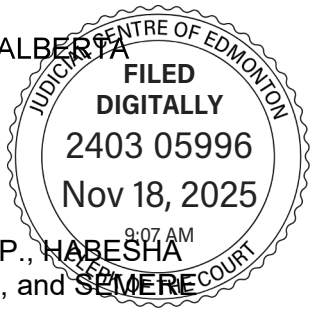
Clerk's Stamp:

COURT FILE NUMBER	2403-05996
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	EDMONTON
PLAINTIFF	ROYAL BANK OF CANADA
DEFENDANTS	BEREKET & G HOLDINGS CORP., HABESHA AFRICAN SUPERMARKET LTD., and SEMERE BERHANE



DOCUMENT	**BENCH BRIEF OF LAW OF BDO CANADA LIMITED IN ITS CAPACITY AS COURT APPOINTED RECEIVER OF BEREKET & G HOLDINGS CORP. AND HABESHA AFRICAN SUPERMARKET LTD.**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	MILLER THOMSON LLP Barristers and Solicitors 2700 Commerce Place 10155 – 102 Street Edmonton, AB, T5J 4G8 Attention: Spencer Norris / Dakota Bailey Phone: 780-429-9746 / 780-429-9777 Email: snorris@millerthomson.com / dbailey@millerthomson.com File No. 0249783.0002

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I. INTRODUCTION

1. This Bench Brief is in support of the Application filed by BDO Canada Limited, in its capacity as court-appointed receiver (the "**Receiver**") in respect of the assets, undertakings and property of Bereket & G Holdings Corp. (the "**Bereket**") and Habesha African Supermarket Ltd. ("**Habesha**" and together with Bereket, the "**Companies**"), pursuant to a receivership order granted by this court on April 4, 2024 and as amended and restated on July 22, 2024 (collectively the "**Receivership Order**"), for the following relief:

   (a) an Order:

      (i) abridging, the time for service of this application and the supporting material, if necessary, and deeming service thereof to be good and sufficient;

      (ii) authorizing and approving the transaction (the "**Transaction**") contemplated under the purchase sale agreement (the "**Sale Agreement**") between the Receiver and Lizotte Investments Inc. (the "**Purchaser**") dated November 3rd, 2025 for the commercial property located at 10709 105 Street NW in Edmonton, Alberta (the "**Real Property**" or the "**Purchased Asset**");

         (A) authorizing and directing the Receiver take all steps reasonably required to carry out the terms of the Sale Agreement;

         (B) upon closing of the Transaction, vesting title to the Purchased Asset in and to the Purchaser, or its nominee; and

   (b) and an Order:

      (i) approving and ratifying the actions, conduct and activities of the Receiver as set out in the Third Report of the Receiver, dated November 17, 2025 (the "**Third Report**");

      (ii) approving the Receiver's Interim Statement of Receipts and Disbursements for the period from inception to November 17, 2025 (the "**Interim SRD**");

(iii) approving the professional fees and disbursements of the Receiver and its legal counsel, Miller Thomson LLP ("**Miller Thomson**"), for the period ending October 31, 2025, for Bereket and Habesha (collectively, the "**Professional Fees**");

(iv) temporarily sealing the Confidential Supplement to the Third Report of the Receiver dated November 17, 2025 (the "**Confidential Supplement to the Report**") until thirty (30) days following the close of the sale of the Real Property has been completed or until further order of this Honourable Court; and

(c) granting such further and other relief as counsel may advise and this Honourable Court deems just and appropriate.

2. Capitalized terms not otherwise defined herein have the definition given to them in the Second Report.

I. SUMMARY OF FACTS

3. The facts are more particularly described in the Third Report. Below is a brief summary.

A. Background

4. On April 4, 2024 (the "**Receivership Date**"), pursuant to the application of RBC the Receiver was appointed over Bereket.[1]

5. On July 22, 2024, the Receiver was also appointed receiver over Habesha pursuant to an amended and restated receivership order (the "**Receivership Order**").[2]

6. RBC is the senior secured creditor of Bereket and, as at March 21, 2024, was owed approximately $2.54 million, plus further accruing interest, costs and legal fees on a solicitor and client full indemnity basis (the "**RBC Indebtedness**"), secured by way of first position mortgage in the principal amount of $3.750 million (the "**BDC**

[1] Receivership Order, dated April 4, 2024.

[2] Amended and Stated Receivership Order, dated July 22, 2024. [**Amended Receivership Order**]

Mortgage") and an assignment of rents and leases ("**Assignment of Rents and Leases**") registered on the titles to the Real Property, among other security.[3]

7. Bereket's business consisted of operating the Real Property, which is a two-story commercial building located in central Edmonton.[4]

8. There are two tenants of the Real Property: a tax consulting business, and a barber shop (collectively the "**Tenants**").[5]

B. Marketing Process

9. On May 28, 2024, the Receiver executed the Exclusive Sale Listing Agreement (the "**Listing Agreement**") with Cushman & Wakefield Edmonton ("**Cushman**") and worked with Cushman to market the Real Property and ultimately negotiate the Sale Agreement in accordance with the terms of the Listing Agreement.[6]

10. On June 7, 2024 Justice J.S. Little granted an order among other things, approving the marketing process (the "**Marketing Process**") of the Real Property and the engagement of Cushman (the "**June 7 Order**").[7]

11. Following the June 7 Order, the Receiver engaged in extensive clean-up efforts of the Real Property in order to maximize recovery, including disposing of unsaleable inventory, washing away graffiti and garbage and debris disposal in and around the Real Property.[8]

12. On or around October 15, 2024, the Receiver formally commenced the Marketing Process.[9]

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[3] Third Report of the Receiver, dated November 17, 2025 at para. 19. [**Third Report**]

[4] Third Report, para. 16.

[5] Third Report, para. 18.

[6] Third Report, para. 3.

[7] Third Report, para. 4.

[8] Third Report, paras. 31-32.

[9] Third Report, para. 33.

13. The Real Property was initially listed for $2.85 million, but was subsequently reduced as follows on the recommendation of Cushman and with the consent of RBC:[10]

    (a) $2,650,000 on February 25, 2025;

    (b) $2,350,000 on May 22, 2025; and

    (c) $1,950,000 on July 28, 2025.

14. On November 3, 2025 the Receiver received the Sale Agreement.[11]

15. Concurrently with the receipt of the Sale Agreement, the first deposit pursuant to the Sale Agreement was received from the Purchaser to the Receiver's legal counsel.[12]

16. The Sale Agreement is stated to close January 19, 2025 (the "**Closing Date**").[13]

17. The Sale Agreement is made subject to certain conditions, including this court's approval of the Sale Agreement and Transaction.[14]

18. Further, the Sale Agreement contains two significant non-refundable deposits (one of which has been paid as at the date of this brief) which, in the Receiver's view, offset any closing risk associated with the Transaction as the Purchaser is understood to be a commercial real estate brokerage and therefore familiar with real estate sales.[15] The Sale Agreement further requires that Bereket take all necessary steps to terminate any extant leases upon the Closing Date.

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[10] Third Report, para. 33.

[11] Third Report, para. 7(c).

[12] Third Report, para. 35(d) and 36(d).

[13] Third Report, para. 35(g).

[14] Third Report, para. 35(e).

[15] Third Report, paras. 35(d) and 36(d).

19. The Receiver is supportive of the Sale Agreement and Transaction for the following key reasons:[16]

(a) the Marketing Process was robust, and was conducted efficiently, with integrity and provided significant exposure of the Real Property to the market over an approximately one year period;

(b) the purchase price under the Sale Agreement is the best price achieved by the Receiver as result of the Marketing Process;

(c) based on the Marketing Process, it is uncertain that further efforts would yield a more favourable outcome;

(d) the Purchaser has provided a non-refundable deposit to the Receiver with the second non-refundable deposit due three days following Court approval. Furthermore, as noted, the Purchaser is understood to be a commercial real estate brokerage and therefore familiar with real estate sales. Therefore, the Receiver believes that they have the capacity to complete the Transaction;

(e) RBC, as primary secured creditor, has advise that it is supportive of the Sale Agreement and Transaction;

(f) completing the Transaction will mitigate the future holding costs that continue to accrue, such as utilities and other building expenses, property taxes, insurance, and professional fees. Furthermore, it will also minimize the risk of potential capital requirements, vandalism or other operational concerns with respect to holding the Real Property over a further period; and

(g) there has been no unfairness in the Marketing Process or in the negotiation of the Sale Agreement, which in the Receiver's view is commercially fair and reasonable and have been negotiated in good faith.

(collectively the Receiver's "**Reasons for Approval**").

[16] Third Report, para. 36.

C. Receiver's Activities

20. Since the Receivership Date, the Receiver has been diligently working to maximize value for all stakeholders of Bereket, including performing the activities set out in the Third Report.

21. The activities of the Receiver since the Second Report of the Receiver filed on July 18, 2025, include, with respect to the Company and Habesha:[17]

Bereket

(a) preparing and submitting the Third Report;

(b) corresponding with Cushman in relation to preparing the Real Property for sale;

(c) establishing utility accounts in the name of the Receiver, coordinating snow removal activities, and establishing regular security checks by a company engaged by the Receiver on the Real Property;

(d) responding to various incidents of loitering in and around the Real Property and broken windows, as well as a fire incident that resulted in minor damage to the exterior door of the Real Property;

(e) completing repair and maintenance items to the Real Property and/or other activities to ultimately prepare the property for sale and in an attempt to maximize recoveries;

(f) borrowing funds pursuant to a Receiver's Certificate in order to pay outstanding property taxes and issuing payment of outstanding property taxes to the city of Edmonton;

(g) initiating and facilitating the Sales Process through Cushman as Sales Agent to the Receiver and ultimately negotiating and entering into the Sale Agreement;

(h) corresponding with tenants and collecting rent due;

(i) facilitating a trust audit in respect of Bereket's CRA accounts; and

[17] Third Report, paras. 28-29.

(j) other administrative items in relation to the receivership.

Habesha

(a) attending at the Real Property (where Habesha operated from) immediately following the Court's granting of the Amended Receivership Order to, among other things, terminate operations and all staff, meet with management, and secure the property and change locks;

(b) documenting the assets of Habesha present at the Real Property;

(c) requesting various books and records of Habesha, both from its principal Mr. Semere Berhane ("**Semere**"), and the Habesha's former accountant;

(d) donating perishable food to the Edmonton Food Bank or returning applicable items to the original suppler (non-perishable food stores were retained for sale at auction);

(e) releasing third-party goods subject to property claims pursuant to section 81.1 of the BIA;

(f) responding to property claims of Semere and other third-parties;

(g) engaging in various junk removal and significant clean-up activities to remove all debris and unsaleable inventory/assets from the Real Property;

(h) responding to and corresponding with various stakeholders;

(i) entering into the auction agreement with an auctioneer, and completing a sale of the assets of Habesha through an auction;

(j) arranging for Habesha's bank account to be closed and all funds sent to the Receiver;

(k) contacting Habesha's insurance broker to notify them of the receivership and have the Receiver added to Habesha's insurance policy;

(l) writing to the CRA and facilitating a trust audit in respect of Habesha's CRA accounts;

(m) arranging for the redirection of all mail from Habesha to the office of the Receiver; and,

(n) issuing the Receiver's statutory Notice and Statement of Receiver to known creditors of Habesha.

(collectively, the "**Receiver's Activities**").

II. ISSUES

22. The issues before this Honourable Court are:

(a) Should the Sale Agreement and Transaction contemplated therein, be approved?

(b) Should the Confidential Supplement to the Third Report be temporarily sealed on the court record?

III. LAW & ARGUMENT

A. The Sale Agreement and Transaction Should be Approved

23. The Receivership Order authorizes the Receiver to, among other things, market and sell Bereket's property outside the ordinary course of business, and apply for any vesting or other order, to convey the Property to a purchaser free and clear of any liens or encumbrances affecting such property.[18]

24. Section 247(b) of the *Bankruptcy and Insolvency Act* [19] directs that a receiver shall deal with the property of an insolvent person in a commercially reasonable manner.

25. The court should consider the following factors described by the Ontario Court of Appeal in *Royal Bank of Canada v Soundair Corp.*[20] ("***Soundair***") when determining if a receiver has acted in a commercially reasonable manner in the context of a proposed sale transaction:

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[18] Amended Receivership Order, at paras. 3(l)(m).

[19] *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, s. 247(b). [*BIA*] [**TAB 1**]

[20] *Royal Bank of Canada v Soundair Corp.*, [1991] OJ No. 1137 (ONCA) at para. 16 [***Soundair***] [**TAB 2**]; adopted and reaffirmed by the Alberta Court of Appeal in *PricewaterhouseCoopers Inc v 1905393 Alberta Ltd,* 2019 ABCA 433 at paras. 10-12. [**TAB 3**]

(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 there has been unfairness in the working out of the process.

26. In granting approval and vesting orders, courts have made clear that the recommendation of the court-appointed receiver is to be afforded deference and, absent a violation of the *Soundair* principles or other exceptional circumstances, the court should uphold the business judgment of the receiver as its court officer.[21]

27. We submit the *Soundair* principles have been met for the following reasons:

(a) the Marketing process undertaken by the Receiver was commercially reasonable and approved by the Court in the June 7 Order;

(b) Cushman is a reputable listing agent having extensive experience selling commercial properties in and around the Edmonton area and marketed the Real Property in accordance with the June 7 Order and Listing Agreement;

(c) the Sale Agreement is the highest offer received for the Real Property;

(d) The Receiver, in consultation with Cushman, believes that the Transaction is the best available in the circumstances, and that further time spent marketing the Real Property would not result in a superior offer;

(e) the Receiver believes that the approval of the Sale Agreement and the Transaction contemplated thereunder is in the best interests of Bereket's stakeholders;

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[21] *Rompsen Investment Corp. v. 6176666 Canada Ltee*, 2012 ONSC 1727 at para 18 [**TAB 4**]; *Crown Trust Co. et al v. Rosenberg et al*, 1986 CanLII 2760 (ONSC) at paras. 83-84 [**TAB 5**]; *1705221 Alberta Ltd. v. Three M Mortgages Inc.*, 2021 ABCA 144 at para. 22; *Soundair*, above note 4 at paras. 21, 46. [**TAB 6**]

(f) there is no evidence of unfairness in the Receiver's Marketing Process and, as at the date of the Third Report, no stakeholders have expressed concerns to the Receiver with the Marketing Process; and

(g) RBC as the primary secured creditor is supportive of the Sale Agreement and Transaction.

28. Based on the foregoing, the Receiver respectfully submits that the marketing process, the Sale Agreement, and Transaction are commercially reasonable in the circumstances and should be approved in the form of Sale Approval and Vesting Order sought.

B. A Sealing Order over the Second Confidential Report Should be Granted

29. The Receiver seeks a temporary sealing order with respect to the Second Confidential Report, which contains commercially sensitive information regarding the Sale Agreement and Marketing and Sales Process.[22]

30. Pursuant to Part 6 Division 4 of the Alberta *Rules of Court*, this court has the discretionary authority to order that a document filed in a civil proceeding is confidential, and that it may be sealed and not form part of the public record of the proceedings.[23]

31. The Supreme Court of Canada in *Sherman Estate v Donovan*[24] recently clarified the two-part *Sierra Club* test for obtaining a sealing order as follows:

> "In order to succeed, the person asking a court to exercise discretion in a way that limits the open court presumption must establish that:
>
> (a) court openness poses a serious risk to an important public interest;

[22] Third Report, paras. 48-50.

[23] *Alberta Rules of Court*, Part 6 Division 4. [**TAB 7**]

[24] *Sherman Estate v.* Donovan, 2021 SCC 25. [**TAB 8**]

(b) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and

(c) as a matter of proportionality, the benefits of the order outweigh its negative effects."[25]

32. It is well established in insolvency matters that sealing orders are justified to ensure the integrity of a court-officer's marketing and sale of a debtor's assets and to avoid the misuse of information by bidders in a subsequent sales process.[26]

33. The disclosure of the information contained in the Second Confidential Report could have a detrimental impact on any future sale efforts of the Receiver, should the Transaction not close. For that reason, the Receiver submits that the salutary effects of a sealing order outweigh any negative effects to the principles of court openness.

34. Additionally, a sealing order is the least restrictive and prejudicial alternative to prevent the dissemination of commercially sensitive information as no stakeholder will be materially prejudiced and any negative effects are limited by the temporary nature of the sealing order.

35. In these circumstances, the Receiver respectfully submits that a sealing order as proposed should be granted.

C. The Activities of the Receiver in the Third Report Should be Approved

36. This Court has the jurisdiction to review and approve the activities of a court-appointed receiver.[27]

37. As detailed in the Third Report, the Receiver has undertaken efforts to carry out its mandate since the Amended Receivership Order, including but not limited to the Receiver's Activities, as described above.

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[25] *Sherman Estate*, above note 27 at para. 38.

[26] *Rompsen Investment Corporation v. Hargate Properties Inc.*, 2012 ABQB 412 at paras. 2,11 [**TAB 9**]; See also *Yukon (Government of) v. Yukon Zinc Corporation*, 2022 YKSC 2 at para. 39 [**TAB 10**]; *Ontario Securities Commission v. Bridging Finance Inc.*, 2022 ONSC 1857 at para. 53. [**TAB 11**]

[27] *Bank of America Canada v. Williann Investments Ltd.*, 1996 CanLII 2782 (ONCA) [**TAB 12**]; *Leslie & Irene Dube Foundation v. P218 Enterprises Ltd.*, 2014 BCSC 1855 at para. 54. [**TAB 13**]

38. The Receiver's Activities described in the Third Report were all necessary and undertaken in good faith pursuant to the Receiver's duties and powers set out in the Amended Receivership Order and June 7 Order and were in the best interest of all stakeholders of Bereket.

39. The Receiver respectfully submits that the Third Report and the activities described therein should be approved.

IV. RELIEF SOUGHT

40. For the reasons outlined above, the Receiver requests that this court grant the relief sought in the Application in the forms of order submitted.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 17th DAY OF NOVEMBER, 2025.

MILLER THOMSON LLP

Per: 

Spencer Norris / Dakota Bailey

Counsel for BDO Canada Limited in its capacity as court-appointed receiver of Bereket & G Holdings Corp. and Habesha African Supermarket Ltd.

TABLE OF AUTHORITIES

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1.	*Bankruptcy and Insolvency Act*, RSC 1985, c B-3
2.	*Royal Bank of Canada v Soundair Corp.*, [1991] OJ No. 1137 (ONCA)
3.	*PricewaterhouseCoopers Inc v 1905393 Alberta Ltd*, 2019 ABCA 433
4.	*Rompsen Investment Corp. v. 6176666 Canada Ltee*, 2012 ONSC 1727
5.	*Crown Trust Co. et al v. Rosenberg et al*, 1986 CanLII 2760 (ONSC)
6.	*1705221 Alberta Ltd. v. Three M Mortgages Inc.*, 2021 ABCA 144
7.	*Alberta Rules of Court*, AR 124/2010
8.	*Sherman Estate v.* Donovan, 2021 SCC 25
9.	*Rompsen Investment Corporation v. Hargate Properties Inc.*, 2012 ABQB 412
10.	*Yukon (Government of) v. Yukon Zinc Corporation*, 2022 YKSC 2
11.	*Ontario Securities Commission v. Bridging Finance Inc.*, 2022 ONSC 1857
12.	*Bank of America Canada v. Williann Investments Ltd.*, 1996 CanLII 2782 (ONCA)
13.	*Leslie & Irene Dube Foundation v. P218 Enterprises Ltd.*, 2014 BCSC 1855

TAB 1

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 February 17, 2025

Last amended on December 12, 2024

À jour au 17 février 2025

Dernière modification le 12 décembre 2024

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

Intellectual property — disclaimer or resiliation

(2) If the insolvent person or the bankrupt is a party to an agreement that grants to another party a right to use intellectual property, the disclaimer or resiliation of that agreement by the receiver does not affect that other party's right to use the intellectual property — including the other party's right to enforce an exclusive use — during the term of the agreement, including any period for which the other party extends the agreement as of right, as long as the other party continues to perform its obligations under the agreement in relation to the use of the intellectual property.

2018, c. 27, s. 268.

Propriété intellectuelle — résiliation

(2) Si la personne insolvable ou le failli est partie à un contrat qui autorise une autre partie à utiliser un droit de propriété intellectuelle, la résiliation de ce contrat par le séquestre n'empêche pas l'autre partie d'utiliser le droit en question ni d'en faire respecter l'utilisation exclusive, à condition que cette autre partie respecte ses obligations contractuelles à l'égard de l'utilisation de ce droit, et ce, pour la période prévue au contrat et pour toute prolongation de celle-ci dont elle se prévaut de plein droit.

2018, ch. 27, art. 268.

Good faith, etc.

247 A receiver shall

(a) act honestly and in good faith; and

(b) deal with the property of the insolvent person or the bankrupt in a commercially reasonable manner.

1992, c. 27, s. 89.

Obligation de diligence

247 Le séquestre doit gérer les biens de la personne insolvable ou du failli en toute honnêteté et de bonne foi, et selon des pratiques commerciales raisonnables.

1992, ch. 27, art. 89.

Powers of court

248 (1) Where the court, on the application of the Superintendent, the insolvent person, the trustee (in the case of a bankrupt), a receiver or a creditor, is satisfied that the secured creditor, the receiver or the insolvent person is failing or has failed to carry out any duty imposed by sections 244 to 247, the court may make an order, on such terms as it considers proper,

(a) directing the secured creditor, receiver or insolvent person, as the case may be, to carry out that duty, or

(b) restraining the secured creditor or receiver, as the case may be, from realizing or otherwise dealing with the property of the insolvent person or bankrupt until that duty has been carried out,

or both.

Pouvoirs du tribunal

248 (1) S'il est convaincu, à la suite d'une demande du surintendant, de la personne insolvable, du syndic — en cas de faillite —, du séquestre ou d'un créancier que le créancier garanti, le séquestre ou la personne insolvable ne se conforme pas ou ne s'est pas conformé à l'une ou l'autre des obligations que lui imposent les articles 244 à 247, le tribunal peut, aux conditions qu'il estime indiquées :

a) ordonner au créancier garanti, au séquestre ou à la personne insolvable de se conformer à ses obligations;

b) interdire au créancier garanti ou au séquestre de réaliser les biens de la personne insolvable ou du failli, ou de faire toutes autres opérations à leur égard, jusqu'à ce qu'il se soit conformé à ses obligations.

Idem

(2) On the application of the Superintendent, the insolvent person, the trustee (in the case of a bankrupt) or a creditor, made within six months after the statement of accounts was provided to the Superintendent pursuant to subsection 246(3), the court may order the receiver to submit the statement of accounts to the court for review, and the court may adjust, in such manner and to such extent as it considers proper, the fees and charges of the receiver as set out in the statement of accounts.

1992, c. 27, s. 89.

Idem

(2) Sur demande du surintendant, de la personne insolvable, du syndic — en cas de faillite — ou d'un créancier, présentée au plus tard six mois après la transmission au surintendant de l'état de comptes visé au paragraphe 246(3), le tribunal peut ordonner au séquestre de lui soumettre cet état de comptes pour examen; le tribunal peut, de la manière et dans la mesure qu'il estime indiquées, ajuster les honoraires et dépenses du séquestre qui y sont consignés.

1992, ch. 27, art. 89.

TAB 2

Royal Bank of Canada v. Soundair Corp., Canadian Pension Capital Ltd. and Canadian Insurers Capital Corp.

Indexed as: Royal Bank of Canada v. Soundair Corp. (C.A.)

4 O.R. (3d) 1
[1991] O.J. No. 1137
Action No. 318/91

ONTARIO
Court of Appeal for Ontario
Goodman, McKinlay and Galligan JJ.A.
July 3, 1991

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

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

IN AGREEING TO SELL TO OEL?

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

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

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

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

2. It should consider the interests of all parties.

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

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

I intend to discuss the performance of those duties separately.

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

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

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

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

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

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

(Emphasis added)

I also agree with and adopt what was said by Macdonald J.A.

bidding situation rather than a private sale, I consider them to be equally applicable to a negotiation process leading to a private sale. Where the court is concerned with the disposition of property, the purpose of appointing a receiver is to have the receiver do the work that the court would otherwise have to do.

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

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

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

(Emphasis added)

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

Before this court, counsel for those opposing the confirmation of the sale to OEL suggested many different ways

TAB 3

In the Court of Appeal of Alberta

Citation: Pricewaterhousecoopers Inc v 1905393 Alberta Ltd, 2019 ABCA 433

Date: 20191114
Docket: 1903-0134-AC
Registry: Edmonton

Between:

Pricewaterhousecoopers Inc. in its capacity as Receiver of 1905393 Alberta Ltd.

Respondent/Cross-Appellants
(Applicant)

- and -

1905393 Alberta Ltd., David Podollan and Steller One Holdings Ltd.

Appellants/Cross-Respondents
(Respondents)

- and -

Servus Credit Union Ltd., Ducor Properties Ltd., Northern Electric Ltd. and Fancy Doors & Mouldings Ltd.

Respondents
(Interested Parties)

The Court:

The Honourable Mr. Justice Thomas W. Wakeling
The Honourable Madam Justice Dawn Pentelechuk
The Honourable Madam Justice Jolaine Antonio

---

[10] As regards the first question, the parties agree that Court approval requires the Receiver to satisfy the well-known test in ***Royal Bank of Canada v Soundair Corporation***, [1991] OJ No 1137 at para 16, 46 OAC 321 ("***Soundair***"). That test requires the Court to consider four factors: (i) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently; (ii) whether the interests of all parties have been considered, not just the interests of the creditors of the debtor; (iii) the efficacy and integrity of the process by which offers are obtained; and (iv) whether there has been unfairness in the working out of the process.

[11] The appellants suggest that ***Soundair*** has been modified by our Court in ***Bank of Montreal v River Rentals Group Ltd,*** 2010 ABCA 16 at para 13, 469 AR 333, to require an additional four factors in assessing whether a receiver has complied with its duties: (a) whether the offer accepted is so low in relation to the appraised value as to be unrealistic; (b) whether the circumstances indicate that insufficient time was allowed for the making of bids; (c) whether inadequate notice of sale by bid was given; and (d) whether it can be said that the proposed sale is not in the best interests of either the creditor or the owner. The appellants argue that, although the chambers judge considered the ***Soundair*** factors, she erred by failing to consider the additional ***River Rentals*** factors and, in so doing, in effect applied the "wrong law".

[12] We disagree. The chambers judge expressly referred to the ***River Rentals*** case. ***River Rentals***, it must be recalled, simply identified a subset of factors that a Court might also consider when considering the first prong of the ***Soundair*** test as to whether a receiver failed to get the best price and has not acted providently. Moreover, the type of factors that might be considered is by no means a closed category and there may be other relevant factors that might lead a court to refuse to approve a sale: ***Salima Investments Ltd v Bank of Montreal*** (1985), 65 AR 372 at paras 12-13. At its core, ***River Rentals*** highlights the need for a Court to balance several factors in determining whether a receiver complied with its duties and to confirm a sale. It did not purport to modify the ***Soundair*** test, establish a hierarchy of factors, nor limit the types of things that a Court might consider. The chambers judge applied the correct test. This ground of appeal is dismissed.

[13] At its core, then, the appellants challenge how the chambers judge applied and weighed the relevant factors in this case. The appellants suggest that the failure to obtain a price at or close to the appraised value of the Hotels is an overriding factor that trumps all the others in assessing whether the Receiver acted improvidently. That is not the test. A reviewing Court's function is not to consider whether a Receiver has failed to get the best price. Rather, a Receiver's duty is to act in a commercially reasonable manner in the circumstances with a view to obtaining the best price having regard to the competing interests of the interested parties: ***Skyepharma PLC v Hyal Pharmaceutical Corp*** (1999), 12 CBR (4^{th}) 84 at para 4, [1999] OJ No 4300, aff'd on appeal 15 CBR (4^{th}) 298 (ONCA).

[14] Nor is it the Court's function to substitute its view of how a marketing process should proceed. The appellants suggest that if the Hotels were re-marketed with an exposure period closer to that which the appraisals were based on, then a better offer might be obtained. Again, that is not

TAB 4

CITATION: Romspen Investment Corp. v. 6176666 Canada Ltée., 2012 ONSC 1727
COURT FILE NO.: 09-8462-00CL
DATE: 20120314

SUPERIOR COURT OF JUSTICE – ONTARIO

COMMERCIAL LIST

RE: Romspen Investment Corporation, Applicant

AND:

6176666 Canada Ltée., Respondent

BEFORE: D. M. Brown J.

COUNSEL: L. Corne, for the Receiver

HEARD: March 14, 2012

REASONS FOR DECISION (CORRECTED)

I. Just how broken is the document management system of the Superior Court of Justice?

[1] I suppose that on a sunny, unusually warm, mid-March day one should be mellow and accept, without complaint, the systemic failures and delay of this Court's document management system. The problem is that from the perspective of the members of the public who use this Court, delays caused by our antiquated, wholly-inadequate document management system impose unnecessary, but all too real, costs on them. And yet the entity that operates that part of the Court's administration system – the Court Services Division of the Ministry of the Attorney General – seems completely indifferent to the unnecessary costs it is causing to the members of the public who use our Court.

[2] Let me tell a little story. It is not an unusual story. Indeed, it is a common story in this court. But the story illustrates an important point, a point which judges, as the ultimate stewards of the health of our system of justice, must be vigilant in keeping on the radar screens of those who hold the purse strings of this Court's administration system.

[3] Romspen Investment Corporation lent money to 6176666 Canada Ltée. ("617") to develop and construct a 25-unit residential condominium project in the Glebe neighborhood of Ottawa. The loan went sour; this Court appointed SF Partners Inc. as receiver and manager of 617 back in late 2009.

II. Motion to approve the sale of the condo unit

[18] The principles governing this motion for the approval of the sale of the condo unit and a vesting order are those set out in *Royal Bank of Canada v. Soundair Corp*.[1] A court should consider:

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

A court should reject the recommendation of a receiver based on such judgment only in the most exceptional circumstances.[3]

[19] In the present case the Receiver followed a sales and marketing program previously accepted by this Court. As described in the Receiver's Seventh Report, the proposed sale of the condo unit is at a price in excess of the appraised value for units of such size.

[20] The Receiver filed proof of service of the motion on those on the Service List. No interested party opposed the relief sought. The form of approval and vesting order followed the Model Order of this Court.

[21] I was satisfied that the proposed sale met the criteria set out in *Soundair*, approved the sale, and signed the approval and vesting order.

[22] I further order that the appraisals previously sealed pursuant to the order of Pepall J. be resealed and that the Commercial List Office staff:

(i) keep the sealed appraisals on site here at 330 University so that they are available for use on the next approval motion, which I understand may occur next week; and,

(ii) make whatever entries can be made in the old FRANK case information system that the sealed documents should be retrieved and made available to the judge hearing any further sale approval motions.

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1 (1991), 4 O.R. (3d) 1 (C.A.).
2 *Ibid*., para. 16. *Crown Trust Co. v. Rosenberg* (1986), 60 O.R. (2d) 87 (H.C.J.), para. 12.
3 *Crown Trust, supra*., paras. 80 and 81.

TAB 5

Crown Trust Co. et al. v. Rosenberg et al.

60 O.R. (2d) 87

ONTARIO
HIGH COURT OF JUSTICE
ANDERSON J.
6TH NOVEMBER 1986.

Civil procedure -- Parties -- Intervention -- Receiver not recommending highest offer for court approval -- Offeror seeking to be added as intervenor on motion for approval -- No right to be added on motion -- No interest in matter -- Not adversely affected -- Considerations -- Rules 1.03, paras. 15, 22, 13.01.

Courts -- Jurisdiction -- Court appointing interim receiver and manager to dispose of large number of properties involved in highly publicized transactions -- Receiver developing complex disposition strategy with court approval -- Moving for approval of offers -- Duties of court on motion.

Debtor and creditor -- Receivers -- Court appointing interim receiver and manager to dispose of large number of properties involved in highly publicized transactions -- Receiver developing complex disposition strategy with court approval -- Not accepting highest offer because of various concerns -- Moving approval of other offers -- Receiver acted reasonably, properly and fairly -- Offers to be approved.

Debtor and creditor -- Receivers -- Court appointing interim receiver and manager to dispose of large number of properties involved in highly publicized transactions -- Receiver developing complex disposition strategy with court approval -- Not accepting highest offer because of various concerns -- Moving approval of other offers -- Highest offeror submitting

had from putting certain negative propositions which are not so explicit in the cases but which I think are fairly to be inferred from them.

The court ought not to enter into the market-place. In this case it ought not to become involved in the implementation of the Disposition Strategy and the attendant negotiations. 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. The court ought not to embark on a process analogous to the trial of a claim by an unsuccessful bidder for something in the nature of specific performance. 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.

In all of this it is necessary to keep in mind not only the function of the court but the function of the Receiver. The Receiver is selected and appointed having regard for experience and expertise in the duties which are involved. It is the function of the Receiver to conduct negotiations and to assess the practical business aspects of the problems involved in the disposition of the assets.

To put the alternative positions briefly they are these. The submission on behalf of the Receiver is that if the conclusion is that it has acted reasonably and fairly, and I would add not arbitrarily, in the best interests of the parties, I should make the order asked.

The submission of the objecting defendants reduced to its narrowest compass is along these lines. The Larco offer is or could by terms of the court's order be made legally susceptible of acceptance. It will produce the most money and it should be approved.

TAB 6

In the Court of Appeal of Alberta

Citation: 1705221 Alberta Ltd v Three M Mortgages Inc, 2021 ABCA 144

Date: 20210421
Docket: 2003-0076AC;
2003-0077AC
Registry: Edmonton

Appeal No. 2003-0076AC

Between:

1705221 Alberta Ltd

Appellant
(Plaintiff)

- and -

Three M Mortgages Inc and Avatex Land Corporation

Respondents
(Plaintiffs)

- and -

Todd Oeming, Todd Oeming as the Personal Representative of the Estate of Albert Oeming and the Estate of Albert Oeming

(Defendants)

- and –

BDO Canada Limited

Interested Party

- and –

Shelby Fehr

Interested Party

iii. The efficacy and integrity of the sale process by which offers are obtained; and

iv. Whether there has been unfairness in the working out of the process.

[20] Although the grounds of appeal of 170 and Oeming differ, they all lead to the central question of whether the Receiver satisfied the ***Soundair*** requirements. 170 seeks to set aside the order and asks that a bid process involving 170 and Fehr be allowed, on the condition that neither party be allowed to submit an offer for less than their last and highest offer. Oeming asks that the order be set aside and that they be provided additional time to refinance or alternatively, that the lands be re-marketed for a minimum of six to nine months.

[21] We will address each of the four ***Soundair*** factors in turn, from the perspective of both 170 and Oeming.

i. Sufficient Efforts to Sell

[22] A court approving a sale recommended by a receiver is not engaged in a perfunctory, rubberstamp exercise. But neither should a court reject a receiver's recommendation on sale absent exceptional circumstances: ***Soundair*** at paras 21, 58. A receiver plays the lead role in receivership proceedings. They are officers of the court; their advice should therefore be given significant weight. To otherwise approach the proceedings would weaken the receiver's central purpose and function and erode confidence in those who deal with them: ***Crown Trust Co v Rosenberg*** (1986), 39 DLR (4th) 526, 60 OR (2d) 87 (ONSC) at p 551.

[23] Oeming argues that the chambers judge erred in relying on the Receiver's appraisal of the lands which was not appended to an affidavit and therefore constituted inadmissible hearsay. Oeming further alleges that the Receiver acted improvidently in listing the lands for sale at $1,950,000, an amount they insist is significantly below property value. They point to their appraisal from Altus Group, appended to the appraiser's affidavit, in support of their claim that the lands are worth far more than the amount suggested by the Receiver.

[24] These arguments cannot succeed. Neither the Receivership/Liquidation Order nor the Order Approving Receiver's Activities and Sale Process required the Receiver to submit its reports by way of affidavit. To the contrary, the Receivership/Liquidation Order was an Alberta template order containing the following provision expressly exempting the Receiver from reporting to the court by way of affidavit:

> 28. Notwithstanding Rule 6.11 of the *Alberta Rules of Court*, unless otherwise ordered by this Court, the Receiver/Liquidator will report to the Court from time to time, which reporting is not required to be in affidavit form and shall be considered by this Court as evidence...

TAB 7

Province of Alberta

JUDICATURE ACT

ALBERTA RULES OF COURT

Alberta Regulation 124/2010

With amendments up to and including Alberta Regulation 126/2023

Current as of January 1, 2024

Office Consolidation

Alberta King's Printer
Suite 700, Park Plaza
10611 - 98 Avenue
Edmonton, AB T5K 2P7
Phone: 780-427-4952

E-mail: kings-printer@gov.ab.ca
Shop on-line at kings-printer.alberta.ca

Inspection or examination of property

6.26 On application, the Court may make one or more of the following orders:

(a) an order to inspect property, including an inspection by a judge or jury, or both, at trial, if the inspection is advisable to decide a question in dispute in an action, application or proceeding;

(b) an order to take samples, make observations or undertake experiments for the purpose of obtaining information or evidence, or both;

(c) an order to enter land or premises for the purpose of carrying out an order under this rule.

Notice before disposing of anything held by the Court

6.27(1) On application, the Court may direct that money or other personal property held by the Court not be paid out or disposed of without notice being served on the applicant.

(2) The applicant must be a person who

(a) is interested in the money or other personal property held by the Court, or

(b) is seeking to have the money or personal property applied to satisfy a judgment or order or a writ of enforcement against the person on whose behalf the money or personal property is held.

(3) The applicant

(a) must file an affidavit verifying the facts relied on in the application, and

(b) may make the application without serving notice of the application on any other person.

Division 4
Restriction on Media Reporting and Public Access to Court Proceedings

Application of this Division

6.28 Unless an enactment otherwise provides or the Court otherwise orders, this Division applies to an application for an order

(a) to ban publication of court proceedings,

(b) to seal or partially seal a court file,

(c) permitting a person to give evidence in a way that prevents that person or another person from being identified,

(d) for a hearing from which the public is excluded, or

(e) for use of a pseudonym.

Restricted court access applications and orders

6.29 An application under this Division is to be known as a restricted court access application and an order made under this Division is to be known as a restricted court access order.

When restricted court access application may be filed

6.30 A person may file a restricted court access application only if the Court has authority to make a restricted court access order under an enactment or at common law.

AR 124/2010 s6.30;194/2020

Timing of application and service

6.31 An applicant for a restricted court access order must, 5 days or more before the date scheduled for the hearing, trial or proceeding in respect of which the order is sought,

(a) file the application in Form 32, and

(b) unless the Court otherwise orders, serve every party and any other person named or described by the Court.

Notice to media

6.32 When a restricted court access application is filed, a copy of it must be served on the court clerk, who must, in accordance with the direction of the Chief Justice, give notice of the application to

(a) the electronic and print media identified or described by the Chief Justice, and

(b) any other person named by the Court.

AR 124/2010 s6.32;163/2010

Judge or applications judge assigned to application

6.33 A restricted court access application must be heard and decided by

(a) the judge or applications judge assigned to hear the application, trial or other proceeding in respect of which the restricted court access order is sought,

(b) if the assigned judge or applications judge is not available or no judge or applications judge has been assigned, the case management judge for the action, or

(c) if there is no judge or applications judge available to hear the application as set out in clause (a) or (b), the Chief Justice or a judge designated for the purpose by the Chief Justice.

AR 124/2010 s6.33;194/2020;136/2022

Application to seal or unseal court files

6.34(1) An application to seal an entire court file or an application to set aside all or any part of an order to seal a court file must be filed.

(2) The application must be made to

(a) the Chief Justice, or

(b) a judge designated to hear applications under subrule (1) by the Chief Justice.

(3) The Court may direct

(a) on whom the application must be served and when,

(b) how the application is to be served, and

(c) any other matter that the circumstances require.

Persons having standing at application

6.35 The following persons have standing to be heard when a restricted court access application is considered

(a) a person who was served or given notice of the application;

(b) any other person recognized by the Court who claims to have an interest in the application, trial or proceeding and whom the Court permits to be heard.

No publication pending application

6.36 Information that is the subject of the initial restricted court access application must not be published without the Court's permission.

AR 124/2010 s6.36;143/2011

Division 5
Facilitating Proceedings

Notice to admit

6.37(1) A party may, by notice in Form 33, call on any other party to admit for the purposes of an application, originating application, streamlined trial or trial, either or both of the following:

(a) any fact stated in the notice, including any fact in respect of a record;

(b) any written opinion included in or attached to the notice, which must state the facts on which the opinion is based.

(2) A copy of the notice must be served on each of the other parties.

(3) Each of the matters for which an admission is requested is presumed to be admitted unless, within 20 days after the date of service of the notice to admit, the party to whom the notice is addressed serves on the party requesting the admission a statement that

(a) denies the fact or the opinion, or both, for which an admission is requested and sets out in detail the reasons why the fact cannot be admitted or the opinion cannot be admitted, as the case requires, or

(b) sets out an objection on the ground that some or all of the matters for which admissions are requested are, in whole or in part,

(i) privileged, or

(ii) irrelevant, improper or unnecessary.

(4) A copy of the statement must be served on each of the other parties.

(5) A denial by a party must fairly meet the substance of the requested admission and, when only some of the facts or opinions for which an admission is requested are denied, the denial must specify the facts or opinions that are admitted and deny only the remainder.

TAB 8

Estate of Bernard Sherman and Trustees of the Estate and Estate of Honey Sherman and Trustees of the Estate *Appellants*

v.

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*

Succession de Bernard Sherman et fiduciaires de la succession et Succession de Honey Sherman et fiduciaires de la succession *Appelants*

c.

Kevin Donovan et Toronto Star Newspapers Ltd. *Intimés*

et

Procureur général de l'Ontario, procureur général de la Colombie-Britannique, Association canadienne des libertés civiles, Centre d'action pour la sécurité du revenu, Ad IDEM/Canadian Media Lawyers Association, Postmedia Network Inc., CTV, une division de Bell Média 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, Réseau juridique VIH et Mental Health Legal Committee *Intervenants*

INDEXED AS: SHERMAN ESTATE *v.* DONOVAN

2021 SCC 25

File No.: 38695.

2020: October 6; 2021: June 11.

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

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Courts — Open court principle — Sealing orders — Discretionary limits on court openness — Important public

RÉPERTORIÉ : SHERMAN (SUCCESSION) *c.* DONOVAN

2021 CSC 25

N° du greffe : 38695.

2020 : 6 octobre; 2021 : 11 juin.

Présents : Le juge en chef Wagner et les juges Moldaver, Karakatsanis, Brown, Rowe, Martin et Kasirer.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Tribunaux — Principe de la publicité des débats judiciaires — Ordonnances de mise sous scellés — Limites

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

qu'il y a un « risque sérieux » pour cette dimension de sa vie privée liée à sa dignité. Pour l'application du test des limites discrétionnaires à la publicité des débats judiciaire, le demandeur doit donc démontrer que les renseignements contenus dans le dossier judiciaire sont suffisamment sensibles pour que l'on puisse dire qu'ils touchent au cœur même des renseignements biographiques de la personne et, dans un contexte plus large, qu'il existe un risque sérieux d'atteinte à la dignité de la personne concernée si une ordonnance exceptionnelle n'est pas rendue.

[36] En l'espèce, les renseignements contenus dans les dossiers judiciaires ne revêtent pas ce caractère si sensible qu'on pourrait dire qu'ils touchent à l'identité fondamentale des personnes concernées; les fiduciaires n'ont pas démontré en quoi la levée des ordonnances de mise sous scellés met en jeu la dignité des personnes touchées. Je ne suis donc pas convaincu que l'atteinte à leur vie privée soulève un risque sérieux pour un intérêt public important, comme l'exige *Sierra Club*. De plus, comme je tenterai de l'expliquer, il n'y avait pas de risque sérieux que les personnes visées subissent un préjudice physique en raison de la levée des ordonnances de mise sous scellés. Par conséquent, la présente affaire n'est pas un cas où il convient de rendre des ordonnances de mise sous scellés ni aucune ordonnance limitant l'accès aux dossiers judiciaires en cause. Dans les circonstances, la question de l'admissibilité des nouveaux éléments de preuve du Toronto Star est théorique. Je suis d'avis de rejeter le pourvoi.

A. *Le test des limites discrétionnaires à la publicité des débats judiciaires*

[37] Les procédures judiciaires sont présumées accessibles au public (*MacIntyre*, p. 189; *A.B. c. Bragg Communications Inc.*, 2012 CSC 46, [2012] 2 R.C.S. 567, par. 11).

[38] Le test des limites discrétionnaires à la publicité présumée des débats judiciaires a été décrit comme une analyse en deux étapes, soit l'étape de la nécessité et celle de la proportionnalité de l'ordonnance proposée (*Sierra Club*, par. 53). Après un examen, cependant, je constate que ce test repose sur trois conditions préalables fondamentales dont une

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*,

personne cherchant à faire établir une telle limite doit démontrer le respect. La reformulation du test autour de ces trois conditions préalables, sans en modifier l'essence, aide à clarifier le fardeau auquel doit satisfaire la personne qui sollicite une exception au principe de la publicité des débats judiciaires. 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 — par exemple une ordonnance de mise sous scellés, une interdiction de publication, une ordonnance excluant le public d'une audience ou une ordonnance de caviardage — pourra dûment être rendue. Ce test s'applique à toutes les limites discrétionnaires à la publicité des débats judiciaires, sous réserve uniquement d'une loi valide (*Toronto Star Newspapers Ltd. c. Ontario*, 2005 CSC 41, [2005] 2 R.C.S. 188, par. 7 et 22).

[39] Le pouvoir discrétionnaire est ainsi structuré et contrôlé de manière à protéger le principe de la publicité des débats judiciaires, qui est considéré comme étant constitutionnalisé sous le régime du droit à la liberté d'expression garanti par l'al. 2b) de la *Charte* (*Nouveau-Brunswick*, par. 23). Reposant sur la liberté d'expression, le principe de la publicité des débats judiciaires est l'un des fondements de la liberté de la presse étant donné que l'accès aux tribunaux est un élément essentiel de la collecte d'information. Notre Cour a souvent souligné l'importance de la publicité pour maintenir l'indépendance et l'impartialité des tribunaux, la confiance du

TAB 9

Court of Queen's Bench of Alberta

Citation: Romspen Investment Corporation v. Hargate Properties Inc., 2012 ABQB 412

Date: 20120625
Docket: 1103 17749
Registry: Edmonton

Romspen Investment Corporation

Plaintiff

- and -

Hargate Properties Inc., 1410973 Alberta Ltd., Voipus Canada Ltd., 1333183 Alberta Ltd., Bellavera Green Condominium Corp. and Kevyn Ronald Frederick Also Known As Kevyn Frederick, Kevin Frederic, Kevyn Sheldon Frederick or Kevin Frederick and Chateau Lacombe Capital Partners Ltd.

Defendants

Reasons for Judgment of the Honourable Mr. Justice Donald Lee

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I. Background

[1] This is an application by the Receiver, D. Manning & Associates Inc. for a sealing order with respect to the Receiver's report dated June 4, 2012; as well as for directions with respect to the disbursement of certain funds recovered by the Receiver from the accounts of Chateau Lacombe Capital Partners Ltd. ["CLCPL"]. There is also an application by the primary creditor for a one day redemption order in a related foreclosure application.

[2] The Receiver's report dated June 4, 2012 provides details with respect to the ongoing sale process of the Chateau Lacombe Hotel in downtown Edmonton, including the realtors marketing reports and appraisal of the hotel. The Receiver submits that the protection of the commercial interest herein forms a proper basis for the issuance of a sealing order as there is an ongoing sales process. In the absence of the sealing order with respect to the appraisal and

marketing reports, it is submitted that there is a serious risk that the integrity of the sales process will be adversely affected and that all parties involved in this matter will suffer financially.

[3] The primary creditor in this matter, Romspen Investment Corporation ("Romspen"), supports the Receiver's application for a sealing order. Romspen is owed approximately 35 million dollars presently, and submits that the sealing order is required to protect the confidentiality of the sales process. The second mortgagee, Allied Hospitality Services Inc., ["Allied"] also supports the sealing order application.

[4] Opposing the sealing order, however, are counsel for Dr. Singh who has claimed a first mortgage on properties known as the "Church lands." The priority of Dr. Singh's claim as first mortgagee on the Church lands is in dispute as Romspen received an apparent postponement in it's favor from Dr. Singh when it financed the hotel purchase in 2010. These lands consist of 20 acres on Ellerslie Road located in a rapidly developing residential suburban area of Edmonton which the principal of CLCPL, Kevin Frederick, had purchased from the Victory Christian Church in August 2008, for 18 million dollars.

[5] Counsel for the Victory Christian Church also opposes the sealing order request, arguing that concept of "Marshalling" could be applicable with respect to the Church lands given that the Church has now received an assignment of the 12 million dollar vendor take-back mortgage given by Kevin Frederick in it's favor at the time of the 2008 purchase by his numbered company. The Victory Christian Church advises that at the present time as a result of the current developments in the case, the 20 acres of prime Edmonton real estate sold for 18 million dollars has resulted in no realisable funds to the Church. The Church is now also the subject of a potential removal proceeding from the lands that it uses for its worship services because of Romspen's present foreclosure application.

[6] Counsel for Dr. Singh, a retired dentist, and the Church submit that they must have access to the marketing and appraisal reports that the Receiver, Romspen, and Allied Properties already have with respect to the Chateau Lacombe Hotel site. Counsel for Dr. Singh and the Church submit that it is only through their receipt of these marketing reports and appraisal that they will be able to determine that the best price is being obtained for the Chateau Lacombe Hotel site.

[7] The present appraisal comes in at a price well below that which is owed to the creditors, so all counsel supporting the granting of the sealing order argue that no useful purpose would be served in disclosing this information any further. They further submit that it is inevitable, and in fact, they wish the Court to direct as part of another application presently before me that a redemption order for the Church property be issued setting the redemption period at one day.

[8] Counsel for Dr. Singh, the first mortgagee on the Church lands, points out that the City of Edmonton's current valuation of the Chateau Lacombe Hotel for municipal tax purposes is approximately 32 million dollars, and at the time the hotel was purchased in 2010 it was 38 million dollars. Based on three appraisals done in 2010, the Chateau Lacombe Hotel property

was worth between 57 to 70 million dollars. The property was purchased in October 2010 for 47.8 million dollars by Mr. Frederick's company, Hargate Properties Inc. ["Hargate"], with Romspen advancing 32 million dollars, a take-back second mortgage by Allied of 11+ million dollars, and Kevin Frederick's 6 million dollar contribution. The 6 million dollars appears to have come from Dr. Singh's first mortgage loan secured on the Church lands. The Church's 12 million dollar vendor take-back mortgage on its lands from Mr. Frederick has been defaulted on and it has been assigned back to the Church, although curiously, the purchase price for the Church lands was listed at Land Titles as 10 million dollars. The Marshalling concept as I understand it involves certain other Leduc properties owned by Kevin Frederick that are also under foreclosure currently.

[9] The argument then of counsel for Dr. Singh and for the Church is that the Chateau Lacombe Hotel property could or should have a value far greater than intimated by the Receiver presently, and if there are proper marketing efforts, all creditors and primarily Romspen would benefit. However, in order to ascertain the validity of the present appraisal and marketing efforts, counsel for Dr. Singh and for the Church need access to the most current reports, which to date has been refused by the Receiver

II. Conclusion

[10] All parties agree that the relevant case law is found in the Supreme Court of Canada's decision in *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] S.C.J 42; [2002] 2 S.C.R 522 at paragraph 53 which reads as follows:

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

[11] The commercial interest as stated in *Sierra Club* in presumed in the present case, but as the Supreme Court of Canada also stated at paragraph 57 "reasonably alternative measures" requires the judge to consider whether reasonable alternatives to the confidentiality order are available as well as to restrict the order as much as reasonably possible while preserving the commercial interest in question. Counsel for the Receiver is not prepared to release the marketing and appraisals even to counsel for Dr. Singh and for the church on any basis.

TAB 10

SUPREME COURT OF YUKON

Citation: *Yukon (Government of) v Yukon Zinc Corporation*, 2022 YKSC 2

Date: 20220121
S.C. No. 19-A0067
Registry: Whitehorse

BETWEEN:

GOVERNMENT OF YUKON
as represented by the Minister of the Department of Energy, Mines and Resources

PETITIONER

AND

YUKON ZINC CORPORATION

RESPONDENT

Before Chief Justice S.M. Duncan

Counsel for the Petitioner	John T. Porter and Kimberly Sova (by video)
No one appearing	Yukon Zinc Corporation
Counsel for Welichem Research General Partnership	H. Lance Williams and Forrest Finn (by video)
Counsel for PricewaterhouseCoopers Inc.	Tevia Jeffries and Emma Newbery (by video)

REASONS FOR DECISION

Introduction

[1] The court-appointed Receiver, PricewaterhouseCoopers Inc., brings two applications: one for Orders approving the sale of certain mineral claims and related

bidders' withdrawal or rejection would affect the possibility of free and open negotiation in any future sale process.

[37] The two-part test for a sealing order was set out in *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41 ("*Sierra Club*") at 543-44:

> (a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and
>
> (b) the salutary effects of the [sealing] order including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

[38] The recent Supreme Court of Canada decision of *Sherman Estate v Donovan*, 2021 SCC 25 ("*Sherman Estate*") confirmed the test set out in *Sierra Club* continues to be an appropriate guide for judicial discretion (at para.43), and added the following three core prerequisites to be met before the imposition of a sealing order at para. 38:

> (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.

[39] In the insolvency context, especially where there is a sale process, it is a standard practice to keep all aspects of the bidding or sales process confidential. Courts have found this appropriately meets the *Sierra Club* test as modified by *Sherman Estate*, as sealing this information ensures the integrity of the sales and marketing

process and avoids misuse of information by bidders in a subsequent process to obtain an unfair advantage. The important public interest at stake is described as the commercial interests of the Receiver, bidders, creditors and stakeholders in ensuring a fair sales and marketing process is carried out, with all bidders on a level playing field.

[40] This requirement for confidentiality no longer exists when the sale process is completed and as a result any sealing order is generally lifted at that time. As noted by the court in the insolvency proceeding of *GE Canada Real Estate Financing Business Property Co v 1262354 Ontario Inc*, 2014 ONSC 1173 at paras. 33-34:

> The purpose of granting such a sealing order is to protect the integrity and fairness of the sales process by ensuring that competitors or potential bidders do not obtain an unfair advantage by obtaining sensitive commercial information about the asset up for sale while others have to rely on their own resources to place a value on the asset when preparing their bids.
>
> **To achieve that purpose a sealing order typically remains in place until the closing of the proposed sales transaction. If the transaction closes, then the need for confidentiality disappears and the sealed materials can become part of the public court file. If the transaction proposed by the receiver does not close for some reason, then the materials remain sealed so that the confidential information about the asset under sale does not become available to potential bidders in the next round of bidding, thereby preventing them from gaining an unfair advantage in their subsequent bids. The integrity of the sale process necessitates keeping all bids confidential until a final sale of the assets has taken place.** [emphasis added].

[41] *Look Communications Inc v Look Mobile Corp* (2009), 183 ACWS (3d) 736 (Ont Sup Ct) ("*Look*") was decided not in the insolvency context but in the context of a court-approved sales process requiring the appointment of a monitor, and a plan of arrangement under the *Business Corporations Act*, R.S.C. 1985, c. C.44. The facts

TAB 11

CITATION: Ontario Securities Commission v. Bridging Finance Inc., 2022 ONSC 1857
COURT FILE NO.: CV-21-00661458-00CL
DATE: 2022-03-30

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: Ontario Securities Commission

- **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

BEFORE: Chief Justice G.B. Morawetz

COUNSEL: *John Finnigan, Grant Moffat and Adam Driedger* for the Receiver, PricewaterhouseCoopers Inc.

Adam Gotfried, for the Ontario Securities Commission

Robert Staley and Kevin Zych, Representative Counsel for the Bridging Unitholders

*David Bish***,** for The Coco Group, 2693600 Ontario Inc., Rocky Coco and Jenny Coco

Marc Wasserman, Martino Calvaruso and Justine Erickson, for BlackRock Financial Management, Inc.

Steve Graff, for several investors in various Bridging Funds

Steve Weisz, for the University of Minnesota Foundation

Melissa Mackewn, for David Sharpe

David Ullman, for Thomas Canning (Maidstone) Limited

Lawrence Thacker, for Natasha Sharpe

Domenico Magisano and Spencer Jones, for a Unitholder in the Bridging Funds

Sharon Kour, for Certain Unitholders

[48] I am satisfied that the Status Quo Option, as recommended by both the Receiver and RC, represents the best possible outcome in these circumstances and it is approved.

[49] The Receiver has also requested an order sealing the Confidential Appendices.

[50] The Receiver takes a position that the Confidential Appendices contain the Remaining Revised Bids and the Receiver's summary of the economic terms of the Remaining Revised Bids and Liquidation Model should be sealed. The Receiver is of the view that the terms of the Remaining Revised Bids are confidential and include confidential information or realization estimates related to certain borrowers or assets. The Receiver submits that the disclosure of the Confidential Appendices, and in particular the assessment of the Cash Proposal Bidder and the Investment Proposal Bidder, by the Receiver of the value of the loans or assets, may negatively impact future realizations on the assets and thus the Receiver's efforts to maximize value for stakeholders. In addition, the Receiver points out that the disclosure of such confidential and commercially sensitive information would undermine the confidentiality rights and/or obligations of the Receiver, the Cash Proposal Bidder, the Investment Proposal Bidder and Certain Borrowers.

[51] The jurisdiction to grant a sealing order is found in s. 137(2) of the *Courts of Justice Act* and the test for the granting of such relief is set out in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, which test was recently restated by the Supreme Court of Canada in *Sherman State v. Donovan*, 2021 SCC 25 at paras. 37 – 38 where Kaiser J. wrote that:

> [37] Court proceedings are presumptively open to the public.
>
> [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 limit must show. Recasting the test around these three prerequisites, without altering its essence, helps to clarify the burden on applicants 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 proportionality, the benefits of the order outweigh its negative effects.

[52] No party opposed the sealing request.

[53] In my view, I am satisfied that the Receiver has satisfied the foregoing test in that the disclosure of the information in the Confidential Appendices would have a negative impact on

future realizations on the assets and thus the Receiver's efforts to maximize value for stakeholders. Further, there are no reasonable alternatives to the sealing order in the circumstances and in my view, no stakeholders will be materially prejudiced by sealing the Confidential Appendices and the salutary effects of granting the relief outweigh any deleterious effects.

[54] Accordingly, I am satisfied that the Confidential Appendices should be sealed pending further order of the court.

[55] Finally, the motion makes reference to proposed amendments to the Appointment Order, which would authorize the Receiver to liquidate the Property of Bridging, without the requirement for Court approval for transactions having a value below certain thresholds. The determination of this issue is deferred to a future date.

Disposition

[56] In summary, the SISP gives the Receiver the authority to terminate the SISP. The Receiver has determined, in its business judgment, that the best path forward is to terminate the SISP and continue with the Status Quo. The recommendation of the Receiver has overwhelming support. RC supports the recommendation of the Receiver, as do a substantial majority of Unitholders. Only one Unitholder opposes the recommendation of the Receiver. There are no exceptional circumstances that would cause me to intervene and proceed contrary to the recommendation of the Receiver, which recommendation I accept.

[57] The relief requested by the Receiver as outlined in [1] above is granted.

Chief Justice G.B. Morawetz

Date: March 30, 2022

TAB 12

C15532 and C16139

COURT OF APPEAL FOR ONTARIO

RE: **BANK OF AMERICA CANADA (Plaintiff) v. WILLANN INVESTMENTS LIMITED and CRANBERRY VILLAGE, COLLINGWOOD INC. (Defendants)**

BEFORE: **FINLAYSON, DOHERTY and CHARRON JJ.A.**

COUNSEL: **Frank Bennett for The Attorney General of Canada**
Ronald B. Moldaver for the Bank of America Canada
Harry Underwood for Coopers & Lybrand Limited

HEARD: **August 8-9, 1996**

E N D O R S E M E N T

We are satisfied that Farley J. had jurisdiction to hear the motion brought by the receiver either under the broad terms of the order of Blair J., or through the inherent jurisdiction of the court to supervise the conduct of court appointed officers.

We see no error in the motion in Farley J.A.'s failure to direct the trial in issue once he was made aware that the appellant had complaints about the receiver's conduct and was contemplating a lawsuit. Those complaints were germane to the motion before Farley J. and he was not asked to sever those complaints from the proceedings beforehand and to direct the trial of an issue. In those circumstances, we cannot say he erred in failing to do something that he was not asked to do.

On the facts as found by Farley J., all of which are supported in the record, we cannot say he erred in holding that the receiver's conduct met the appropriate standard.

The appeal must be dismissed.

TAB 13

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Leslie & Irene Dube Foundation Inc. v. P218 Enterprises Ltd.,* 2014 BCSC 1855

Date: 20141002
Docket: S-139627
Registry: Vancouver

Between:

Leslie & Irene Dube Foundation Inc. and 1076586 Alberta Ltd.

Petitioners

And

P218 Enterprises Ltd., Wayne Holdings Ltd., Okanagan Valley Asset Management Corporation, Willow Green Estates Inc., BMK 112 Holdings Inc., 0720609 B.C. Ltd., 0757736 B.C. Ltd., 0748768 B.C. Ltd., Dr. T. O'Farrell Inc., Pinloco Holdings Inc., 602033 B.C. Ltd., Andrian W. Bak, MD, FRCPC, Inc., Interior Savings Credit Union, Valiant Trust Company, Mara Lumber (Kelowna) (2007) Ltd., Rona Revy Inc., Rocky Point Engineering Ltd., Mitsubishi Electric Sales Canada Inc., BFI Canada Inc., John Byrson & Partners, Winn Rentals Ltd., 0964502 B.C. Ltd., Denby Land Surveying Limited, Mega Cranes Ltd., Weq Britco LP, Roynat Inc., Mcap Leasing Inc., Bodkin Leasing Corporation, HSBC Bank Canada, and Bank of Montreal

Respondents

Before: The Honourable Mr. Justice G.C. Weatherill

Reasons for Judgment

Counsel for the Receiver, Ernest & Young Inc.:	J.D. Schultz J.R. Sandrelli
Counsel for the Petitioners:	D.E. Gruber
Counsel for Valiant Trust Company:	J.D. Shields
Counsel for 0964502 B.C. Ltd.:	C.K. Wendell

e) engagement of Colliers for SH Process:	$50,000
f) other consulting fees:	$75,000
g) office, utility and operating expenses:	$52,500
h) contingency:	$55,000
TOTAL	$1,357,500

[49] The Receiver seeks to amend the Receivership Order pronounced January 27, 2014, as amended February 6, 2014 such that its permitted borrowing charge is increased from $2.5 million to $3.5 million.

[50] The Bond Holders and the Lien Claimants oppose the increase on the basis that there is no evidence as to where the increase in financing will come from or what the rate will be and that no particulars have been provided as to who the money will be paid to or why.

[51] I agree that approval of an increase in the borrowing charge in a vacuum is not desirable. However, I understand that negotiations are underway with the lender. I am satisfied that there is a need for the Receiver's borrowing charge to be increased, particularly given that more work will be required regarding the valuation and marketing of the Development.

[52] I am prepared to allow the increase on the condition that the financial terms for the increase are no less favourable to the creditors than the current terms of the Receiver's borrowing charge.

Approval of the Receiver's Activities to Date

[53] The Receiver seeks approval of its activities as set out in its first and second reports to the Court dated January 30 and August 14, 2014, respectively.

[54] The court has inherent jurisdiction to review and approve or disapprove the activities of a court appointed receiver. If the receiver has met the objective test of demonstrating that it has acted reasonably, prudently and not arbitrarily, the court

may approve the activities set out in its report to the court: *Bank of America Canada v. Willann Investments Ltd.*, [1993] O.J. No. 1647 (Ct. J.) at paras. 3-5, aff'd [1996] O.J. No. 2806 (C.A.); *Lang Michener v. American Bullion Minerals Ltd.*, 2005 BCSC 684 at para. 21.

[55] I accept that the Receiver has essentially fulfilled its mandate with respect to completion of Phase 1. Its activities as set out in its first report are approved.

[56] After completion of Phase 1, the Receiver commenced on a sale process in an attempt to maximize the return for the creditors. It may well be that the Receiver will be able to demonstrate that the steps it took in this regard were objectively reasonable. However, given my previous comments, I am not satisfied that the Receiver has shown that the stalking horse bid process it entered into was done prudently. It is premature to approve its activities in this regard.

Sealing Order

[57] Given my ruling on the SH Agreement and my comments that the Altus Group's appraisal dated March 3, 2014 is outdated, there is no need to consider this issue.

Conclusion

[58] The Receiver's applications for a Bidding Procedures Order and a Conditional Vesting Order approving the stalking horse bid subject to the procedures set out in the Bidding Procedures Order is dismissed.

[59] The Receiver's application for an order approving the SL 6 Purchase Agreement is granted.

[60] The Receiver's application for an order amending Paragraphs 19 and 20(c) of the Receivership Order pronounced January 27, 2014, as amended February 6, 2014, such that the term "$2.5 million" is changed to "$3.5 million" is allowed on the condition that the terms of such increase will not be less favourable than the existing terms of the Receiver's borrowing charge.