice of remedy between damages or rescission out of the hands of the court and permitted the plaintiff to make the election. Therefore, the *OSA* confers a non-discretionary right to elect a remedy, but it does not grant a non-discretionary right to a remedy. The right to damages or rescission is not automatic. The court must be satisfied regarding several factors, including that a misrepresentation was made and that the defence in s. 130.1(2) does not apply. Only then will a plaintiff be entitled to a remedy. This remedy is available generally to security holders and is not limited to insolvency situations.

29 The more significant issue is whether, in enacting this section, the legislature intended to grant a priority to rescission claimants. There is no language in the section that explicitly references granting a priority. This is a curious omission if that was the legislature's intention. A legislature is presumed to use the clearest way of expressing its intention: Ruth Sullivan, *The Construction of Statutes*, 7th ed. (Toronto: LexisNexis Canada, 2023), at § 8.02. Accordingly, the ordinary meaning of a legislative provision is deemed to be the meaning intended by the legislature, unless compelling reasons exist to justify a departure from the ordinary meaning: Sullivan, at § 3.01; Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 S.C.R. 27, at para. 21. In keeping with this presumption, Canadian courts have consistently held that express and unambiguous statutory language is required to create a statutory priority. The list of examples is numerous, both in the insolvency context and beyond.

30 Courts have held that the absence of express statutory language is fatal to claims for statutory priority. For example, the Supreme Court has rejected the proposition that the Bankruptcy and Insolvency Act, R.S.C., 1985, c. B-3 (“BIA”) or the Companies' Creditors Arrangement Act, R.S.C., 1985, c. C-36 (“CCAA”) confer on the Crown a statutory priority in respect of GST claims upon insolvency, concluding that if Parliament had "sought to give the Crown a priority for GST claims, it could have done so explicitly as it did for source deductions": Century Services Inc. v. Canada (Attorney General), 2010 SCC 60, [2010] 3 S.C.R. 379, at para. 51. Similarly, this court has refused to import a municipal super priority into the provisions of the Residential Tenancies Act, 2006, S.O. 2006, c. 17, dealing with payment for vital services, holding that there is no basis for any sort of priority "[w]ithout explicit language from the legislature": Hamilton (City) v. The Equitable Trust Company, 2013

ONCA 143, 114 O.R. (3d) 602, at para. 29. In short, courts have rejected statutory priority claims unless the claim is supported by unequivocal statutory language.

31 Two such examples of clear language are s. 67(3) of the BIA and the former s. 18.3(2) of the CCAA. Both of these provisions use express language to provide that deemed trusts for source deductions — unlike other deemed trusts — remain effective in insolvency. That is, the ordinary meaning of these provisions indicates that Parliament has legislated a statutory priority "explicitly and elaborately": *Century Services* , at para. 45. Other *BIA* and *CCAA* provisions similarly use explicit language to create a statutory priority. These provisions include BIA, s. 14.06(7)(b) and CCAA, s. 11.8(8)(b) (super priority of the Crown for environmental remediation costs in respect of the real property of a debtor), as well as BIA, s. 136 (general priority distribution scheme for the property of a bankrupt).

32 The legislative use of express language to create a priority is not limited to insolvency statutes. It is also evidenced in, for example, ss. 221(1) and 222 of the Business Corporations Act, R.S.O. 1990, c. B.16; ss. 30-35 of the Personal Property Security Act, R.S.O. 1990, c. P.10; and ss. 2-5 of the Wages Act, R.S.O. 1990, c. W.1. In each of these statutory provisions, the language indicating a priority is plain and unambiguous.

33 The primary difficulty with the submission that s. 130.1 grants a priority is that the legislation does not state that explicitly. I have difficulty accepting that it was the intention of the legislature to grant a priority by implication. The whole point of creating statutory priorities is to alert the world regarding the distribution scheme for a given fund. The idea is to create certainty so that claimants understand where they stand relative to other claimants. A clear priority scheme also makes it easier for courts to adjudicate competing claims. They are not required to examine the equities of the positions of the parties but are only obliged to implement the existing rules. The important public policy objectives of certainty, transparency, and efficiency underlying statutory priorities would be eroded if courts presume an intention of a legislature to create a priority. I decline to do so in this case.

(b) The Nature of the Rescission Remedy

34 The other suggested basis for a priority is the nature of the remedy of rescission. The argument advanced by the Statutory Rescission Claimants is that rescission is a proprietary remedy, which puts the claimant in a position where the contract is void *ab initio*. This submission may be dealt with by considering the categories of potential rescission claims.

35 The Statutory Rescission Claims are reserved for those who can assert a claim under s. 130.1 of the OSA (and equivalent securities legislation) and residents of British Columbia, Alberta, and Quebec who were granted that statutory remedy under the constating documents. For the purpose of the motion, it was agreed that these claimants would be able to make out their claims and no defences would apply.

36 The competing claims were the General Unitholders' Claims, which, as mentioned, are the claims that are not Statutory Rescission Claims or Potential Redemption Claims. The Agreed Statement of Facts also references a court order that tolled limitation periods for certain claims. Included in this list are claims for damages or rescission pursuant to, among other things, "any common law or civil law rights."

37 It is clear, therefore, that the General Unitholders' Claims include common law claims to rescission. In other words, there is a subclass of Unitholders who could potentially assert a successful common law claim for rescission. There can therefore be no basis to award a priority to the Statutory Rescission Claimants over those with common law claims to rescission. Regardless of how the claim for rescission is established, the nature of the remedy is identical. Thus, the motion judge erred in finding that the Statutory Rescission Claimants have a "different relationship to the assets."

38 In summary, neither the wording of s. 130.1 of the OSA nor the nature of the remedy of rescission provides a basis for finding that the Statutory Rescission Claimants have a priority. Accordingly, I would grant the General Unitholders' appeal.

(4) Pari Passu

39 There was a great deal of debate among the parties regarding whether the Bridging Funds are insolvent and, as a consequence, whether the *pari passu* rule should automatically apply. I need not resolve the insolvency issue because I have determined that neither the Statutory Rescission Claimants nor the Redemption Claimants are entitled to a priority. It follows, therefore, that the Unitholders should share *pari passu*. I note that this result is consistent with the constating documents of the Bridging Funds, which provided that holders of Units had the same rights and obligations as all other holders of the same class or series of Units.

III. DISPOSITION

40 I would dismiss the appeal of the Redemption Claimants and allow the appeal of the General Unitholders. For greater certainty, I would order that the Redemption Claims and the Statutory Rescission Claims have no priority over the General Unitholders' Claims and order that all Unitholders shall rank *pari passu* with respect to the distribution of proceeds of the Bridging Funds. We were advised by counsel that no party is seeking costs, so I would make no order as to the costs of the appeals.

***K. van Rensburg J.A.*:**

I agree.

***L. Favreau J.A.*:**

I agree.

Appeal allowed in part.

Footnotes

1 "Statutory Rescission Claimants" refers to both the Quebec Misrepresentation Claimants and the Outside Quebec Misrepresentation Claimants.

2 "Redemption Claimants" refers to both the Quebec Redemption Claimants and the Outside Quebec Redemption Claimants.

3 Quebec securities legislation grants an equivalent right of action. See *Securities Act*, C.Q.L.R. c.V-1.1, ss. 217, 221, and 225.0.2.

Schedule "A"

~~Winnipeg Centre~~

File No. CI 24-01-45056

THE
~~QUEEN'S~~KING'S
BENCH WINNIPEG
CENTRE

IN THE MATTER OF: THE APPOINTMENT OF A RECEIVER PURSUANT TO SECTION 243 OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3 AS AMENDED, AND SECTION 55 OF *THE COURT OF KING'S BENCH ACT*, C.C.S.M. c. C280

BETWEEN:

BANK OF MONTREAL,

Applicant,

-and-

GENESUS INC., CAN-AM GENETICS INC. and GENESUS GENETICS, INC.,

Respondents.

APPROVAL AND VESTING ORDER

MLT AIKINS LLP
Barristers and Solicitors
30th Floor – 360 Main Street
Winnipeg, MB R3G 4G1

J.J. BURNELL / ANJALI SANDHU
Telephone: (204) 957-4663/(204) 957-4760
Facsimile: (204) 957-0840

File No. 0128056.00004

THE KING'S BENCH

Winnipeg Centre

THE HONOURABLE ~~——~~MR. JUSTICE ~~——~~CHARTIER	)) ~~)~~ ~~)~~)	~~WEEKDAY~~THURSDAY, THE #~~4~~4th DAY OF ~~MONTH~~JULY, ~~20YR~~2024

~~B E T W E E N:~~

IN THE MATTER OF: THE APPOINTMENT OF A RECEIVER PURSUANT TO SECTION 243 OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3 AS AMENDED, AND SECTION 55 OF *THE COURT OF KING'S BENCH ACT*, C.C.S.M. c. C280

~~**PLAINTIFF**~~

~~Plaintiff~~[1]

~~and~~

[1] ~~A receivership or other proceeding that might lead to an Approval and Vesting Order may be commenced either by action or by application. This model Order is drafted on the basis that the receivership proceeding was commenced by way of an action.~~

BETWEEN:

THE KING'S BENCH

Winnipeg Centre

BANK OF MONTREAL,

Applicant,

-and-

GENESUS INC., CAN-AM GENETICS INC. and GENESUS GENETICS, INC.,

~~**DEFENDANT**~~

~~Defendant~~Respondents.

APPROVAL AND VESTING ORDER

THIS MOTION, made by ~~[RECEIVER'S NAME]~~BDO Canada Limited in its capacity as the ~~Court-appointed~~Court- appointed receiver (the ~~"~~"**Receiver**~~"~~") of the undertaking, property and assets of ~~[DEBTOR] (the "**Debtor**~~Genesus Inc. ("**Genesus**"), Can-Am Genetics Inc. ("**Can-Am**") and Genesus Genetics, Inc. ("**GGI**", and together with Genesus and Can-Am, the "**Debtors**") for an order approving the sale transaction (the ~~"~~"**Transaction**~~"~~") contemplated by an agreement of purchase and sale (the ~~"**Sale Agreement**"~~"**APA**") between the Receiver and ~~[NAME OF PURCHASER] (the "~~Canada ZF Investments Inc. (the "**Purchaser**~~"~~") dated ~~[DATE]~~June 28, 2024 and appended in a redacted form to the First Report of the Receiver dated ~~[DATE] (the "**Report**"),~~ *** (the "**First Report**") and in an unredacted form to the Confidential Supplement of the Receiver dated *** (the "**Confidential Supplement**") and vesting in the Purchaser all of the Receiver's and the Debtors' right, title and interest in and to the assets described in the APA (the "**Purchased Assets**"), was heard this day at the Law Courts Building, 408 York Avenue, Winnipeg, Manitoba.

THE KING'S BENCH

Winnipeg Centre

THE HONOURABLE MR.	)	THURSDAY, THE 4th
	)	
JUSTICE CHARTIER	)	DAY OF JULY, 2024

IN THE MATTER OF: THE APPOINTMENT OF A RECEIVER PURSUANT TO SECTION 243 OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3 AS AMENDED, AND SECTION 55 OF *THE COURT OF KING'S BENCH ACT*, C.C.S.M. c. C280

BETWEEN:

BANK OF MONTREAL,

Applicant,

-and-

GENESUS INC., CAN-AM GENETICS INC. and GENESUS GENETICS, INC.,

Respondents.

APPROVAL AND VESTING ORDER

THIS MOTION, made by BDO Canada Limited in its capacity as the Court-appointed receiver (the "**Receiver**") of the undertaking, property and assets of Genesus Inc. ("**Genesus**"), Can-Am Genetics Inc. ("**Can-Am**") and Genesus Genetics, Inc. ("**GGI**", and together with Genesus and Can-Am, the "**Debtors**") for an order approving the sale transaction (the "**Transaction**") contemplated by an agreement of purchase and sale (the "**APA**") between the Receiver and Canada ZF Investments Inc. (the "**Purchaser**") dated June 28, 2024 and appended in a redacted form to the First Report of the Receiver dated *** (the "**First Report**") and in an unredacted form to the Confidential Supplement of the Receiver dated *** (the "**Confidential Supplement**") and vesting in the Purchaser ~~the Debtor's~~all of the Receiver's and the Debtors' right, title and interest in and to the assets described in the ~~Sale Agreement~~APA (the ~~"~~"**Purchased Assets**~~"~~"), was heard this day at ~~_____~~the Law Courts Building, 408 York Avenue, Winnipeg, Manitoba.

ON READING the Report and on hearing the submissions of counsel for the Receiver, ~~[NAMES OF OTHER PARTIES APPEARING]~~counsel for the Purchaser, counsel for the Bank of Montreal, and counsel for Farm Credit Canada, no one appearing for any other person on the service list, although properly served as appears from the affidavit of ~~[NAME]~~Kari Klassen sworn ~~[DATE]~~***, filed[2]:

1. THIS COURT ORDERS AND DECLARES that the time for service of the Receiver's Notice of Motion and the supporting materials is hereby abridged and validated so that this motion is properly returnable today, and hereby dispenses with further service thereof.

2. ~~1.~~ THIS COURT ORDERS AND DECLARES that the Transaction is hereby approved,[3] and the execution of the ~~Sale Agreement~~APA by the Receiver[4] is hereby authorized and approved, with such minor amendments as the Receiver may deem necessary. 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 Transaction and for the conveyance of the Purchased Assets to the Purchaser.

3. ~~2.~~ THIS COURT ORDERS AND DECLARES that upon the delivery of a Receiver's certificate to the Purchaser substantially in the form attached as **Schedule ~~A~~"1"** hereto (the ~~"**Receiver's**~~"**Receiver's Certificate**~~"~~"), all of the ~~Debtor's~~Receiver's and Debtors' right, title and interest in and to the Purchased Assets described in the ~~Sale Agreement [and listed on Schedule B hereto]~~[5]APA shall vest absolutely in the Purchaser, free and clear of and from any and all security interests (whether contractual, statutory,

---

[2] ~~This model order assumes that the time for service does not need to be abridged. The motion seeking a vesting order should be served on all persons having an economic interest in the Purchased Assets, unless circumstances warrant a different approach. Counsel should consider attaching the affidavit of service to this Order.~~

[3] ~~In some cases, notably where this Order may be relied upon for proceedings in the United States, a finding that the Transaction is commercially reasonable and in the best interests of the Debtor and its stakeholders may be necessary. Evidence should be filed to support such a finding, which finding may then be included in the Court's endorsement.~~

[4] ~~In some cases, the Debtor will be the vendor under the Sale Agreement, or otherwise actively involved in the Transaction. In those cases, care should be taken to ensure that this Order authorizes either or both of the Debtor and the Receiver to execute and deliver documents, and take other steps.~~

[5] ~~To allow this Order to be free standing (and not require reference to the Court record and/or the Sale Agreement), it may be preferable that the Purchased Assets be specifically described in a Schedule.~~

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 have attached or been perfected, registered or filed and whether secured, unsecured or otherwise (collectively, the ~~"~~"**Claims**~~"~~[6]") including, without limiting the generality of the foregoing: (i) any encumbrances or charges created by the Order of the Honourable Justice ~~[NAME]~~Chartier dated ~~[DATE]~~June 11, 2024; (ii) all charges, security interests or claims evidenced by registrations pursuant to *The Personal Property Security Act* (Manitoba) or any other personal property registry system; and (iii) those Claims listed on **Schedule ~~C~~"2"** hereto (all of which are collectively referred to as the ~~"~~"**Encumbrances**~~"~~", which term shall not include the permitted encumbrances, easements and restrictive

[6] ~~The "Claims" being vested out may, in some cases, include ownership claims, where ownership is disputed and the dispute is brought to the attention of the Court. Such ownership claims would, in that case, still continue as against the net proceeds from the sale of the claimed asset. Similarly, other rights, titles or interests could also be vested out, if the Court is advised what rights are being affected, and the appropriate persons are served. It is the Subcommittee's view that a non specific vesting out of "rights, titles and interests" is vague and therefore undesirable.~~

covenants listed on **Schedule ~~D~~"3"**) and, for greater certainty, this Court orders that all of the Encumbrances affecting or relating to the Purchased Assets are hereby expunged and discharged as against the Purchased Assets.

4. ~~3.~~ THIS COURT ORDERS that upon the registration in the _____[7] Portage la Prairie Land Titles Office (~~"____ LTO") of a Transmission~~ "**PLTO**") and the Brandon Land Titles Office ("**BLTO**") of Transmissions in the form prescribed by *The Real Property Act* (Manitoba) duly executed by the Purchaser[8], and accompanied by a certified true copy of this Order, title to the real property identified in Schedule B hereto (the "**Real Property**") shall vest in the Purchaser subject to all instruments registered on title at that time, other than those described in Schedule ~~C~~"3", and the District ~~Registrar is~~ Registrars are hereby directed to issue title accordingly.

5. ~~4.~~ THIS COURT ORDERS that this Order shall be accepted by the District ~~Registrar~~ Registrars notwithstanding that the appeal period in respect of this Order has not elapsed, which appeal period is expressly waived.[9]

6. ~~5.~~ THIS COURT ORDERS that for the purposes of determining the nature and priority of Claims, the net proceeds[10] from the sale of the Purchased Assets shall stand in the place and stead of the Purchased Assets, and that from and after the delivery of the ~~Receiver's~~ Receiver's Certificate all Claims and Encumbrances shall attach to the net proceeds from the sale of the Purchased Assets with the same priority as they had with respect to the Purchased Assets immediately prior to the sale[11], as if the Purchased 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.

~~[7] Insert applicable Land Titles Office.~~

~~[8] Elect the language appropriate to the land registry system.~~

~~[9] On October 20, 2004 the Registrar General of the Property Registry of Manitoba issued a Directive which changed its previous practice and indicated that it would no longer accept a Vesting Order for registration until the applicable appeal period had expired subject to a number of exceptions including the Court ordering the Vesting Order to be immediately filed. Counsel should consider whether it is appropriate in the circumstances to seek inclusion of a paragraph along these lines.~~

~~[10] The Report should identify the disposition costs and any other costs which should be paid from the gross sale proceeds, to arrive at "net proceeds".~~

~~[11] This provision crystallizes the date as of which the Claims will be determined. If a sale occurs early in the insolvency process, or potentially secured claimants may not have had the time or the ability to register or perfect proper claims prior to the sale, this provision may not be appropriate, and should be amended to remove this crystallization concept.~~

7. ~~6.~~ THIS COURT ORDERS AND DIRECTS the Receiver to file with the Court a copy of the ~~Receiver's~~Receiver's Certificate, forthwith after delivery thereof.

8. ~~7.~~ THIS COURT ORDERS that, pursuant to clause 7(3)(c) of the Canada *Personal Information Protection and Electronic Documents Act*, the Receiver is authorized and permitted to disclose and transfer to the Purchaser all human resources and payroll information in the ~~Company's~~Company's records pertaining to the ~~Debtor's~~Debtors' past and current employees, including personal information of ~~those employees listed on Schedule "●" to the Sale Agreement~~the Target Employees (as defined in the

APA). The Purchaser shall maintain and protect the privacy of such information and shall be entitled to use the personal information provided to it in a manner which is in all material respects identical to the prior use of such information by the ~~Debtor~~Debtors.

9. ~~8.~~ THIS COURT ORDERS that, notwithstanding:

(a) the pendency of these proceedings;

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

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

the vesting of the Purchased Assets in the Purchaser pursuant to this Order shall be binding on any trustee in bankruptcy that may be appointed in respect of the ~~Debtor~~Debtors and shall not be void or voidable by creditors of the ~~Debtor~~Debtors, nor shall it constitute nor be deemed to be a 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 or action other than in good faith pursuant to any applicable federal or provincial legislation.

10. THIS COURT AUTHORIZES AND DIRECTS the Receiver to assign the contracts (the "**Assigned Contracts**") listed in Schedule "C" of the APA to the Purchaser.

11. THIS COURT ORDERS AND DECLARES that upon the delivery of the Receiver's Certificate: (i) all of the rights and obligations of the Debtors under and to the Assigned Contracts shall be assigned, conveyed and transferred to, and assumed by, the Purchaser; and (ii) the assignment of the Assigned Contracts is hereby declared valid and binding upon all of the counterparties to the Assigned Contracts, notwithstanding any restriction, condition or prohibition contained in any such Assigned Contract relating to the assignment thereof, including any provision requiring the consent of any party to the assignment.

12. THIS COURT ORDERS AND DECLARES that the assignment and transfer of the Assigned Contracts shall be subject to the provisions herein directing that the Receiver's and the Debtors' rights, title and interests in the Purchased Assets shall vest absolutely in the Purchaser free and clear of all Encumbrances in accordance with the provisions of this Order.

13. THIS COURT ORDERS AND DECLARES that, no counterparty under any Assigned Contract, nor any other person, upon the assignment and transfer to, and assumption by, the Purchaser of any Assigned Contract shall make or pursue any demand, claim, action or suit or exercise any right or remedy under such Assigned Contract against the Purchaser relating to:

(a) the Applicant having sought or obtained relief under the *Bankruptcy and Insolvency Act* (Canada) against the Debtors;

(b) the insolvency of the Debtors; or

(c) any failure by the Debtors to perform a non-monetary obligation under any Assigned Contract;

and all such counterparties and persons shall be forever barred and estopped from taking such action. For greater certainty nothing herein shall limit or exempt the Purchaser in respect of obligations accruing, arising or continuing after the delivery of the Receiver's Certificate under the Assigned Agreements other than in respect of items (a) to (c) above.

14. THIS COURT ORDERS AND DECLARES that the Confidential Supplement be filed under seal, kept confidential and is not to form part of the public record, and shall remain stored electronically with this Court on an encrypted basis limiting access to only the Registrar of this Court and the presiding Judge, until:

(a) further order of the Court; or

(b) the Receiver's Certificate has been filed;

whichever shall first occur, at which time the Confidential Supplement shall be unsealed and thereafter form part of the public record.

15. THIS COURT ORDERS that the actions of the Receiver to date in respect of its administration of these receivership proceedings and the First Report, including the statements of receipts and disbursements contained in the First Report and the activities of the Receiver described therein are hereby approved;

16. 9. THIS COURT HEREBY 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.

_____

_____, 2024

_____

, J.

I, J.J. BURNELL, OF THE FIRM OF MLT AIKINS LLP HEREBY CERTIFY THAT I HAVE RECEIVED THE CONSENTS AS TO FORM OF THE FOLLOWING PARTIES:

***

AS DIRECTED BY THE HONOURABLE MR. JUSTICE CHARTIER

Schedule ~~A~~"1" – Form of Receiver's Certificate

~~Court~~ File No. ~~_____~~CI 24-01-45056

THE
~~QUEEN'S~~KING'S
BENCH

WINNIPEG
~~_____~~CENTRE

IN THE MATTER OF: THE APPOINTMENT OF A RECEIVER PURSUANT TO SECTION 243 OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3 AS AMENDED, AND SECTION 55 OF *THE COURT OF KING'S BENCH ACT*, C.C.S.M. c. C280

~~B E T W E E N~~BETWEEN:

~~PLAINTIFF~~

~~Plaintiff~~

BANK OF MONTREAL,

~~RECITALS~~

Applicant,

-and-

~~DEFENDANT~~

~~Defendant~~

GENESUS INC., CAN-AM GENETICS INC. and GENESUS GENETICS, INC.,

~~RECEIVER'S CERTIFICATE~~

Respondents.

RECEIVER'S CERTIFICATE

RECITALS

A. ~~A.~~Pursuant to an Order of the Honourable ~~[NAME OF JUDGE]~~Mr. Justice Chartier of the Manitoba Court of ~~Queen's~~King's Bench (the ~~"~~"**Court**~~"~~") dated ~~[DATE OF ORDER], [NAME OF RECEIVER]~~June 11, 2024, BDO Canada Limited was appointed as the receiver (the ~~"~~"**Receiver**~~"~~") of the undertaking, property and assets of ~~[DEBTOR] (the "Debtor")~~Genesus Inc. ("**Genesus**"), Can-Am Genetics Inc. ("**Can-Am**") and Genesus Genetics, Inc. ("**GGI**", and together with Genesus and Can-Am, the "**Debtors**").

B. ~~B.~~Pursuant to an Order of the Court ~~dated [DATE]~~pronounced July 4, 2024, the Court approved the agreement of purchase and sale made as of ~~[DATE OF~~

~~AGREEMENT]~~June 28, 2024 (the ~~"Sale Agreement"~~"**APA**") between the Receiver ~~[Debtor] and [NAME OF PURCHASER] (the "~~and Canada ZF Investments Inc. (the "**Purchaser**~~"~~") and provided for the vesting in the Purchaser of the ~~Debtor's~~Debtors' right, title and interest in

and to the Purchased Assets, which vesting is to be effective with respect to the Purchased Assets upon the delivery by the Receiver to the Purchaser of a certificate confirming (i) the payment by the Purchaser of the Purchase Price for the Purchased Assets; (ii) that the conditions to Closing have been satisfied or waived by the Receiver and the Purchaser; and (iii) the Transaction has been completed to the satisfaction of the Receiver.

C. ~~C.~~ Unless otherwise indicated herein, terms with initial capitals have the meanings set out in the ~~Sale Agreement~~APA.

THE RECEIVER CERTIFIES the following:

1. ~~1.~~ The Purchaser has paid and the Receiver has received the Purchase Price for the Purchased Assets payable on the Closing Date pursuant to the ~~Sale Agreement~~[12]APA;

2. ~~2.~~ The conditions to Closing the ~~Sale Agreement~~APA have been satisfied or waived by the Receiver and the Purchaser; ~~and~~

3. The Receiver has received the Purchase Price less the Holdback Amount (each as defined in the APA); and

4. ~~3.~~ The Transaction has been completed to the satisfaction of the Receiver.

5. ~~4.~~ This Certificate was delivered by the Receiver at ~~_____~~ _____ [TIME] on ~~_____~~ [DATE].

[12] ~~While ordinarily the Receiver will expect payment in full on closing this language may need to be varied to accommodate certain transactions. For example, where the Purchaser's lender cannot advance until the mortgage has been registered in which case it can be revised to read:~~

~~The Purchaser has made arrangements to pay the purchase price for the purchased assets pursuant to the Sale Agreement satisfactory to Receiver's counsel.~~

~~**[NAME OF RECEIVER], in its capacity as Receiver of the undertaking, property and assets of [DEBTOR], and not in its personal capacity**~~

~~Per:~~ _____

~~Name:~~

~~Title:~~

BDO CANADA LIMITED, in its capacity as Receiver of the undertaking, property and assets of Genesus Inc., Can-Am Genetics Inc. and Genesus Genetics, Inc., and not in its personal capacity

Per: _____

Name:
Title:

~~**Schedule B – Purchased Assets**~~

Schedule "2" – Claims to be deleted and expunged from title to Real Property

For Title Numbers: 1892437/2 and 1848166/2:

a. Mortgage No. 1219289/2 (Genesus Inc.) (the "**Genesus Mortgage**");
b. Postponement of Rights No. 1228844/2 (Registered by Genesus Inc. postponing its right sunder the Genesus Mortgage to Manitoba Agricultural Credit Corp.);
c. Mortgage No. 1503944/2 (Bank of Montreal); and
d. Postponement of Rights No. 1505568/2 (Registered by Genesus Inc. postponing its rights under the Genesus Mortgage to Bank of Montreal)

For Title Number: 2316076/3:

a. Mortgage No. 1230862/3 (Bank of Montreal);
b. Certificate of Judgment No. 1232076/3 (Sea Air International Forwarders Limited); and
c. Certificate of Judgment No. 1232212/3 (Fermes Durand Farms Ltee.)

~~Schedule C – Claims to be deleted and expunged from title to Real Property~~

Schedule ~~D~~"3" – Permitted Encumbrances, Easements and Restrictive Covenants related to the Real Property

(unaffected by the Vesting Order)

For Title Numbers: 1892437/2 and 1848166/2:

Caveat 1130601/2 (MTS Communications)

For Title Number: 2316076/3:

None