COURT FILE NUMBER	25-2979721 B201 979721 25-2979725 25-2979732 25-2979735 25-2979736 25-2979737 25-2979738 25-2979739

C91289

COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
	IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c B-3, AS AMENDED AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF GRIFFON PARTNERS OPERATION CORPORATION, GRIFFON PARTNERS HOLDING CORPORATION, GRIFFON PARTNERS CAPITAL MANAGEMENT LTD., STELLION LIMITED, 2437801 ALBERTA LTD., 2437799 ALBERTA LTD., 2437815 ALBERTA LTD., and SPICELO LIMITED
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ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**OSLER, HOSKIN & HARCOURT LLP** Suite 2700, Brookfield Place 255 – 6th Avenue SW Calgary, AB T2P 1N2 Solicitors: Randal Van de Mosselaer / Emily Paplawski Phone: 403.260.7000 / 7071 Email: rvandemosselaer@osler.com / epaplawski@osler.com Matter: 1247318

APPLICATION BEFORE THE HONOURABLE JUSTICE JOHNSTON ON SEPTEMBER 22, 2023 AT 10:00 AM ON THE COMMERCIAL LIST

COURT FILE NUMBER	25-2979721 25-2979725 25-2979732 25-2979735 25-2979736 25-2979737 25-2979738 25-2979739

C91299

COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
	IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c B-3, AS AMENDED AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF GRIFFON PARTNERS OPERATION CORPORATION, GRIFFON PARTNERS HOLDING CORPORATION, GRIFFON PARTNERS CAPITAL MANAGEMENT LTD., STELLION LIMITED, 2437801 ALBERTA LTD., 2437799 ALBERTA LTD., 2437815 ALBERTA LTD., and SPICELO LIMITED
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COURT	COURT OF KING'S BENCH OF ALBERTA
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APPLICATION BEFORE THE HONOURABLE JUSTICE JOHNSTON ON SEPTEMBER 22, 2023 AT 10:00 AM ON THE COMMERCIAL LIST

B201 979736

COURT FILE NUMBER	25-2979721 25-2979725 25-2979732 25-2979735 25-2979736 25-2979737 25-2979738 25-2979739

C91321

COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
	IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c B-3, AS AMENDED AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF GRIFFON PARTNERS OPERATION CORPORATION, GRIFFON PARTNERS HOLDING CORPORATION, GRIFFON PARTNERS CAPITAL MANAGEMENT LTD., STELLION LIMITED, 2437801 ALBERTA LTD., 2437799 ALBERTA LTD., 2437815 ALBERTA LTD., and SPICELO LIMITED
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B201 979737

COURT FILE NUMBER	25-2979721 25-2979725 25-2979732 25-2979735 25-2979736 25-2979737 25-2979738 25-2979739

C91322

COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
	IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c B-3, AS AMENDED AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF GRIFFON PARTNERS OPERATION CORPORATION, GRIFFON PARTNERS HOLDING CORPORATION, GRIFFON PARTNERS CAPITAL MANAGEMENT LTD., STELLION LIMITED, 2437801 ALBERTA LTD., 2437799 ALBERTA LTD., 2437815 ALBERTA LTD., and SPICELO LIMITED
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APPLICATION BEFORE THE HONOURABLE JUSTICE JOHNSTON ON SEPTEMBER 22, 2023 AT 10:00 AM ON THE COMMERCIAL LIST

B201 979738

COURT FILE NUMBER	25-2979721 25-2979725 25-2979732 25-2979735 25-2979736 25-2979737 25-2979738 25-2979739
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY

C91328

IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c B-3, AS AMENDED

AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF GRIFFON PARTNERS OPERATION CORPORATION, GRIFFON PARTNERS HOLDING CORPORATION, GRIFFON PARTNERS CAPITAL MANAGEMENT LTD., STELLION LIMITED, 2437801 ALBERTA LTD., 2437799 ALBERTA LTD., 2437815 ALBERTA LTD., and SPICELO LIMITED

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APPLICATION BEFORE THE HONOURABLE JUSTICE JOHNSTON ON SEPTEMBER 22, 2023 AT 10:00 AM ON THE COMMERCIAL LIST

B201 979739

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COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY

C91342

IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c B-3, AS AMENDED

AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF GRIFFON PARTNERS OPERATION CORPORATION, GRIFFON PARTNERS HOLDING CORPORATION, GRIFFON PARTNERS CAPITAL MANAGEMENT LTD., STELLION LIMITED, 2437801 ALBERTA LTD., 2437799 ALBERTA LTD., 2437815 ALBERTA LTD., and SPICELO LIMITED

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APPLICATION BEFORE THE HONOURABLE JUSTICE JOHNSTON ON SEPTEMBER 22, 2023 AT 10:00 AM ON THE COMMERCIAL LIST

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I. INTRODUCTION

1. This Bench Brief is submitted on behalf of the Applicants, Griffon Partners Operation Corp. ("**GPOC**"), Griffon Partners Holding Corp. ("**GPHC**"), Griffon Partners Capital Management Ltd. ("**GPCM**", and together with GPOC and GPHC, the "**Griffon Entities**"), Stellion Limited ("**Stellion**"), 2437801 Alberta Limited, 2437799 Alberta Limited, 2437815 Alberta Limited (together with Stellion, 2437801 Alberta Limited and 2437799 Alberta Limited, the "**Shareholder Corporations**"), and Spicelo Limited ("**Spicelo**") (collectively, the "**Applicants**"). The Applicants filed Notices of Intention to Make a Proposal (the "**NOIs**", and each, an "**NOI**") under the *Bankruptcy and Insolvency Act* on August 25, 2023.

2. The Applicants now seek an Order, among other things:

   (a) directing that the proposal proceedings and estates of the Griffon Entities, the Shareholder Corporations, Stellion, and Spicelo shall be procedurally consolidated and shall continue under a single proceeding and estate (such proceedings, the "**Proposal Proceedings**", and such consolidated estates, the "**Estate**"), authorizing and directing Alvarez and Marsal Canada Inc. in its capacity as Trustee under the NOIs (in such capacity, the "**Proposal Trustee**") to administer the Estate on a consolidated basis, authorizing the Applicants to file and make a single, consolidated proposal to their creditors and granting ancillary relief arising from the procedural consolidation of the Estate;

   (b) declaring that all of the Applicants' present and after-acquired assets, property and undertakings (together, the "**Property**") is subject to a first-ranking charge and security (the "**Administration Charge**") in favour of the Applicants' counsel, the Proposal Trustee and the Proposal Trustee's counsel, and the Refinancing Advisor (as defined below) (collectively, the "**Administrative Professionals**") as security for their professional fees and disbursements up to a maximum amount of $500,000;

(c) declaring that the Property is subject to a second-ranking charge and security in favour of the directors and officers of the Applicants (collectively, the "**Directors**") as security for any obligations and liabilities they may incur as directors or officers of the Applicants after the commencement of the Proposal Proceedings, up to a maximum amount of $250,000 (the "**D&O Charge**");

(d) approving the Engagement Letter between Alvarez & Marsal Canada Securities ULC (the "**Refinancing Advisor**") and GPOC, dated September 11, 2023 (the "**Engagement Letter**") and directing that the Engagement Letter be sealed by the Clerk of the Court;

(e) authorizing the Applicants, *nunc pro tunc*, with the consent of the Proposal Trustee to make payments up to a maximum aggregate amount of $1,000,000 for goods or services supplied to the Applicants prior to the filing of the NOIs (as defined below) if, in the opinion of the Applicants, and with the consent of the Proposal Trustee, the supplier or vendor of such goods or services is determined by the Applicants to be necessary to their ongoing operations and/or restructuring efforts; and

(f) extending the time within which the Applicants are required to file a proposal (the "**Stay Period**") to November 8, 2023 (the "**Stay Extension**").

3. This Bench Brief outlines the legislation and jurisprudence supporting the relief requested, which is critical to ensuring that the Applicants can successfully restructure. The Applicants' financial difficulties were caused by unforeseen challenges impacting the business of the Griffon Entities, whose debt is guaranteed by the other Applicants. However, the Griffon Entities' business is viable, and the senior lenders have acknowledged that they are overcollateralized. The Applicants should be granted a stay extension so they can draft a comprehensive proposal that is acceptable to creditors and that preserves the value of their business. Any termination of these Proposal Proceedings would be premature and risks needlessly destroying the enterprise value of the Griffon Entities which would otherwise accrue to all stakeholders.

II. FACTS AND BACKGROUND

4. The Applicants' application is supported by the Affidavit of Daryl Stepanic, Chief Executive Officer of GPOC and a Director of each of the Griffon Entities, sworn on September 14, 2023 (the "**Stepanic Affidavit**"). Capitalized terms not defined herein have the meanings given to them in the Stepanic Affidavit.

5. The NOIs at issue in this case derive from financial difficulties encountered by the Griffon Entities. All of the Griffon Entities are private corporations existing under the laws of the Province of Alberta, with their registered offices in Calgary, Alberta. GPCM is the ultimate parent company of the Griffon Entities. GPHC and GPOC are wholly-owned, direct subsidiaries of GPCM.

Stepanic Affidavit at para 6

6. Each of the Griffon Entities (other than GPHC) has the same four directors: Elliott Choquette, Jonathan Klesch, Trevor Murphy and Daryl Stepanic (together, the "**Directors**"), all of whom have been directors of the Griffon Entities since the incorporation of each company in 2022. GPHC has one additional director, Dave Gallagher, who is a nominee of Signal (as defined below).

Stepanic Affidavit at para 7

7. GPCM is wholly owned by the four Shareholder Corporations, which are in turn each legally or beneficially owned by a director of the Griffon Entities. All of the Shareholder Corporations are incorporated pursuant to the laws of Alberta except for Stellion, which is incorporated pursuant to the laws of the Republic of Cyprus and extra-provincially registered in Alberta.

Stepanic Affidavit at paras 8-9

8. Spicelo is an investment company incorporated pursuant to the laws of Cyprus and extra-provincially registered in Alberta. Spicelo is beneficially owned by Mr. Klesch, who is also a Director of each of the Griffon Entities.

Stepanic Affidavit at para 11

9. As discussed more fully below, all four of the Shareholder Corporations and Spicelo are guarantors in respect of the principal obligation of the Griffon Entities.

The Business of the Applicants

10. The business of the Griffon Entities is the exploration and development of light oil and natural gas liquids in the Viking formation in western Saskatchewan and eastern Alberta. All the Griffon Entities' oil and gas interests are held in the name of or otherwise through GPOC, which conducts all business and operations on behalf of the Griffon Entities.

Stepanic Affidavit at para 13

11. GPOC holds rights in more than 120,000 acres in the Viking light oil and natural gas fairway. As at December 31, 2022, the Griffon Entities had total proved reserves of approximately 5.75 million barrels of oil equivalent ("**MBOE**") and total proved plus probable reserves of approximately 9.40 MBOE. The net present value of future net revenue before taxes discounted at a rate of 10% of such proved reserves is approximately $70.7 million and proved plus probable reserves is $119.3 million.

Stepanic Affidavit at paras 14, 50

12. The Griffon Entities' average daily production for the year ended December 31, 2022 totalled 1,679 barrels per day, comprised of approximately 30% light oil, 50% natural gas, and 20% natural gas liquids.

Stepanic Affidavit at para 16

13. All the Griffon Entities' commodity production is marketed and sold by Trafigura Canada Limited ("**Trafigura**") pursuant to three marketing agreements (the "**Marketing Agreements**"). By email dated September 8, 2023, Trafigura confirmed that it would continue delivering all revenues and other deliverables to the Griffon Entities pursuant to the Marketing Agreements without exercising rights of set-off, notwithstanding these Proposal Proceedings.

Stepanic Affidavit at para 17

14. The Shareholder Corporations and Spicelo are investment corporations. The only assets held by the Shareholder Corporations are their respective shares of GPMC. The only significant assets held by Spicelo are approximately 1.125 million common shares in Greenfire Resources Inc. ("**Greenfire**", and the "**Greenfire Shares**"), a private Alberta corporation specializing in the acquisition, development, and production of oil and gas assets in Western Canada. As described more fully below, the Greenfire Shares held by Spicelo are pledged as security for the Griffon Entities' obligations.

Stepanic Affidavit at paras 19-20

Principal Indebtedness of the Applicants

15. As of June 30, 2023, the Griffon Entities had total assets having a book value of approximately $69 million CAD and liabilities of approximately $75 million CAD.

Stepanic Affidavit at paras 23-24

(a) Trafigura Loan Agreement

16. GPOC is indebted to Trafigura and Signal Alpha C4 Limited ("**Signal**", and together with Trafigura, the "**Lenders**") pursuant to a Loan Agreement executed July 21, 2022 (as amended, the "**Loan Agreement**"). As at August 16, 2023, approximately USD $37.9 million (approximately CAD $51.6 million) is outstanding under the Loan Agreement.

Stepanic Affidavit at paras 11, 30

17. GPOC's obligations under the Loan Agreement are secured by a Fixed and Floating Charge Debenture over all of GPOC's present and after-acquired real and personal property.

Stepanic Affidavit at para 28

18. To further secure the obligations under the Loan Agreement, GPHC and GPCM each provided the Lenders with: (i) a full unconditional guarantee of the obligations of GPOC, each of the Shareholder Corporations, Spicelo, and GPCM or GPHC (the "**Guarantees**"); (ii) a fixed and floating charge debenture granting a security interest over all present and after-acquired real and personal property (the "**Debentures**") and (iii) a pledge in respect

of all securities in the capital of GPHC or GPOC and any proceeds derived therefrom (the "**Securities Pledge Agreements**").

Stepanic Affidavit at paras 28-29

19. In addition to the foregoing, all of the Shareholder Corporations and Spicelo each provided the Lenders with a Limited Recourse Guarantee and Share Pledge Agreement (each, a "**Share Pledge Agreement**") pursuant to which all of GPOC's obligations under the Loan Agreement were guaranteed, and such guarantees were secured by, in respect of the Shareholder Corporations, a pledge of their securities in the capital of GPCM and any proceeds derived therefrom and, in respect of Spicelo, a pledge of all of the Greenfire Shares and any proceeds derived therefrom.

Stepanic Affidavit at para 29

20. The Share Pledge Agreement signed by Spicelo expressly incorporates certain transfer restrictions and rights of first refusal ("**ROFR**") in respect of the Greenfire Shares. In essence, shareholders (including Spicelo) are restricted from directly or indirectly selling, transferring, or otherwise disposing of their shares in Greenfire to anyone other than a "Permitted Transferee". A transfer of the Greenfire Shares to anyone other than a Permitted Transferee is subject to a ROFR by every other applicable Greenfire shareholder, who has 30 days to exercise their ROFR and purchase their pro rata portion of the Greenfire Shares. Any purported transfer of the Greenfire Shares in violation of these restrictions is null and void. The Lenders were aware of, and expressly incorporated, these transfer restrictions into the Spicelo Share Pledge Agreement.

Stepanic Affidavit at paras 60-62

21. The Lenders are not a Permitted Transferee. If Spicelo attempted to transfer the Greenfire Shares to the Lenders, or if the Lenders attempted to enforce on their security over the Greenfire Shares, such actions would trigger the obligation to provide notice to applicable Greenfire shareholders under the ROFR, which would start the 30-day ROFR exercise period.

(b) Tamarack Promissory Note

22. The Griffon Entities' current oil and gas production and related assets were acquired by GPOC from Tamarack Valley Energy Ltd. ("**Tamarack**") for a purchase price of $70 million. This purchase was funded in part by financing from the Loan Agreement and in part by a Subordinated Secured Promissory Note in the amount of $20 million granted by GPOC in favour of Tamarack (the "**Subordinated Tamarack Note**"). The Subordinated Tamarack Note bears interest at a rate of 12% annually until the maturity date of July 21, 2025. Any unpaid interest when due bears interest at the interest rate plus 2% per annum during the period in arrears. As of August 16, 2023, approximately CAD $22.7 million is outstanding under the Subordinated Tamarack Note. The Subordinated Tamarack Note is secured against the property of GPOC.

Stepanic Affidavit at paras 31-32

23. Pursuant to an Intercreditor Agreement between GPOC, Tamarack, and the Collateral Agent for the Lenders under the Loan Agreement, the Subordinated Tamarack Note is subordinated to all secured obligations under the Loan Agreement.

Stepanic Affidavit at para 22

(c) Unsecured Debt

24. Approximately CAD $2.3 million is owed in unsecured trade debt.

Stepanic Affidavit at para 34

Events Leading to the Applicants' Insolvency

25. The Griffon Entities' business strategy depended on economies of scale, which in turn required significant production volumes. The Griffon Entities' business plan in the Fall of 2022 was to acquire oil and gas assets within Western Canada capable of generating production volumes of (at minimum) 15,000 to 20,000 boe/d. The Tamarack transaction was expected to add approximately 2,000 boe/d of production to the Griffon Entities' portfolio.

Stepanic Affidavit at para 36

26. At the time of the Tamarack transaction in summer 2022, the Griffon Entities had three other potential acquisitions subject to letters of intent and ongoing negotiation. Two failed to proceed. Negotiation of the third transaction (the "**2023 Acquisition**") took significantly longer than expected and a Share Purchase and Sale Agreement was only signed on May 30, 2023. The 2023 Acquisition transaction remains subject to conditions including regulatory approval from the Alberta Energy Regulator ("**AER**"), which the Griffon Entities hope to receive in the coming months.

Stepanic Affidavit at para 37

27. While the 2023 Acquisition promises to provide the greater production volumes required to realise the Griffon Entities' business strategy, in late 2022, the Griffon Entities were in a difficult position as the viability of their business plan depended on a greater production base than that offered by the Tamarack assets alone. Accordingly, in winter 2022, the Griffon Entities implemented a drilling program to increase production volumes. However, the two wells produced lower volumes than anticipated while generating significant cost overruns. Then, in November 2022, the Kindersley area of Saskatchewan (where a majority of GPOC's wells are located) experienced unprecedented amounts of snowfall, which cut off access to the well sites. The unprecedented weather conditions exacerbated the high cost of equipment and materials existing in November 2022, and obtaining the necessary snow removal equipment proved impossible. GPOC was forced to shut-in production at 40% of its operated wells for significant periods of time over the winter, further reducing production levels by approximately 350 boe/d.

Stepanic Affidavit at paras 38-42

28. The combination of increased drilling costs and severely constrained commodity production volumes significantly impacted the Griffon Entities' available cash flow, causing an already difficult forecast to become dire. As a direct result of the foregoing, starting in November 2022, GPOC was unable to make the required monthly payment of principal to the Lenders pursuant to the Loan Agreement.

Stepanic Affidavit at para 43

29. While the Lenders waived GPOC's payment defaults in November and December 2022, it was clear to the Griffon Entities that a longer-term solution was required. Accordingly, in January 2023 the Griffon Entities consulted with Houlihan Lokey and retained Imperial Capital ("**Imperial**") and ARCO Capital Partners ("**ARCO**") to assist them in canvassing the market for a sale, investment, or other solution to refinance and/or restructure the Griffon Entities' debt and cash flow issues. Although Imperial and ARCO contacted 54 strategic third parties, no transaction resulted and efforts were terminated in June 2023.

Stepanic Affidavit at paras 44, 46

30. Importantly, at the time, the Griffon Entities did not explore any refinancing or takeout of the Lenders. The Griffon Entities have only now, within the context of these Proposal Proceedings, retained the Refinancing Advisor to assist them to locate, negotiate and finalize a transaction to right size the Applicants' current capital structure and refinance their obligations to the Lenders.

Stepanic Affidavit at para 45

31. Although GPOC has been unable to make the required monthly principal payments to the Lenders since November 2022, GPOC had hithertho successfully remitted all monthly interest payments as and when such interest became due. However, in July 2023, as a result of declining commodity prices, narrowing hedges, and continuing constraints to the Griffon Entities' cash flows, GPOC paid only a portion (64%) of the required monthly interest payment to the Lenders. While GPOC suggested various cash sweep arrangements and partial payment options to the Lenders, none of GPOC's proposals were accepted. On August 16, 2023, the Lenders served each of the Applicants with Demands for Payment and Notices of Intention to Enforce Security.

Stepanic Affidavit at para 48

32. In response to the Demands and Notices of Intention to Enforce Security, the Applicants each filed an NOI on August 25, 2023.

The Path Forward

33. The Applicants commenced these Proposal Proceedings to preserve the value of their business and the available security for the benefit of all stakeholders. The Griffon Entities' business has significant value both currently and on a go-forward basis, particularly now that the 2023 Acquisition is poised to close, subject to satisfaction of remaining closing conditions (including AER approval). Moreover, as a result of the significant collateral package held by the Lenders encompassing assets held by all of the Applicants, the Lenders are, by their own admission, overcollateralized. The value of the Lenders' security will only increase during the proposed Stay Extension period.

(a) The Griffon Entities' Business has Value as a Going Concern

34. Currently, GPOC's oil and gas assets have total proved reserves of approximately 6.06 MBOE and total proved plus probable reserves of approximately 5.75 MBOE and total proved plus probable reserves of approximately 9.40 MBOE. The net present value of future net revenue before taxes discounted at a rate of 10% of such proved reserves is approximately $70.7 million and proved plus probable reserves is $119.3 million. As at August 2023, the Griffon Entities' enterprise value was estimated at $25-30 million. Importantly, the Griffon Entities have actively managed all abandonment and reclamation obligations and, as a result, have licensed assets with significant value and minimal regulatory obligations.

Stepanic Affidavit at paras 15, 50-51

35. Going forward (and as discussed above), on May 20, 2023, GPCM signed a Share Purchase and Sale Agreement in respect of the 2023 Acquisition which is expected to increase the Griffon Entities' commodity production by 9,500 boe/d. The only material condition to the closing of the 2023 Acquisition is approval by the AER of the applicable license transfers, which GPOC hopes to receive in the coming months.

Stepanic Affidavit at para 52

36. In the event that the licence transfers relating to the 2023 Acquisition are approved by the AER, the production capacity of the Griffon Entities' asset portfolio will fall squarely

within the 15,000-20,000 boe/d contemplated in their business plan discussed above. At these levels, the Griffon Entities will be able to take advantage of economies of scale and are expected to generate significant revenue for the Griffon Entities and their stakeholders.

37. Importantly, due to the structure of the 2023 Acquisition, little, if any, cash outlay will be required from the Griffon Entities to close the transaction and obtain the benefits thereof.

Stepanic Affidavit at para 54

(b) The Lenders are Overcollateralized

38. The principal debt of the Griffon Entities – which is guaranteed by all the remaining Applicants and is the cause of these Proposal Proceedings – is the amount owed to the Lenders under the Loan Agreement. That amount currently totals approximately USD $38 million. The collateral package held by the Lenders in respect of this debt includes:

(a) A Fixed and Floating Debenture over all the current and future assets of GPOC (described above);

(b) Full unconditional guarantees of all GPOC's obligations under the Loan Agreement from GPHC and GPCM;

(c) A Debenture Agreement providing the Lenders with a fixed and floating charge over all present and after-acquired property of each of GPOC, GPHC, and GPCM;

(d) A Limited Recourse Guarantee and Share Pledge Agreement from each of the Shareholder Corporations in respect of each of their shares in GPCM; and

(e) A Limited Recourse Guarantee and Share Pledge Agreement from Spicelo in respect of the Greenfire Shares.

39. While the Greenfire Shares are currently illiquid and subject to a 30-day ROFR (described more fully above), and are therefore limited in value, this state of affairs will change dramatically when Greenfire undergoes a business combination (the "**Greenfire IPO**") currently scheduled for the week of September 18, 2023. When the Greenfire IPO occurs:

(a) Spicelo will receive a payment of approximately USD $6.6 million in exchange for a portion of the Greenfire Shares; and

(b) the remainder of the Greenfire Shares will be exchanged and Spicelo will receive shares of a new entity publicly listed on the New York Stock Exchange, with such shares having an initial listing value of approximately USD $62 million (the "**New Greenfire Shares**"). While the New Greenfire Shares will be subject to a 180-day lock-up period, they will be freely tradeable thereafter for the benefit not only of the Lenders, but of Tamarack with respect to the Promissory Note and all other stakeholders of the Griffon Entities.[1]

Stepanic Affidavit at paras 64-69

40. In short, the Lenders are overcollateralized, and as a result have little to no risk from an extension of the Stay. The Lenders acknowledged their overly collateralized position based only on the Greenfire Shares in an email dated August 11, 2023 (just five days prior to the issuance of the Demands and Notices of Intention to Enforce Security): "The lenders already have 1st lien security over 100% of Spicelo's Greenfire shares. We bear very limited market risk on the value of these shares because of the over-collateralized nature of the security pledge."

Stepanic Affidavit at para 71

41. Due to the Greenfire IPO and the 2023 Acquisition, the Lenders' secured position is poised to improve during the Stay Extension period.

42. The Applicants filed the NOIs to preserve the value of the Applicants' business and security for the benefit of all stakeholders – not just the Lenders. The Applicants have also

[1] The Greenfire Share certificates are currently in the possession of the Collateral Agent pursuant to the terms of the Limited Recourse Guarantee and Securities Pledge Agreement. As such, Spicelo does not have the ability to deposit the Greenfire Share certificates to the depositary. Under Section 5.1(d) of the Plan of Arrangement, any certificate representing the Greenfire Shares that is not deposited, together with all other documents required in connection with such deposit before the third anniversary of the closing date of the Business Combination shall terminate and be deemed to be surrendered and forfeited to Greenfire for no consideration and shall be deemed to be cancelled. The Applicants' counsel is in discussions with Lenders' counsel regarding a consensual tendering of the Greenfire Share certificates. Such discussions remain ongoing and require additional time to conclude. (Stepanic Affidavit at para 70)

engaged the Refinancing Advisor to assist them in canvassing the market for a refinancing transaction to right size their balance sheet and repay the Lenders in full.

III. ISSUES

43. This Brief addresses whether this Honourable Court should:

(a) extend the time within which the Applicants are required to file a proposal;

(b) approve the procedural consolidation of the Proposal Proceedings;

(c) approve the Engagement Letter of the Refinancing Advisor and seal it;

(d) authorize the payment of Critical Suppliers;

(e) grant the Administration Charge; and

(f) grant the D&O Charge.

IV. LAW AND ARGUMENT

A. The Stay Extension Should be Granted

44. The Stay Period of the Applicants expires on September 25, 2023. The Applicants are required to file a proposal within the Stay Period unless they obtain an extension of time from the Court prior to the expiry of the current Stay Period.

45. Pursuant to section 50.4(9) of the *BIA*, a debtor in a proposal proceeding may apply to the Court for an order extending the time to file a proposal by a maximum of 45 days provided the Court is satisfied that:

(a) the insolvent person has acted, and is acting, in good faith and with due diligence;

(b) the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and

(c) no creditor would be materially prejudiced if the extension be applied for were granted.

BIA section 50.4(9) **[Tab 1]**

46. The Applicants are seeking a Stay Extension to November 8, 2023 in these Proposal Proceedings. The Applicants respectfully submit that the test in section 50.4(9) of the BIA is satisfied and the Stay Extension ought to be approved because:

(a) the Stay Extension is required in order for the Applicants to prepare and finalize a proposal for the benefit of their stakeholders;

(b) the Applicants have acted in good faith and with due diligence and meet the criteria to make a Proposal under the BIA; and

(c) no creditor will be materially prejudiced, and many stakeholders stand to benefit, if the Stay Extension is granted.

BIA section 50.4(9) **[Tab 1]**

47. The Applicants respectfully submit that this Court should exercise its discretion to grant the Stay Extension.

(a) The Stay Extension is Required to Present a Proposal for the Benefit of All Stakeholders

48. The proposal sections of the BIA have remedial objectives: they are designed for the reorganization of business entities that are insolvent, so that when the proposal has been accepted by creditors and approved by the court, the business will become viable in an operational sense. When considering whether to extend a proposal stay period or terminate proposal proceedings, matters are to be judged on a rehabilitation basis rather than on a liquidation basis.

Mernick, Re, 1994 CarswellOnt 257 (Ont CJ [Gen Div]) at para 5 **[Tab 20]**
Cantrail Coach Lines Ltd, Re, 2005 BCSC 351 [*Cantrail*] at para 11 **[Tab 7]**

49. Operational viability is the Applicants' goal in these Proposal Proceedings. The Stay Extension is required to allow the Applicants to put forward a viable proposal to creditors, allowing them to restructure on a going-concern basis and preserve their enterprise value. If the Stay Extension is granted, the Applicants expect to put forward a viable proposal.

50. "Viable" for the purposes of obtaining the Stay Extension is not a high threshold. To grant the Stay Extension, this Court need only conclude that it "might well happen" that if the Stay Extension is granted, the Applicants can put forward a proposal that would be "reasonable on its face to a reasonable creditor". This is an objective standard that "ignores the possible idiosyncrasies of any specific creditor".

> *Enirgi Group Corp v Andover Mining Corp*, 2013 BCSC 1833 [*Enirgi*] at paras 66, 74 **[Tab 12]**

51. Courts in proposal proceedings have repeatedly emphasized when granting extensions to file proposals that they must take a "broad approach and look at a number of interested and potentially affected parties", even in the face of objecting secured creditors.

> *Cantrail* at para 12 **[Tab 7]**

52. As described above, the Applicants filed the NOIs to preserve the value of their business for all stakeholders. For the same reason, they have also engaged the Refinancing Advisor to seek opportunities to repay the Lenders. The Refinancing Advisor's efforts are in their early stages and additional time is required for the market to be canvassed, potential transactions to be identified and negotiated, and a proposal to be finalized for consideration by the Applicants' creditors.

> Stepanic Affidavit at para 72

53. Courts have emphasized that a lone objecting secured creditor cannot be permitted to hamstring a potentially viable proposal proceeding. An extension may be granted to allow the debtor to file a proposal even if a substantial secured creditor has said that it will veto any proposal the debtor could put forward. "That may take place but thus far there is no proposal and [the objecting creditor] will have to make a business decision about its response in the event that one is presented."

Enirgi at para 75 **[Tab 12]**; *Cantrail* at paras 15-16 **[Tab 7]**

54. A creditor may not "pre-reject" an as-yet-nonexistent proposal.

Rizzo, Re, 2016 ONSC 8192 at para 16 **[Tab 25]**

55. If events during the proposed extension period will allow the debtor to make a superior proposal to the objecting secured creditor, an extension will be granted.

High Street Construction Ltd, Re, 1993 CarswellOnt 210 (Ont SCJ [Gen Div]) at para 5 **[Tab 14]**

56. If the Stay Extension is granted, the Applicants will likely be able to make a viable proposal to their creditors. Both the Griffon Entities and Greenfire are at critical junctures. Through the 2023 Acquisition the Griffon Entities are poised to acquire an additional 9,500 boe/d for very little, if any, immediate capital output, thereby putting them into the position of having an implementable, cash flow positive business plan with which to pay off their debts. As for the Lenders' security, Greenfire is days away from implementing a significant and complex business combination approved by its securityholders and the Alberta Court of King's Bench and from an initial public offering on the New York Stock Exchange. Finally, the Griffon Entities have engaged the Refinancing Advisor to investigate refinancing options to repay the Lenders in full.

57. All three processes are expected to generate value for all the Applicants' stakeholders – and enable the Applicants to repay all obligations owing to the Lenders under the Loan Agreement prior to the final January 2025 repayment date. If the Stay Extension is granted, the Applicants will be able to use the funding generated by both the 2023 Acquisition and the Greenfire IPO as the basis for a viable proposal. Indeed, even if only the Greenfire IPO is completed (which may well be completed by the time of the hearing of this application) there will be significant value available with which to fund a viable proposal (including by arranging take-out financing with which to repay the Lenders in full).

58. The Proposal Trustee supports the granting of the Stay Extension.

(b) The Applicants are Acting in Good Faith and Meet the Criteria for BIA Protection

59. The Applicants have acted in good faith and with due diligence in these Proposal Proceedings. In particular, the Applicants met and continue to meet the criteria for issuing an NOI and making a proposal under the BIA.

60. Section 50(1)(a) of the BIA provides that a proposal may be made by "an insolvent person". Section 2 of the BIA provides the following definition of an "insolvent person":

> insolvent person means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and
>
> (a) who is for any reason unable to meet his obligations as they generally become due,
>
> (b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or
>
> (c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due;
>
> *BIA* sections 2, 50(1)(a) **[Tab 1]**

61. This definition is disjunctive, meaning that a person need only satisfy <u>one</u> of the criteria in subparagraphs (a), (b), or (c) to be eligible to issue an NOI.

62. The Applicants all either reside, carry on business, or have property in Canada, satisfying the first step of the test for "insolvent persons":

(a) the Griffon Entities and three of the four Shareholder Corporations are all incorporated under the laws of Canada, in addition to which they carry on business and own property in Canada; and

(b) while Stellion and Spicelo are incorporated in Cyprus, both are registered extra-provincially in Alberta and have property in Canada because they own shares in Canadian corporations (respectively, GPOC and Greenfire). The location of a share is either the place where the corporation was incorporated, or the location of the corporation's share registry. GPOC and Greenfire are both incorporated in Canada, and the share registries of both companies are located in Calgary, Alberta. The shares owned by Stellion and Spicelo are therefore "property in Canada" within the meaning of the BIA.

Braun v The Custodian, [1994] SCR 339 **[Tab 6]**

Hunt et al v The Queen, [1968] SCR 323 **[Tab 15]**

E Prelutsky Estate v The Queen, 74 DTC 6506, 1974 CanLII 2674 (FC) **[Tab 10]**

MacMillan Inc v Bishopgate Investment Trust plc et al, [1995] EWCA Civ 55 **[Tab 19]**

63. Moreover, the Applicants are all unable to meet their obligations as they come due, satisfying the second step of the test for "insolvent persons". GPOC is the principal debtor under the Loan Agreement, and all of the other Applicants are guarantors. Currently USD $38 million is due and owing under the Loan Agreement and the Lenders have issued each of the Applicants demands for payment. Neither GPOC nor the remaining Applicants have sufficient liquidity to satisfy the obligations under the Loan Agreement, and they are therefore each "insolvent".

64. The Applicants' obligations in relation to the Loan Agreement cannot be satisfied as they come due by delivery of collateral. In particular, and contrary to the anticipated submissions of the Lenders, Spicelo cannot satisfy its obligations as they come due merely by transferring the Greenfire Shares to the Lenders.

65. As outlined above, the Share Pledge Agreement signed by the Lenders preserves certain transfer restrictions and ROFR rights in respect of the Greenfire Shares. Any attempt by Spicelo to transfer the Greenfire Shares to the Lenders, or any attempt by the Lenders or their Collateral Agent to enforce their security in the Greenfire Shares, would trigger the ROFR. At best, this would give rise to a 30-day exercise period during which existing

Greenfire shareholders would have the opportunity to decide whether to exercise their ROFR rights. The expiry of this 30-day ROFR exercise period would pass the date of the Greenfire IPO, at which point the Greenfire Shares would be subject to a 180-day freeze period. There is no way the Lenders can exercise their security in respect of the Greenfire Shares until outside of this period totaling 210 days.

66. Nor are the Lenders, or the Collateral Agent on behalf of the Lenders, entitled simply to foreclose immediately on the Greenfire Shares to avoid the above-noted issues. First, the 30-day ROFR period would still be triggered by any attempted foreclosure. Second, and in addition to the 30-day ROFR period, pursuant to section 62 of the *Personal Property Security Act,* in order to exercise a right of foreclosure the Collateral Agent must serve all interested parties with a notice advising of the Lenders' intention to foreclose. A 15-day hold period then comes into effect under the legislation for parties to object to the proposed foreclosure. If one or more interested parties object within the 15-day hold period, the PPSA prohibits the Lenders from proceeding with their intended foreclosure without a court order and requires that the Greenfire shares be monetized by either private or public sale. The notice requirements of the PPSA are not ousted by the terms of the security agreement.

Personal Property Security Act, RSA 2000, c P-7, section 62 **[Tab 3]**

Atlas (Brampton) Limited Partnership v Canada Grace Park Ltd, 2021 ONCA 221 at para 79 **[Tab 5]**

67. The Applicants have acted, and continue to act, in good faith and with due diligence since filing the NOIs on August 25, 2023. The Applicants have worked with the Proposal Trustee and other professional advisors to begin formulating a viable proposal, taken steps to stabilize their business and ensure they remain financially viable through these Proposal Proceedings, and proceeded with the 2023 Acquisition with the intent to put forward a joint proposal that will enable a going-concern solution for the benefit of all stakeholders.

Stepanic Affidavit at para 64

(c) No Creditor would be Materially Prejudiced by the Stay Extension

68. Finally, section 50.4(9) asks this Court to assure itself that no creditor would be materially prejudiced by the Stay Extension. This criterion is a balancing test which asks the Court to "weigh[] the interests of the debtor against the hardship incurred on the creditor. This has been referred to as the 'balance of hurt' test."

> *Lockhart Saw Ltd, Re*, 2007 NBQB 93 at para 13 **[Tab 18]**

69. Importantly, the test is not whether a creditor is "prejudiced" but whether a creditor would be "materially prejudiced". A secured creditor seeking to cut short a debtor's time to make a viable proposal must present evidence that it is "substantially or considerably prejudiced if the extension being applied for is granted", over and above the "simple prejudice" of having its secured obligation stayed.

> *Cantrail* at paras 21-22 **[Tab 7]**

70. The "material prejudice" standard is an objective test that considers the impact of an extension of time on the prejudice suffered by the creditor vis-à-vis the indebtedness and the attendant security. Where there is no evidence that a creditor's security will be lessened if an extension is granted, the creditor will not be materially prejudiced.

> *Lockhart* at para 12 **[Tab 18]**; *Enirgi* at para 76 **[Tab 12]**; *Cantrail* at para 22 **[Tab 7]**

71. A creditor alleging material prejudice must put forward particulars of this prejudice, including quantifying the extent of the losses it will suffer as a result of the extension sought by the debtors.

> *Nortec Colour Graphics Inc, Re*, 2000 CarswellOnt 2797 (Ont SCJ [Gen Div]) at paras 14-16 **[Tab 22]**

72. Instead of establishing "material prejudice", the Lenders have acknowledged that they are overcollateralized and expect to be fully repaid. Their over-secured position is only strengthened by the Greenfire IPO and the corresponding increase in the value of their security in the New Greenfire Shares. The Applicants have engaged A&M Corporate Finance to secure take-out financing to repay the Lenders the full amount of the debt owing

to them. In these circumstances, it is impossible to suggest that the Lenders would be "materially prejudiced" by a Stay Extension.

73. Moreover, during the Stay Extension period, the Applicants expect to receive a response from the AER regarding the licence transfers underpinning the 2023 Acquisition, which approval would significantly improve the value of the Griffon Entities' business and consequently the Lenders' security. If the Stay Extension is granted, the Lenders stand to benefit alongside all other stakeholders.

74. Terminating these Proposal Proceedings and permitting the Lenders to appoint a Receiver would destroy the value which would otherwise accrue to other creditors and stakeholders, including Tamarack, the Griffon Entities' second-ranked secured creditor.

75. The termination of these Proposal Proceedings and the appointment of a Receiver at this juncture would be highly disruptive and value destructive to the long-term going-concern value of the Griffon Entities' business. The closing of the 2023 Acquisition, and the anticipated license transfers by the AER , will provide the Griffon Entities with sufficient production to implement their business plan and grow their enterprise value for the benefit of all stakeholders.

Stepanic Affidavit at paras 62-63

76. Contrary to the anticipated submissions of the Lenders, granting the Stay Extension would preserve the Griffon Entities' enterprise value to achieve a better result for the Applicants' stakeholders than could be achieved in a liquidation. The requested Stay Extension will allow:

(a) the Griffon Entities to work towards closing 2023 Acquisition, subject to receipt of AER approval of the license transfers;

(b) the Griffon IPO to be completed and a consensual path forward reached with the Collateral Agent to permit the Greenfire Shares to be exchanged for applicable cash consideration and the New Greenfire Shares;

(c) the Refinancing Advisor to canvass the market for potential refinancing transactions; and

(d) the Applicants to continue formulating a viable proposal, buttressed by the 2023 Acquisition and the proceeds of the Greenfire IPO, for the benefit of all stakeholders.

B. Procedural Consolidation is Appropriate

77. The *BIA* does not confer an express power to consolidate the administration of bankrupt estates; however, Courts throughout Canada have routinely found that they have jurisdiction to grant a procedural order to consolidate multiple debtors' proposal proceedings pursuant to section 183 of the *BIA*.

BIA section 183 **[Tab 1]**

Gray Aqua Group of Companies, Re, 2015 NBQB 107 at para 10 **[Tab 13]**

78. The Ontario Superior Court in *Electro Sonic*, citing section 3 of the *Bankruptcy and Insolvency General Rules* states:

> Bankruptcy proceedings in this Court operate subject to the general principle that the litigation process should secure the just, most expeditious and least expensive determination of every proceeding on its merits . One practical application of that general principle occurs when courts join together two closely-related bankruptcy proceedings so that they can proceed and be managed together. This procedural or administrative consolidation does not involve the substantive merger or consolidation of the bankruptcy estates, merely their procedural treatment together by the court.

Bankruptcy and Insolvency General Rules, CRC, c 368 at section 3 **[Tab 2]**

Electro Sonic Inc, Re, 2014 CarswellOnt 1568 [*Electro*] at para 4 **[Tab 11]**

79. Procedural consolidation was recently granted by this Court in the proposal proceedings of BR Capital Inc.

In the matter of the notice of intention to make a proposal of BR Capital LP et al, Order (Procedural Consolidation, Administration Charge, Interim Financing, Interim Financing Charge, D&O Charge and Stay Extension) of Dario J. dated October 14, 2022 [*BR Capital* Order] at paras 2-6 **[Tab 16]**

80. Importantly, the Applicants do not seek substantive consolidation of their respective estates. Instead, the Applicants seek only that the Proposal Proceedings be consolidated procedurally and addressed together. Administrative consolidation of the Applicants' Proposal Proceedings is analogous to bringing related civil actions under common case management.

Electro at para 4 **[Tab 11]**

81. Procedural consolidation (or administrative consolidation) of notices of intention in proposal proceedings is appropriate where the debtors' affairs are sufficiently related and where consolidation would serve the goals of a just and expeditious determination of claims. Consolidating proceedings under Part III of the BIA avoids a multiplicity of proceedings and the costs associated with serving and filing separate sets of largely identical materials with this Court at each juncture of the proceedings.

Mustang GP Ltd., Re, 2015 ONSC 6562 [*Mustang*] at para 25 **[Tab 21]**

82. No creditor will be materially prejudiced by procedural consolidation. Procedural consolidation of these Proposal Proceedings will streamline the proposal process, creating savings for all parties and facilitating a faster and more efficient restructuring.

83. The Applicants respectfully submit that for reasons of time and cost efficiency this Court should authorize the procedural consolidation of these Proposal Proceedings. The Applicant's insolvencies are intertwined and stem directly from a single source: GPOC's liabilities under the Loan Agreement, for which each of the other Applicants is liable as a guarantor. If liability under the Loan Agreement can be resolved, the Applicants will no longer be insolvent.

84. The Applicants are interrelated and do not have distinct business purposes: the Griffin Entities are related corporations; the Shareholder Corporations exist solely to own shares in GPMC; and Spicelo is an investment corporation wholly owned by one of the four directors of all the Griffon Entities (who is also an owner of one of the Shareholder Corporations) with no operations and which is a guarantor of the obligations of GPOC under the Loan Agreement.

85. Given that the root of the Applicants' Proposal Proceedings is identical, the Applicants will likely apply together at future dates for relief such as stay extensions and transaction approvals. In this context, it is appropriate that their Proposal Proceedings be consolidated for the purposes of future steps of this order.

Electro at para 6 **[Tab 11]**

86. No administrative, practical, or legal purpose would be served by having these Proposal Proceedings resolved separately. The Applicants submit that this Court should exercise its discretion to order that the Proposal Proceedings should be procedurally consolidated.

C. The Engagement Letter Should Be Approved and Sealed

87. In order to maximize the value of the Applicants for the benefit of their stakeholders, the Applicants are seeking Court approval of the engagement of the Refinancing Advisor pursuant to the Engagement Letter.

88. The Refinancing Advisor was selected by the Applicants to assist them in locating, negotiating and finalizing a transaction to right-size the Applicants' current capital structure and refinance their debt obligations. As noted above, the mandate of the Refinancing Advisor is different from the previous marketing process undertaken by ARCO and Imperial which focused only on raising funds for the Griffon Entities' ongoing operations. The mandate of the Refinacing Advisor is to identify and finalize a refinancing to repay the Lenders in full.

89. The Refinancing Advisor's services are necessary to maximize the Applicant' opportunity to identify and close a value-maximizing transaction for the benefit of all stakeholders. If the Lenders can be repaid in full, significant solvency pressure on the Applicants will be lifted, enabling the Griffon Entities to focus on implementing their business plan and giving full effect to the 2023 Acquisition to generate value for all stakeholders. The Refinancing Advisor is qualified to serve in this role and the Proposal Trustee supports the engagement of the Refinancing Advisor. The Applicants therefore submit that the Engagement Letter should be approved.

90. The Applicants also seek an order that the Engagement Letter be sealed by the Clerk of the Court, and no persons other than the parties (and their respective successors and assigns), their counsel and Court personnel be given access. The Engagement Letter contains confidential, commercially sensitive information related to the professional fee rates charged by the Refinancing Advisor for its services. Such information, if made public, could negatively affect the Refinancing Advisor's competitive position in the market, its relationship with third parties, and future commercial negotiations.

Stepanic Affidavit at para 89

91. The Applicants submit that the sealing order in this case meets the test articulated by the Supreme Court in *Sherman Estate v Donovan*:

(a) public disclosure of the Engagement Letter poses a serious risk to the important public interest of competition and facilitating a successful restructuring. Professionals may be reluctant to work with restructuring businesses if their competitive position will be harmed by doing so.

(b) the order is necessary to prevent this risk and alternative measures will not prevent the risk. The order sought is as narrow as possible and only seeks to maintain the confidentiality of the Refinancing Advisor's rates;

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

Sherman Estate v. Donovan, 2021 SCC 25 at paras 37-38 **[Tab 26]**

D. Payment of Critical Suppliers Should be Authorized

92. Since filing the NOIs, the Applicants have, and intend to continue, making payments for goods and services supplied to them in the ordinary course, as set out in the cash flow projections filed by each Applicant. If these payments cease as a result of these Proposal Proceedings, certain critical third parties may be reluctant to continue their business relationship with GPOC, thereby resulting in potential deterioration of the value of the business, operations, and collateral. It may also lead to safety or environmental concerns.

Stepanic Affidavit at para 91

93. Critical supplier orders are common in insolvency proceedings to ensure that debtors can maintain key supplier relationships necessary for a successful restructuring. Courts in proposal proceedings under the BIA have authorized debtors to make payments of pre-filing obligations for critical suppliers where such payments are necessary to preserve the value of the business and facilitate reorganization. As the Ontario Court of Appeal has written, it would "undermine the first stage of the BIA process that serves to encourage a debtor's successful reorganization as a going concern" if a debtor could not enter into agreements for the payment of past debts to ensure future supply.

> *Proposition de Brunswick Health Group Inc*, 2023 QCCS 3224 at paras 29-30 **[Tab 24]**
>
> *1732427 Ontario Inc v 1787930 Ontario Inc*, 2019 ONCA 947 at para 13 **[Tab 4]**

94. The Applicants therefore propose that they be authorized, but not required, to make payments for goods or services supplied to them prior to the filing of the NOIs by third-party suppliers or service providers up to a maximum aggregate amount of $1,000,000 if, in the opinion of the Applicants, the supplier or service provider is critical to the Applicants' restructuring efforts. In all cases such payments would only be made with the consent of the Proposal Trustee.

> Stepanic Affidavit at para 92

E. The Administration Charge Should be Granted

95. The Applicants seek the Administration Charge of $500,000 to secure the fees of the Administrative Professionals whose services are critical to these proceedings. The Administrative Charge is to rank in priority to all other security interests in the Property of the Applicants.

96. This Court has jurisdiction under section 64.2 of the *BIA* to grant the Administration Charge and give it super priority:

> **64.2(1)** ***Court may order security or charge to cover certain costs****:* On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a person in respect of whom a notice of intention is filed under

> section 50.4 or a proposal is filed under subsection 62(1) is subject to a security or charge, in an amount that the court considers appropriate, in respect of the fees and expenses of
>
> (a) the trustee, including the fees and expenses of any financial, legal or other experts engaged by the trustee in the performance of the trustee's duties;
>
> (b) any financial, legal or other experts engaged by the person for the purpose of proceedings under this Division;
>
> […]
>
> **64.2(2) *Priority*:** The court may order that the security or charge rank in priority over the claim of any secured creditor of the person.

BIA section 64.2 **[Tab 1]**

97. The Applicants seek the Administration Charge in an amount up to $500,000 to secure the fees and expenses of its own counsel, of the Proposal Trustee and the Proposal Trustee's counsel, and the Refinancing Advisor. Such a charge is necessary and appropriate in the circumstances to ensure that the Applicants have access to professional advisors throughout the course of these proceedings.

98. Administration charges have been approved in BIA proposal proceedings where, as in the present case, the participation of insolvency professionals is necessary to ensure a successful proceeding under the BIA.

> *Mustang* at paras 32-33 **[Tab 21]**
>
> *BR Capital* Order at para 9 **[Tab 16]**
>
> *In the matter of the notice of intention to make a proposal of Trakopolis IoT Corp et al,* Order (Extension of the Stay, Administration Charge, FA Charge, D&O Charge) of Macleod J. dated December 16, 2019 [*Trakopolis* Order] at para 3 **[Tab 17]**

99. The Applicants submit that the present case is an appropriate circumstance for this Court to grant the Administration Charge with priority over any pre-existing security interests and other encumbrances. The quantum of the proposed Administration Charge is both fair and reasonable given the size and complexity of the Applicants' business. The

Administrative Professionals have played, and will continue to play, a critical role in these proceedings.

100. As a result of the foregoing, the Applicants respectfully submit that this Honourable Court should exercise its discretion to grant the Administration Charge.

F. The D&O Charge Should be Granted

101. The Applicants also seek a declaration that the Property is subject to the D&O Charge, in the maximum amount of $250,000, indemnifying the Directors for obligations and liabilities which they may incur in their capacities as officers and directors after the commencement of these Proposal Proceedings. The D&O Charge would rank in priority to any other security or charge other than the Administration Charge.

102. The *BIA* expressly authorizes this Court to grant the D&O Charge:

> **64.1 (1)** ***Security or charge relating to director's indemnification***. On application by a person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the property of the person is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the person to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer after the filing of the notice of intention or the proposal, as the case may be.
>
> **64.1(2)** ***Priority*****.** The court may order that the security or charge rank in priority over the claim of any secured creditor of the person.
>
> *BIA* sections 64.1(1)-(2) **[Tab 1]**

103. The purpose of the D&O Charge is to:

(a) keep the Directors in place during a restructuring by providing them with protection against liabilities they could incur during the restructuring and to avoid the inevitable destabilization of the business of the Applicants that would arise if the Directors did not remain in place, or were concerned about potential liabilities that they may incur in carrying out their functions; and

(b) enable the Applicants to benefit from the experience and expertise of the Directors.

Northstar Aerospace Inc., Re, 2013 ONSC 1780 at para 29 **[Tab 23]**;

Canwest Global Communications Corp., Re, 2009 CarswellOnt 6184 at para 48 **[Tab 8]**

104. There is currently no directors' and officers' liability insurance in place to indemnify the Directors.

105. D&O Charges, as in the immediate case, have been approved in BIA proposal proceedings where:

(a) the charge is only available to the extent that the directors and officers do not have coverage under existing policies;

(b) there is a possibility the directors and officers whose participation in the process is critical, may not continue their involvement; and

(c) the Proposal Trustee states the charge is reasonable and is supportive of the same.

Colossus Minerals Inc., Re, 2014 ONSC 514 at paras 13, 19-20 **[Tab 9]**

See also *Mustang* at para 35 **[Tab 21]**; *BR Capital* Order at paras 13-14 **[Tab 16]**; *Trakopolis* Order at para 6 **[Tab 17]**

106. The Applicants respectfully submit that these circumstances are appropriate for this Honourable Court to grant the D&O Charge. The Applicants require the services of their directors and officers to develop a viable proposal. The Applicants' directors and officers have the technical and institutional knowledge, experience, and relationships necessary to preserve the value of the Griffon Entities' operations and business for the benefit of all stakeholders. The Applicants' chances to implement a successful restructuring are maximized by the continued involvement of their directors and officers.

Stepanic Affidavit at para 70

107. The quantum of the proposed D&O Charge is both fair and reasonable given the size and complexity of the Applicants' business. The Directors have played, and will continue to

play, an important role in these Proposal Proceedings. Accordingly, the Applicants respectfully submit that this Court should exercise its discretion to grant the D&O Charge.

V. CONCLUSION AND RELIEF SOUGHT

108. For the reasons above, the Applicants request the Orders sought be granted as they are fair, necessary and reasonable in the circumstances and represent the best option to permit the Applicants to present a joint proposal which will benefit their creditors.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 19 day of September, 2023.

Randal Van de Mosselaer / Emily Paplawski
Osler Hoskin & Harcourt LLP
Counsel for the Applicants

TABLE OF AUTHORITIES

20. *Mernick, Re*, 1994 CarswellOnt 257 (Ont CJ [Gen Div])

21. *Mustang GP Ltd. (Re),* 2015 ONSC 6562

22. *Nortec Colour Graphics Inc, Re*, 2000 CarswellOnt 2797 (Ont SCJ [Gen Div])

23. *Northstar Aerospace, Inc. (Re),* 2013 ONSC 1780

24. *Proposition de Brunswick Health Group Inc*, 2023 QCCS 3224

25. *Rizzo, Re*, 2016 ONSC 8192

26. *Sherman Estate v. Donovan*, 2021 SCC 25

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 September 13, 2023

Last amended on April 27, 2023

À jour au 13 septembre 2023

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income trust means a trust that has assets in Canada if

(a) its units are listed on a prescribed stock exchange on the date of the initial bankruptcy event, or

(b) the majority of its units are held by a trust whose units are listed on a prescribed stock exchange on the date of the initial bankruptcy event; (*fiducie de revenu*)

insolvent person means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and

(a) who is for any reason unable to meet his obligations as they generally become due,

(b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or

(c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due; (*personne insolvable*)

legal counsel means any person qualified, in accordance with the laws of a province, to give legal advice; (*conseiller juridique*)

locality of a debtor means the principal place

(a) where the debtor has carried on business during the year immediately preceding the date of the initial bankruptcy event,

(b) where the debtor has resided during the year immediately preceding the date of the initial bankruptcy event, or

(c) in cases not coming within paragraph (a) or (b), where the greater portion of the property of the debtor is situated; (*localité*)

Minister means the Minister of Industry; (*ministre*)

net termination value means the net amount obtained after netting or setting off or compensating the mutual obligations between the parties to an eligible financial contract in accordance with its provisions; (*valeurs nettes dues à la date de résiliation*)

official receiver means an officer appointed under subsection 12(2); (*séquestre officiel*)

b) il a résidé au cours de l'année précédant l'ouverture de sa faillite;

c) se trouve la plus grande partie de ses biens, dans les cas non visés aux alinéas a) ou b). (*locality of a debtor*)

localité d'un débiteur [Abrogée, 2005, ch. 47, art. 2(F)]

ministre Le ministre de l'Industrie. (*Minister*)

moment de la faillite S'agissant d'une personne, le moment :

a) soit du prononcé de l'ordonnance de faillite la visant;

b) soit du dépôt d'une cession de biens la visant;

c) soit du fait sur la base duquel elle est réputée avoir fait une cession de biens. (*time of the bankruptcy*)

opération sous-évaluée Toute disposition de biens ou fourniture de services pour laquelle le débiteur ne reçoit aucune contrepartie ou en reçoit une qui est manifestement inférieure à la juste valeur marchande de celle qu'il a lui-même donnée. (*transfer at undervalue*)

ouverture de la faillite Relativement à une personne, le premier en date des événements suivants à survenir :

a) le dépôt d'une cession de biens la visant;

b) le dépôt d'une proposition la visant;

c) le dépôt d'un avis d'intention par elle;

d) le dépôt de la première requête en faillite :

(i) dans les cas visés aux alinéas 50.4(8) a) et 57 a) et au paragraphe 61(2),

(ii) dans le cas où la personne, alors qu'elle est visée par un avis d'intention déposé aux termes de l'article 50.4 ou une proposition déposée aux termes de l'article 62, fait une cession avant que le tribunal ait approuvé la proposition;

e) dans les cas non visés à l'alinéa d), le dépôt de la requête à l'égard de laquelle une ordonnance de faillite est rendue;

f) l'introduction d'une procédure sous le régime de la *Loi sur les arrangements avec les créanciers des compagnies*. (*date of the initial bankruptcy event*)

personne

PART III

Proposals

DIVISION I

General Scheme for Proposals

Who may make a proposal

50 (1) Subject to subsection (1.1), a proposal may be made by

(a) an insolvent person;

(b) a receiver, within the meaning of subsection 243(2), but only in relation to an insolvent person;

(c) a liquidator of an insolvent person's property;

(d) a bankrupt; and

(e) a trustee of the estate of a bankrupt.

Where proposal may not be made

(1.1) A proposal may not be made under this Division with respect to a debtor in respect of whom a consumer proposal has been filed under Division II until the administrator under the consumer proposal has been discharged.

To whom proposal made

(1.2) A proposal must be made to the creditors generally, either as a mass or separated into classes as provided in the proposal, and may also be made to secured creditors in respect of any class or classes of secured claim, subject to subsection (1.3).

Idem

(1.3) Where a proposal is made to one or more secured creditors in respect of secured claims of a particular class, the proposal must be made to all secured creditors in respect of secured claims of that class.

Classes of secured claims

(1.4) Secured claims may be included in the same class if the interests or rights of the creditors holding those claims are sufficiently similar to give them a commonality of interest, taking into account

(a) the nature of the debts giving rise to the claims;

PARTIE III

Propositions concordataires

SECTION I

Dispositions d'application générale

Admissibilité

50 (1) Sous réserve du paragraphe (1.1), une proposition peut être faite par :

a) une personne insolvable;

b) un séquestre au sens du paragraphe 243(2), mais seulement relativement à une personne insolvable;

c) le liquidateur des biens d'une personne insolvable;

d) un failli;

e) le syndic de l'actif d'un failli.

Inadmissibilité

(1.1) Il ne peut être fait de proposition aux termes de la présente section relativement au débiteur à l'égard de qui une proposition de consommateur a été produite aux termes de la section II tant que l'administrateur désigné dans le cadre de la première proposition n'a pas été libéré.

Destinataires

(1.2) La proposition est faite aux créanciers en général, étant entendu qu'elle s'adresse, selon ce qu'elle prévoit, soit à la masse de ceux-ci, soit aux diverses catégories auxquelles ils appartiennent; elle peut en outre, sous réserve du paragraphe (1.3), être faite aux créanciers garantis d'une ou de plusieurs catégories.

Idem

(1.3) La proposition portant sur des réclamations garanties d'une catégorie particulière doit être faite à tous les créanciers garantis dont la réclamation appartient à cette catégorie.

Catégories de créances garanties

(1.4) Peuvent faire partie de la même catégorie les créances garanties des créanciers ayant des droits ou intérêts à ce point semblables, compte tenu des critères énumérés ci-après, qu'on peut en conclure qu'ils ont un intérêt commun :

Excluded secured creditor

50.2 A secured creditor to whom a proposal has not been made in respect of a particular secured claim may not file a proof of secured claim in respect of that claim.

1992, c. 27, s. 19.

Rights in bankruptcy

50.3 On the bankruptcy of an insolvent person who made a proposal to one or more secured creditors in respect of secured claims, any proof of secured claim filed pursuant to section 50.1 ceases to be valid or effective, and sections 112 and 127 to 134 apply in respect of a proof of claim filed by any secured creditor in the bankruptcy.

1992, c. 27, s. 19.

Notice of intention

50.4 (1) Before filing a copy of a proposal with a licensed trustee, an insolvent person may file a notice of intention, in the prescribed form, with the official receiver in the insolvent person's locality, stating

(a) the insolvent person's intention to make a proposal,

(b) the name and address of the licensed trustee who has consented, in writing, to act as the trustee under the proposal, and

(c) the names of the creditors with claims amounting to two hundred and fifty dollars or more and the amounts of their claims as known or shown by the debtor's books,

and attaching thereto a copy of the consent referred to in paragraph (b).

Certain things to be filed

(2) Within ten days after filing a notice of intention under subsection (1), the insolvent person shall file with the official receiver

(a) a statement (in this section referred to as a "cash-flow statement") indicating the projected cash-flow of the insolvent person on at least a monthly basis, prepared by the insolvent person, reviewed for its reasonableness by the trustee under the notice of intention and signed by the trustee and the insolvent person;

(b) a report on the reasonableness of the cash-flow statement, in the prescribed form, prepared and signed by the trustee; and

(c) a report containing prescribed representations by the insolvent person regarding the preparation of the

Le cas des autres créanciers garantis

50.2 Le créancier garanti à qui aucune proposition n'a été faite relativement à une réclamation garantie en particulier n'est pas admis à produire une preuve de réclamation garantie à cet égard.

1992, ch. 27, art. 19.

Droits en cas de faillite

50.3 En cas de faillite d'une personne insolvable ayant fait une proposition à un ou plusieurs créanciers garantis relativement à des réclamations garanties, les preuves de réclamations garanties déposées aux termes de l'article 50.1 sont sans effet, et les articles 112 et 127 à 134 s'appliquent aux preuves de réclamations déposées par des créanciers garantis dans le cadre de la faillite.

1992, ch. 27, art. 19.

Avis d'intention

50.4 (1) Avant de déposer copie d'une proposition auprès d'un syndic autorisé, la personne insolvable peut, en la forme prescrite, déposer auprès du séquestre officiel de sa localité un avis d'intention énonçant :

a) son intention de faire une proposition;

b) les nom et adresse du syndic autorisé qui a accepté, par écrit, les fonctions de syndic dans le cadre de la proposition;

c) le nom de tout créancier ayant une réclamation s'élevant à au moins deux cent cinquante dollars, ainsi que le montant de celle-ci, connu ou indiqué aux livres du débiteur.

L'avis d'intention est accompagné d'une copie de l'acceptation écrite du syndic.

Documents à déposer

(2) Dans les dix jours suivant le dépôt de l'avis d'intention visé au paragraphe (1), la personne insolvable dépose les documents suivants auprès du séquestre officiel :

a) un état établi par la personne insolvable — appelé « l'état » au présent article — portant, projections au moins mensuelles à l'appui, sur l'évolution de son encaisse, et signé par elle et par le syndic désigné dans l'avis d'intention après que celui-ci en a vérifié le caractère raisonnable;

b) un rapport portant sur le caractère raisonnable de l'état, établi, en la forme prescrite, par le syndic et signé par lui;

c) un rapport contenant les observations — prescrites par les Règles générales — de la personne insolvable

cash-flow statement, in the prescribed form, prepared and signed by the insolvent person.

Creditors may obtain statement

(3) Subject to subsection (4), any creditor may obtain a copy of the cash-flow statement on request made to the trustee.

Exception

(4) The court may order that a cash-flow statement or any part thereof not be released to some or all of the creditors pursuant to subsection (3) where it is satisfied that

(a) such release would unduly prejudice the insolvent person; and

(b) non-release would not unduly prejudice the creditor or creditors in question.

Trustee protected

(5) If the trustee acts in good faith and takes reasonable care in reviewing the cash-flow statement, the trustee is not liable for loss or damage to any person resulting from that person's reliance on the cash-flow statement.

Trustee to notify creditors

(6) Within five days after the filing of a notice of intention under subsection (1), the trustee named in the notice shall send to every known creditor, in the prescribed manner, a copy of the notice including all of the information referred to in paragraphs (1)(a) to (c).

Trustee to monitor and report

(7) Subject to any direction of the court under paragraph 47.1(2)(a), the trustee under a notice of intention in respect of an insolvent person

(a) shall, for the purpose of monitoring the insolvent person's business and financial affairs, have access to and examine the insolvent person's property, including his premises, books, records and other financial documents, to the extent necessary to adequately assess the insolvent person's business and financial affairs, from the filing of the notice of intention until a proposal is filed or the insolvent person becomes bankrupt;

(b) shall file a report on the state of the insolvent person's business and financial affairs — containing the prescribed information, if any —

relativement à l'établissement de l'état, établi, en la forme prescrite, par celle-ci et signé par elle.

Copies de l'état

(3) Sous réserve du paragraphe (4), tout créancier qui en fait la demande au syndic peut obtenir une copie de l'état.

Exception

(4) Le tribunal peut rendre une ordonnance de non-communication de tout ou partie de l'état, s'il est convaincu que sa communication à l'un ou l'autre ou à l'ensemble des créanciers causerait un préjudice indu à la personne insolvable ou encore que sa non-communication ne causerait pas de préjudice indu au créancier ou aux créanciers en question.

Immunité

(5) S'il agit de bonne foi et prend toutes les précautions voulues pour bien réviser l'état, le syndic ne peut être tenu responsable des dommages ou pertes subis par la personne qui s'y fie.

Notification

(6) Dans les cinq jours suivant le dépôt de l'avis d'intention, le syndic qui y est nommé en fait parvenir à tous les créanciers connus, de la manière prescrite, une copie contenant les renseignements mentionnés aux alinéas (1)a) à c).

Obligation de surveillance

(7) Sous réserve de toute instruction émise par le tribunal aux termes de l'alinéa 47.1(2)a), le syndic désigné dans un avis d'intention se rapportant à une personne insolvable :

a) a, dans le cadre de la surveillance des affaires et des finances de celle-ci et dans la mesure où cela est nécessaire pour lui permettre d'estimer adéquatement les affaires et les finances de la personne insolvable, accès aux biens — locaux, livres, registres et autres documents financiers, notamment — de cette personne, biens qu'il est d'ailleurs tenu d'examiner, et ce depuis le dépôt de l'avis d'intention jusqu'au dépôt de la proposition ou jusqu'à ce que la personne en question devienne un failli;

b) dépose un rapport portant sur l'état des affaires et des finances de la personne insolvable et contenant les renseignements prescrits :

(i) with the official receiver without delay after ascertaining a material adverse change in the insolvent person's projected cash-flow or financial circumstances, and

(ii) with the court at or before the hearing by the court of any application under subsection (9) and at any other time that the court may order; and

(c) shall send a report about the material adverse change to the creditors without delay after ascertaining the change.

(i) auprès du séquestre officiel dès qu'il note un changement négatif important au chapitre des projections relatives à l'encaisse de la personne insolvable ou au chapitre de la situation financière de celle-ci,

(ii) auprès du tribunal au plus tard lors de l'audition de la demande dont celui-ci est saisi aux termes du paragraphe (9) et aux autres moments déterminés par ordonnance du tribunal;

c) envoie aux créanciers un rapport sur le changement visé au sous-alinéa b)(i) dès qu'il le note.

Where assignment deemed to have been made

(8) Where an insolvent person fails to comply with subsection (2), or where the trustee fails to file a proposal with the official receiver under subsection 62(1) within a period of thirty days after the day the notice of intention was filed under subsection (1), or within any extension of that period granted under subsection (9),

(a) the insolvent person is, on the expiration of that period or that extension, as the case may be, deemed to have thereupon made an assignment;

(b) the trustee shall, without delay, file with the official receiver, in the prescribed form, a report of the deemed assignment;

(b.1) the official receiver shall issue a certificate of assignment, in the prescribed form, which has the same effect for the purposes of this Act as an assignment filed under section 49; and

(c) the trustee shall, within five days after the day the certificate mentioned in paragraph (b.1) is issued, send notice of the meeting of creditors under section 102, at which meeting the creditors may by ordinary resolution, notwithstanding section 14, affirm the appointment of the trustee or appoint another licensed trustee in lieu of that trustee.

Cas de cession présumée

(8) Lorsque la personne insolvable omet de se conformer au paragraphe (2) ou encore lorsque le syndic omet de déposer, ainsi que le prévoit le paragraphe 62(1), la proposition auprès du séquestre officiel dans les trente jours suivant le dépôt de l'avis d'intention aux termes du paragraphe (1) ou dans le délai supérieur accordé aux termes du paragraphe (9) :

a) la personne insolvable est, à l'expiration du délai applicable, réputée avoir fait une cession;

b) le syndic en fait immédiatement rapport, en la forme prescrite, au séquestre officiel;

b.1) le séquestre officiel délivre, en la forme prescrite, un certificat de cession ayant, pour l'application de la présente loi, le même effet qu'une cession déposée en conformité avec l'article 49;

c) le syndic convoque, dans les cinq jours suivant la délivrance du certificat de cession, une assemblée des créanciers aux termes de l'article 102, assemblée à laquelle les créanciers peuvent, par résolution ordinaire, nonobstant l'article 14, confirmer sa nomination ou lui substituer un autre syndic autorisé.

Extension of time for filing proposal

(9) The insolvent person may, before the expiry of the 30-day period referred to in subsection (8) or of any extension granted under this subsection, apply to the court for an extension, or further extension, as the case may be, of that period, and the court, on notice to any interested persons that the court may direct, may grant the extensions, not exceeding 45 days for any individual extension and not exceeding in the aggregate five months after the expiry of the 30-day period referred to in subsection (8), if satisfied on each application that

Prorogation de délai

(9) La personne insolvable peut, avant l'expiration du délai de trente jours — déjà prorogé, le cas échéant, aux termes du présent paragraphe — prévu au paragraphe (8), demander au tribunal de proroger ou de proroger de nouveau ce délai; après avis aux intéressés qu'il peut désigner, le tribunal peut acquiescer à la demande, pourvu qu'aucune prorogation n'excède quarante-cinq jours et que le total des prorogations successives demandées et accordées n'excède pas cinq mois à compter de l'expiration du délai de trente jours, et pourvu qu'il soit convaincu, dans le cas de chacune des demandes, que les conditions suivantes sont réunies :

(a) the insolvent person has acted, and is acting, in good faith and with due diligence;

(b) the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and

(c) no creditor would be materially prejudiced if the extension being applied for were granted.

Court may not extend time

(10) Subsection 187(11) does not apply in respect of time limitations imposed by subsection (9).

Court may terminate period for making proposal

(11) The court may, on application by the trustee, the interim receiver, if any, appointed under section 47.1, or a creditor, declare terminated, before its actual expiration, the thirty day period mentioned in subsection (8) or any extension thereof granted under subsection (9) if the court is satisfied that

(a) the insolvent person has not acted, or is not acting, in good faith and with due diligence,

(b) the insolvent person will not likely be able to make a viable proposal before the expiration of the period in question,

(c) the insolvent person will not likely be able to make a proposal, before the expiration of the period in question, that will be accepted by the creditors, or

(d) the creditors as a whole would be materially prejudiced were the application under this subsection rejected,

and where the court declares the period in question terminated, paragraphs (8)(a) to (c) thereupon apply as if that period had expired.

1992, c. 27, s. 19; 1997, c. 12, s. 32; 2004, c. 25, s. 33(F); 2005, c. 47, s. 35; 2007, c. 36, s. 17; 2017, c. 26, s. 6(E).

Trustee to help prepare proposal

50.5 The trustee under a notice of intention shall, between the filing of the notice of intention and the filing of a proposal, advise on and participate in the preparation of the proposal, including negotiations thereon.

1992, c. 27, s. 19.

Order — interim financing

50.6 (1) On application by a debtor in respect of whom a notice of intention was filed under section 50.4 or a proposal was filed under subsection 62(1) and on notice to the secured creditors who are likely to be affected by the

a) la personne insolvable a agi — et continue d'agir — de bonne foi et avec toute la diligence voulue;

b) elle serait vraisemblablement en mesure de faire une proposition viable si la prorogation demandée était accordée;

c) la prorogation demandée ne saurait causer de préjudice sérieux à l'un ou l'autre des créanciers.

Non-application du paragraphe 187(11)

(10) Le paragraphe 187(11) ne s'applique pas aux délais prévus par le paragraphe (9).

Interruption de délai

(11) À la demande du syndic, d'un créancier ou, le cas échéant, du séquestre intérimaire nommé aux termes de l'article 47.1, le tribunal peut mettre fin, avant son expiration normale, au délai de trente jours — prorogé, le cas échéant — prévu au paragraphe (8), s'il est convaincu que, selon le cas :

a) la personne insolvable n'agit pas — ou n'a pas agi — de bonne foi et avec toute la diligence voulue;

b) elle ne sera vraisemblablement pas en mesure de faire une proposition viable avant l'expiration du délai;

c) elle ne sera vraisemblablement pas en mesure de faire, avant l'expiration du délai, une proposition qui sera acceptée des créanciers;

d) le rejet de la demande causerait un préjudice sérieux à l'ensemble des créanciers.

Si le tribunal acquiesce à la demande qui lui est présentée, les alinéas (8)a) à c) s'appliquent alors comme si le délai avait expiré normalement.

1992, ch. 27, art. 19; 1997, ch. 12, art. 32; 2004, ch. 25, art. 33(F); 2005, ch. 47, art. 35; 2007, ch. 36, art. 17; 2017, ch. 26, art. 6(A).

Préparation de la proposition

50.5 Le syndic désigné dans un avis d'intention doit, entre le dépôt de l'avis d'intention et celui de la proposition, participer, notamment comme conseiller, à la préparation de celle-ci, y compris aux négociations pertinentes.

1992, ch. 27, art. 19.

Financement temporaire

50.6 (1) Sur demande du débiteur à l'égard duquel a été déposé un avis d'intention aux termes de l'article 50.4 ou une proposition aux termes du paragraphe 62(1), le tribunal peut par ordonnance, sur préavis de la demande

file a report thereof in the prescribed form with the official receiver, who shall thereupon issue a certificate of assignment in the prescribed form, which has the same effect for the purposes of this Act as an assignment filed pursuant to section 49.

R.S., 1985, c. B-3, s. 63; 1992, c. 27, s. 28; 2004, c. 25, s. 34(F).

la présente loi, le même effet qu'une cession déposée en conformité avec l'article 49.

L.R. (1985), ch. B-3, art. 63; 1992, ch. 27, art. 28; 2004, ch. 25, art. 34(F).

Removal of directors

64 (1) The court may, on the application of any person interested in the matter, make an order removing from office any director of a debtor in respect of whom a notice of intention has been filed under section 50.4 or a proposal has been filed under subsection 62(1) if the court is satisfied that the director is unreasonably impairing or is likely to unreasonably impair the possibility of a viable proposal being made in respect of the debtor or is acting or is likely to act inappropriately as a director in the circumstances.

Révocation des administrateurs

64 (1) Sur demande d'un intéressé, le tribunal peut, par ordonnance, révoquer tout administrateur d'un débiteur à l'égard duquel a été déposé un avis d'intention aux termes de l'article 50.4 ou une proposition aux termes du paragraphe 62(1) s'il est convaincu que l'administrateur, sans raisons valables, compromet ou compromettra vraisemblablement la possibilité de faire une proposition viable ou agit ou agira vraisemblablement de façon inacceptable dans les circonstances.

Filling vacancy

(2) The court may, by order, fill any vacancy created under subsection (1).

R.S., 1985, c. B-3, s. 64; 1992, c. 27, s. 29; 1997, c. 12, s. 40; 1999, c. 31, s. 20; 2005, c. 47, s. 42.

Vacances

(2) Le tribunal peut, par ordonnance, combler toute vacance découlant de la révocation.

L.R. (1985), ch. B-3, art. 64; 1992, ch. 27, art. 29; 1997, ch. 12, art. 40; 1999, ch. 31, art. 20; 2005, ch. 47, art. 42.

Security or charge relating to director's indemnification

64.1 (1) On application by a person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the property of the person is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the person to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer after the filing of the notice of intention or the proposal, as the case may be.

Biens grevés d'une charge ou sûreté en faveur d'administrateurs ou de dirigeants

64.1 (1) Sur demande de la personne à l'égard de laquelle a été déposé un avis d'intention aux termes de l'article 50.4 ou une proposition aux termes du paragraphe 62(1), le tribunal peut par ordonnance, sur préavis de la demande aux créanciers garantis qui seront vraisemblablement touchés par la charge ou sûreté, déclarer que tout ou partie des biens de la personne sont grevés d'une charge ou sûreté, d'un montant qu'il estime indiqué, en faveur d'un ou de plusieurs de ses administrateurs ou dirigeants pour l'exécution des obligations qu'ils peuvent contracter en cette qualité après le dépôt de l'avis d'intention ou de la proposition.

Priority

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the person.

Priorité

(2) Il peut préciser, dans l'ordonnance, que la charge ou sûreté a priorité sur toute réclamation des créanciers garantis de la personne.

Restriction — indemnification insurance

(3) The court may not make the order if in its opinion the person could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

Restriction — assurance

(3) Il ne peut toutefois rendre une telle ordonnance s'il estime que la personne peut souscrire, à un coût qu'il estime juste, une assurance permettant d'indemniser adéquatement les administrateurs ou dirigeants.

Negligence, misconduct or fault

(4) The court shall make an order declaring that the security or charge does not apply in respect of a specific

Négligence, inconduite ou faute

(4) Il déclare, dans l'ordonnance, que la charge ou sûreté ne vise pas les obligations que l'administrateur ou le

obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

2005, c. 47, s. 42; 2007, c. 36, s. 24.

dirigeant assume, selon lui, par suite de sa négligence grave ou de son inconduite délibérée ou, au Québec, par sa faute lourde ou intentionnelle.

2005, ch. 47, art. 42; 2007, ch. 36, art. 24.

Court may order security or charge to cover certain costs

64.2 (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) is subject to a security or charge, in an amount that the court considers appropriate, in respect of the fees and expenses of

(a) the trustee, including the fees and expenses of any financial, legal or other experts engaged by the trustee in the performance of the trustee's duties;

(b) any financial, legal or other experts engaged by the person for the purpose of proceedings under this Division; and

(c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for the effective participation of that person in proceedings under this Division.

Biens grevés d'une charge ou sûreté pour couvrir certains frais

64.2 (1) Le tribunal peut par ordonnance, sur préavis aux créanciers garantis qui seront vraisemblablement touchés par la charge ou sûreté, déclarer que tout ou partie des biens de la personne à l'égard de laquelle a été déposé un avis d'intention aux termes de l'article 50.4 ou une proposition aux termes du paragraphe 62(1) sont grevés d'une charge ou sûreté, d'un montant qu'il estime indiqué, pour couvrir :

a) les dépenses et honoraires du syndic, ainsi que ceux des experts — notamment en finance et en droit — dont il retient les services dans le cadre de ses fonctions;

b) ceux des experts dont la personne retient les services dans le cadre de procédures intentées sous le régime de la présente section;

c) ceux des experts dont tout autre intéressé retient les services, si, à son avis, la charge ou sûreté était nécessaire pour assurer sa participation efficace aux procédures intentées sous le régime de la présente section.

Priority

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the person.

Priorité

(2) Il peut préciser, dans l'ordonnance, que la charge ou sûreté a priorité sur toute réclamation des créanciers garantis de la personne.

Individual

(3) In the case of an individual,

(a) the court may not make the order unless the individual is carrying on a business; and

(b) only property acquired for or used in relation to the business may be subject to a security or charge.

2005, c. 47, s. 42; 2007, c. 36, s. 24.

Personne physique

(3) Toutefois, s'agissant d'une personne physique, il ne peut faire la déclaration que si la personne exploite une entreprise et, le cas échéant, seuls les biens acquis ou utilisés dans le cadre de l'exploitation de l'entreprise peuvent être grevés.

2005, ch. 47, art. 42; 2007, ch. 36, art. 24.

Where proposal is conditional on purchase of new securities

65 A proposal made conditional on the purchase of shares or securities or on any other payment or contribution by the creditors shall provide that the claim of any creditor who elects not to participate in the proposal

Cas où la proposition est subordonnée à l'achat de nouvelles valeurs mobilières

65 Une proposition faite subordonnément à l'achat d'actions ou de valeurs mobilières ou à tout autre paiement

(2) [Repealed, 1992, c. 27, s. 65]

R.S., 1985, c. B-3, s. 182; 1992, c. 27, s. 65.

(2) [Abrogé, 1992, ch. 27, art. 65]

L.R. (1985), ch. B-3, art. 182; 1992, ch. 27, art. 65.

PART VII

Courts and Procedure

Jurisdiction of Courts

Courts vested with jurisdiction

183 (1) The following courts are invested with such jurisdiction at law and in equity as will enable them to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act during their respective terms, as they are now, or may be hereafter, held, and in vacation and in chambers:

(a) in the Province of Ontario, the Superior Court of Justice;

(b) [Repealed, 2001, c. 4, s. 33]

(c) in the Provinces of Nova Scotia and British Columbia, the Supreme Court;

(d) in the Provinces of New Brunswick and Alberta, the Court of Queen's Bench;

(e) in the Province of Prince Edward Island, the Supreme Court of the Province;

(f) in the Provinces of Manitoba and Saskatchewan, the Court of Queen's Bench;

(g) in the Province of Newfoundland and Labrador, the Trial Division of the Supreme Court; and

(h) in Yukon, the Supreme Court of Yukon, in the Northwest Territories, the Supreme Court of the Northwest Territories, and in Nunavut, the Nunavut Court of Justice.

Superior Court jurisdiction in the Province of Quebec

(1.1) In the Province of Quebec, the Superior Court is invested with the jurisdiction that will enable it to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act during its term, as it is now, or may be hereafter, held, and in vacation and in chambers.

PARTIE VII

Tribunaux et procédure

Compétence des tribunaux

Tribunaux compétents

183 (1) Les tribunaux suivants possèdent la compétence en droit et en equity qui doit leur permettre d'exercer la juridiction de première instance, auxiliaire et subordonnée en matière de faillite et en d'autres procédures autorisées par la présente loi durant leurs termes respectifs, tels que ces termes sont maintenant ou peuvent par la suite être tenus, pendant une vacance judiciaire et en chambre :

a) dans la province d'Ontario, la Cour supérieure de justice;

b) [Abrogé, 2001, ch. 4, art. 33]

c) dans les provinces de la Nouvelle-Écosse et de la Colombie-Britannique, la Cour suprême;

d) dans les provinces du Nouveau-Brunswick et d'Alberta, la Cour du Banc de la Reine;

e) dans la province de l'Île-du-Prince-Édouard, la Cour suprême;

f) dans les provinces du Manitoba et de la Saskatchewan, la Cour du Banc de la Reine;

g) dans la province de Terre-Neuve-et-Labrador, la Division de première instance de la Cour suprême;

h) au Yukon, la Cour suprême du Yukon, dans les Territoires du Nord-Ouest, la Cour suprême des Territoires du Nord-Ouest et, au Nunavut, la Cour de justice du Nunavut.

Compétence de la Cour supérieure de la province de Québec

(1.1) Dans la province de Québec, la Cour supérieure possède la compétence pour exercer la juridiction de première instance, auxiliaire et subordonnée en matière de faillite et en d'autres procédures autorisées par la présente loi durant son terme, tel que celui-ci est maintenant ou peut par la suite être tenu, pendant une vacance judiciaire et en chambre.

Courts of appeal — common law provinces

(2) Subject to subsection (2.1), the courts of appeal throughout Canada, within their respective jurisdictions, are invested with power and jurisdiction at law and in equity, according to their ordinary procedures, except as varied by this Act or the General Rules, to hear and determine appeals from the courts vested with original jurisdiction under this Act.

Court of Appeal of the Province of Quebec

(2.1) In the Province of Quebec, the Court of Appeal, within its jurisdiction, is invested with power and jurisdiction, according to its ordinary procedures, except as varied by this Act or the General Rules, to hear and determine appeals from the Superior Court.

Supreme Court of Canada

(3) The Supreme Court of Canada has jurisdiction to hear and to decide according to its ordinary procedure any appeal so permitted and to award costs.

R.S., 1985, c. B-3, s. 183; R.S., 1985, c. 27 (2nd Supp.), s. 10; 1990, c. 17, s. 3; 1998, c. 30, s. 14; 1999, c. 3, s. 15; 2001, c. 4, s. 33; 2002, c. 7, s. 83; 2015, c. 3, s. 9.

Appointment of officers

184 Each of the following persons, namely,

(a) the Chief Justice of the court,

(b) in Quebec, the Chief Justice or the Associate Chief Justice in the district to which the Chief Justice or Associate Chief Justice was appointed,

(c) in Yukon, the Commissioner of Yukon,

(d) in the Northwest Territories, the Commissioner of the Northwest Territories, and

(e) in Nunavut, the Commissioner of Nunavut,

shall appoint and assign such registrars, clerks and other officers in bankruptcy as deemed necessary for the transaction or disposal of matters in respect of which power or jurisdiction is given by this Act and may specify or limit the territorial jurisdiction of any such officer.

R.S., 1985, c. B-3, s. 184; 1993, c. 28, s. 78; 2002, c. 7, s. 84.

Assignment of judges to bankruptcy work by Chief Justice

185 (1) The Chief Justice of the court, and in the Province of Quebec the Chief Justice or the Associate

Cours d'appel — provinces de common law

(2) Sous réserve du paragraphe (2.1), les cours d'appel du Canada, dans les limites de leur compétence respective, sont, en droit et en equity, conformément à leur procédure ordinaire, sauf divergences prévues par la présente loi ou par les Règles générales, investies de la compétence d'entendre et de juger les appels interjetés des tribunaux exerçant juridiction de première instance en vertu de la présente loi.

Cour d'appel de la province de Québec

(2.1) Dans la province de Québec, la Cour d'appel, dans les limites de sa compétence, est, conformément à sa procédure ordinaire, sauf divergences prévues par la présente loi ou par les Règles générales, investie de la compétence d'entendre et de juger les appels interjetés de la Cour supérieure.

Cour suprême du Canada

(3) La Cour suprême du Canada a compétence pour entendre et décider, suivant sa procédure ordinaire, tout appel ainsi autorisé et pour adjuger les frais.

L.R. (1985), ch. B-3, art. 183; L.R. (1985), ch. 27 (2e suppl.), art. 10; 1990, ch. 17, art. 3; 1998, ch. 30, art. 14; 1999, ch. 3, art. 15; 2001, ch. 4, art. 33; 2002, ch. 7, art. 83; 2015, ch. 3, art. 9.

Nomination de registraires, etc.

184 Chacune des personnes énumérées ci-dessous procède aux nominations et affectations de registraires, commis et autres fonctionnaires en matière de faillite qu'elle juge utiles pour l'expédition des questions au sujet desquelles la présente loi accorde compétence ou pouvoir, et peut spécifier ou restreindre la compétence territoriale de ces registraires, commis ou autres fonctionnaires :

a) le juge en chef du tribunal;

b) dans la province de Québec, le juge en chef ou le juge en chef adjoint du district pour lequel il a été nommé;

c) au Yukon, le commissaire du Yukon;

d) dans les Territoires du Nord-Ouest, le commissaire des Territoires du Nord-Ouest;

e) dans le territoire du Nunavut, le commissaire du Nunavut.

L.R. (1985), ch. B-3, art. 184; 1993, ch. 28, art. 78; 2002, ch. 7, art. 84.

Désignation, par le juge en chef, de juges pour siéger en faillite

185 (1) Le juge en chef du tribunal, ou, dans la province de Québec, le juge en chef ou le juge en chef adjoint dans

TAB 2

CANADA

CONSOLIDATION

CODIFICATION

Bankruptcy and Insolvency General Rules

Règles générales sur la faillite et l'insolvabilité

C.R.C., c. 368

C.R.C., ch. 368

Current to September 13, 2023

Last amended on March 25, 2011

À jour au 13 septembre 2023

Dernière modification le 25 mars 2011

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General

2 Documents that by the Act are to be prescribed must be in the form prescribed, with any modifications that the circumstances require and subject to any deviations permitted by section 32 of the *Interpretation Act*, and must be used in proceedings under the Act.

SOR/92-579, s. 3; SOR/98-240, s. 1; SOR/2007-61, s. 2(E).

3 In cases not provided for in the Act or these Rules, the courts shall apply, within their respective jurisdictions, their ordinary procedure to the extent that that procedure is not inconsistent with the Act or these Rules.

SOR/98-240, s. 1.

4 If a period of less than six days is provided for the doing of an act or the initiating of a proceeding under the Act or these Rules, calculation of the period does not include Saturdays or holidays.

SOR/98-240, s. 1; SOR/2007-61, s. 63(E).

5 (1) Subject to subsection (2), a notice or other document that is received by a Division Office outside of its business hours is deemed to have been received

(a) on the next business day of that Division Office, if it was received

(i) between the end of business hours and midnight, local time, on a business day, or

(ii) on a Saturday or holiday; or

(b) at the beginning of business hours of that Division Office, if it was received between midnight and the beginning of business hours, local time, on a business day.

(2) Subsection (1) does not apply to documents related to proceedings under Part III of the Act that are filed by facsimile.

SOR/78-389, s. 1; SOR/92-579, s. 4; SOR/98-240, s. 1; SOR/2005-284, s. 1.

6 (1) Unless otherwise provided in the Act or these Rules, every notice or other document given or sent pursuant to the Act or these Rules must be served, delivered personally, or sent by mail, courier, facsimile or electronic transmission.

(2) Unless otherwise provided in these Rules, every notice or other document given or sent pursuant to the Act or these Rules

(a) must be received by the addressee at least four days before the event to which it relates, if it is served,

Dispositions générales

2 Les documents à prescrire au titre de la Loi sont en la forme prescrite, avec les adaptations nécessaires et les différences de présentation permises par l'article 32 de la *Loi d'interprétation*, et sont utilisés dans les procédures engagées sous le régime de la Loi.

DORS/92-579, art. 3; DORS/98-240, art. 1; DORS/2007-61, art. 2(A).

3 Dans les cas non prévus par la Loi ou les présentes règles, les tribunaux appliquent, dans les limites de leur compétence respective, leur procédure ordinaire dans la mesure où elle est compatible avec la Loi et les présentes règles.

DORS/98-240, art. 1.

4 Lorsqu'un délai de moins de six jours est prévu pour accomplir un acte ou intenter une procédure en vertu de la Loi ou des présentes règles, les samedis et les jours fériés n'entrent pas dans le calcul du délai.

DORS/98-240, art. 1; DORS/2007-61, art. 63(A).

5 (1) Sous réserve du paragraphe (2), les avis et autres documents que le bureau de division reçoit en dehors des heures d'ouverture sont réputés reçus :

a) le premier jour ouvrable suivant de ce bureau, s'ils sont reçus :

(i) après les heures d'ouverture et avant minuit, heure locale, un jour ouvrable,

(ii) le samedi ou un jour férié;

b) au début des heures d'ouverture de ce bureau, s'ils sont reçus entre minuit et le début des heures d'ouverture, heure locale, un jour ouvrable.

(2) Le paragraphe (1) ne s'applique pas aux documents concernant les procédures fondées sur la partie III de la Loi qui sont déposés par télécopieur.

DORS/78-389, art. 1; DORS/92-579, art. 4; DORS/98-240, art. 1; DORS/2005-284, art. 1.

6 (1) Sauf disposition contraire de la Loi ou des présentes règles, les avis et autres documents à remettre ou à envoyer sous le régime de la Loi ou des présentes règles sont signifiés, remis en mains propres ou envoyés par courrier, par service de messagerie, par télécopieur ou par transmission électronique.

(2) Sauf disposition contraire des présentes règles, les avis et autres documents à remettre ou à envoyer sous le régime des présentes règles :

a) doivent être reçus par le destinataire au moins quatre jours avant l'événement auquel ils se

TAB 3

Province of Alberta

PERSONAL PROPERTY SECURITY ACT

Revised Statutes of Alberta 2000
Chapter P-7

Current as of November 16, 2022

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

(a) the amount collected pursuant to section 57(1) or the amount realized from the disposition of the collateral under section 60,

(b) the manner in which the collateral was disposed of,

(c) the amount of expenses deducted as provided in sections 17, 57 and 60,

(d) the distribution of the amount received from the collection or disposition, and

(e) the amount of any surplus.

(4) Unless otherwise agreed, or unless otherwise provided in this or any other Act, the debtor is liable for any deficiency.

1988 cP-4.05 s61;1990 c31 s49

Retention of collateral

62(1) After default, the secured party may propose to take the collateral in satisfaction of the obligations secured, and shall give a notice of the proposal to

(a) the debtor or any other person who is known by the secured party to be the owner of the collateral,

(b) a creditor or person who has a security interest in the collateral whose interest is subordinate to that of the secured party, and

(i) who has, prior to the date that the notice of the proposal is given to the debtor, registered a financing statement according to the name of the debtor or according to the serial number of the collateral in the case of goods of a kind prescribed by the regulations as serial number goods, or

(ii) whose interest was perfected by possession at the time the collateral was seized,

(c) any other person with an interest in the collateral who has given a written notice to the secured party of an interest in the collateral prior to the date that notice is given to the debtor, and

(d) the civil enforcement agency, unless possession or seizure has been surrendered or released by the civil enforcement agency pursuant to section 58(5) or (7).

(2) If any person who is entitled to notification under subsection (1) and whose interest in the collateral would be adversely affected by the secured party's proposal gives to the secured party a written notice of objection not later than 15 days after giving the notice under subsection (1), the secured party shall dispose of the collateral in accordance with section 60.

(3) If no notice of objection is given, the secured party is, at the expiry of the 15-day period referred to in subsection (2), deemed to have irrevocably elected to take the collateral in satisfaction of the obligation secured by it, and is entitled to hold or dispose of the collateral free from all rights and interest of the debtor and any person entitled to receive a notice

(a) under subsection (1)(b), and

(b) under subsection (1)(c) whose interest is subordinate to that of the secured party,

who has been given the notice and all obligations secured by the interests referred to in clauses (a) and (b) are deemed performed for the purposes of sections 49(7)(a) and 50(3)(a).

(4) The notice required under subsection (1) may be given in accordance with section 72 or, where notice is to be given to a person who has registered a financing statement, by registered mail addressed to the address of the person to whom it is to be given as it appears on the financing statement.

(5) The secured party may require any person who has made an objection to the secured party's proposal to furnish the secured party with proof of that person's interest in the collateral and, unless the person furnishes the proof not later than 10 days after the secured party's demand, the secured party may proceed as if the secured party had received no objection from that person.

(6) On application by a secured party, the Court may determine that an objection to the proposal of a secured party is ineffective on the grounds that

(a) the person made the objection for a purpose other than the protection of the person's interest in the collateral, or

(b) the market value of the collateral is less than the total amount owing to the secured party and the costs of disposition.

(7) Where a secured party disposes of the collateral to a purchaser who acquires the purchaser's interest for value and in good faith

and who takes possession of it, the purchaser acquires the collateral free from

(a) the interest of the debtor,

(b) an interest subordinate to that of the debtor, and

(c) an interest subordinate to that of the secured party

whether or not the requirements of this section have been complied with by the secured party, and all obligations secured by the subordinate interests are deemed performed for the purposes of sections 49(7)(a) and 50(3)(a).

(8) Subsection (7) does not apply so as to affect the rights of a person with a security interest deemed to be registered under section 77 who has not been given a written notice under this section.

1988 cP-4.05 s62;1990 c31 s50;1991 c21 s29(10);1994 cC-10.5 s148

Redemption of collateral

63(1) At any time before the secured party has disposed of the collateral or has contracted for its disposition under section 60 or before the secured party is deemed to have irrevocably elected to take the collateral under section 62,

(a) any person entitled to receive a notice of disposition under section 60(4) or (8) may, unless the person has otherwise agreed in writing after default, redeem the collateral by tendering fulfilment of all obligations secured by the collateral, or

(b) the debtor, other than a guarantor or indemnitor, may, unless the debtor has otherwise agreed in writing after default, reinstate the security agreement by paying the sums actually in arrears, exclusive of the operation of any acceleration clause, and by curing any other default by reason of which the secured party intends to dispose of the collateral,

together with payment of a sum equal to the reasonable expenses of seizing, holding, repairing, processing and preparing for disposition and any other reasonable expenses incurred by the secured party.

(2) Unless otherwise agreed, the debtor is not entitled to reinstate a security agreement

(a) more than twice, if the security agreement or any agreement modifying the security agreement provides for payment in full by the debtor not later than 12 months after the day value was given by the secured party;

TAB 4

COURT OF APPEAL FOR ONTARIO

CITATION: 1732427 Ontario Inc. v. 1787930 Ontario Inc., 2019 ONCA 947
DATE: 20191203
DOCKET: C66803, C66871

Rouleau, Roberts and Harvison Young JJ.A.

In the Matter of Notices of Intention to make a proposal of 1732427 Ontario Inc. and 1787930 Ontario Inc. both of the City of St. Thomas, in the Province of Ontario

Sherry Kettle, for the appellant, Transit Petroleum Inc.

Paul Neil Feldman and Oscar Strawczynski, for the respondent, 1787930 Ontario Inc.

Heard: November 15, 2019

On appeal from the order of Justice Russell M. Raikes of the Superior Court of Justice, dated January 28, 2019, with reasons reported at 2019 ONSC 716, and 2019 ONSC 1623.

REASONS FOR DECISION

[1] The appellant appeals from the motion judge's order requiring it to pay to the respondent the sum of $35,299.75, plus pre-judgment interest, and costs in the sum of $31,767.52.

[2] The motion judge allowed in part the respondent's motion to recover monies paid to the appellant after it had filed a notice of intention to file a proposal in bankruptcy ("NOI") on July 2, 2018. The motion judge found that the pre-authorized debit payment in the amount of $83,734.05 ("the PAD") made to the appellant post-NOI, under a payment plan concluded pre-NOI, related to pre-NOI debts. As a result, contrary to s. 69(1)(a) of the *Bankruptcy and Insolvency*

Act, R.S.C. 1985, c. B-3 ("*BIA*"), the PAD represented a prohibited "remedy against the insolvent person or the insolvent person's property". The motion judge concluded that the appellant should return the PAD to the respondent, net of the $48,434.30 owing to the appellant for post-NOI fuel purchases. The appellant's entitlement to the latter is not disputed on appeal.

[3] The appellant submits that the motion judge erred in characterizing the payment as the prohibited exercise of a creditor's remedy when it represented a *bona fide* agreement concluded on July 5, 2018 to satisfy past debts in order to continue a vital fuel supply to assist in the respondent's restructuring.

[4] The respondent argues that the motion judge correctly determined that the July 5th PAD was a prohibited self-help creditor's remedy because it was payment for past fuel purchases. Moreover, once he determined that the PAD was a prohibited remedy, the motion judge was not required to consider any alleged agreements because the parties could not ratify what was otherwise prohibited. In any event, the respondent maintains that the appellant did not raise an alleged July 5th agreement before the motion judge but confined its argument to the impact of a pre-NOI agreement.

[5] In our view, the motion judge erred by failing to consider whether the parties had entered into a legitimate agreement to pay past debts in order to

secure the future supply of fuel. As a result, the matter should be remitted to him for a new hearing.

[6] In determining whether the July 5th PAD was a remedy, the motion judge was required to consider all the relevant surrounding circumstances in which it occurred. Accordingly, it is useful to set out a brief synopsis of the relevant context leading up to and concerning the July 5th PAD and the alleged agreement between the parties.

[7] Up until July 11, 2018, the appellant supplied fuel to the respondent, a trucking company. The respondent was experiencing serious financial difficulties and had fallen into arrears in payments to the appellant for fuel supplied. In June 2018, the parties entered into negotiations to conclude an agreement governing payment of past and future fuel purchases.

[8] While the motion judge declined to determine whether the parties had reached an agreement prior to the filing of the NOI on July 2nd, the appellant submits that pursuant to the agreement that it says was reached on June 28th, on notice to and without objection from the respondent, it submitted the PAD for payment on July 3rd, which was processed and paid to the appellant on July 5th.

[9] The appellant did not learn of the NOI until its meeting with the respondent on July 5, 2018. As noted at para. 21 of the motion judge's reasons, at that meeting, the respondent's owner, Louise Vonk, accompanied by its general

manager, Blaine Skirtschak, informed the appellant's representatives, Monique Paul and Trevor Chambers, that the respondent "had filed a NOI on July 2, 2018 to restrict further action by CRA and to give [the respondent] some time to reorganize financially to carry on business".

[10] In para. 22 of his reasons, the motion judge summarized the appellant's evidence concerning the respondent's representations which the appellant says formed the July 5th agreement between the parties:

> During the July 5 meeting, Vonk indicated that [the respondent] needed [the appellant's] support to keep operating and she was willing to do whatever was necessary to keep [the appellant] as its fuel supplier. She did not request return of the monies received by [the appellant] from the July 5 PAD. According to Paul and Chambers, Vonk advised that she allowed the PAD to go through because Transit was a 'vital vendor' necessary for [the respondent] to remain in business.

[11] The appellant insists that the issue of a July 5th agreement was raised before the motion judge. Paragraph 30 of the motion judge's reasons provide some support for the appellant's submission that it had advanced the argument that it was a key supplier who, subsequent to the NOI, was permitted to keep the July 5 PAD for past debts in furtherance of an agreement to maintain supply to the respondent as it restructured its business. Similarly, the appellant points to para. 31 of the affidavit of Trevor Chambers in which he deposes that:

> Transit specifically relied on the representations of [the respondent], including Louise, Blaine and Nathan, that all purchases would be paid for by [the respondent] and

> that the Agreed Payment had been allowed to go through so that [the respondent] could continue in business. Transit continued to supply fuel to [the respondent] post-NOI at [the respondent's] request and continued to do business with [the respondent] in good faith and based on [the respondent's] representations.

[12] To be fair to the motion judge, it is not entirely clear to what extent in argument on the motion the appellant characterized the July 5th exchanges as constituting an agreement. However, it seems common ground that the motion judge did not squarely consider whether, in context, that exchange represented a *bona fide* agreement with a key supplier to pay past debts in order to secure a vital future supply of fuel for the respondent's continued operations.

[13] We do not agree with the respondent's submissions that the parties could not enter into an agreement for the payment of past debts in order to secure future fuel supplies. This would undermine the first stage of the *BIA* process that serves to encourage a debtor's successful reorganization as a going concern. Creditors and debtors alike benefit from the latter's continued operation. The goal of the stay and preference provisions under ss. 69, 95, 96 and 97 of the *BIA* is to give the debtor some breathing room to reorganize. Legitimate agreements with key suppliers also form a vital part of that process.

[14] Apposite is the commentary of E. Patrick Shea, "Dealing with Suppliers in a Reorganization" (2008) 37 C.B.R. (5th) 161 who writes:

> There is, however, no specific prohibition in the *BIA* on the debtor effecting payment of claims provable in the

> proposal proceedings. Instead, the BIA provides the trustee in the proposal (or the bankruptcy trustee in the event the proposal fails) with remedies against any creditor who receives such a payment on the basis that the payment is a preference. Payments to critical suppliers in the context of proposal proceedings are best analyzed on the basis that they are a preference. … In the context of proposals, section 97 [of the BIA][1] arguably clarifies that payments to suppliers made in good faith after the date the proposal proceedings are commenced (even payments of pre-filing claims) are intended to be valid. [Emphasis added.]

[15] It is our view whether the parties concluded a *bona fide* agreement on July 5th for the payment of past fuel supplies in consideration for continued fuel supply was a key issue to be determined on the respondent's motion. The determination of the issue of the July 5th PAD and alleged agreement could affect the motion judge's characterization of the PAD as a prohibited remedy under s. 69(1) of the *BIA*. As the motion judge made no factual findings respecting this issue, it is not possible nor desirable for this court to come to any determination. Given our reasons, the fairest route, as the parties agree, is to remit the matter to the motion judge for a new hearing.

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[1] Section 97(1) of the *BIA* provides as follows: No payment, contract, dealing or transaction to, by or with a bankrupt made between the date of the initial bankruptcy event and the date of the bankruptcy is valid, except the following, which are valid if made in good faith, subject to the provisions of this Act with respect to the effect of bankruptcy on an execution, attachment or other process against property, and subject to the provisions of this Act respecting preferences and transfers at undervalue:
(a) a payment by the bankruptcy to any of the bankrupt's creditors;
(b) a payment or delivery to the bankrupt;
(c) a transfer by the bankrupt for adequate valuable consideration; and
(d) a contract, dealing or transaction, including any giving of security, by or with the bankrupt for adequate valuable consideration.

[16] We leave to the motion judge's discretion how best to manage the re-adjudication of this matter. With respect to the pre-NOI agreement, the motion judge concluded that, if he were inclined to do so, conflicts in the evidentiary record precluded him from making any findings concerning that agreement and he would order that the issue proceed to trial. It may be that is the case in relation to the alleged July 5th agreement. It will be up to the motion judge to decide whether he can make the necessary findings on the motion or whether the resolution of all these issues requires a trial.

[17] Accordingly, we set aside the motion judge's order and remit the matter to the motion judge for a new hearing on all issues except for the appellant's entitlement to the payment of $48,434.30 for post-NOI fuel purchases.

[18] The appellant is entitled to its partial indemnity costs of the appeal in the agreed upon amount of $15,000, inclusive of disbursements and applicable taxes. The disposition of the costs of the motion below is reserved to the motion judge.

"Paul Rouleau J.A."

"L.B. Roberts J.A."

"A. Harvison Young J.A."

TAB 5

COURT OF APPEAL FOR ONTARIO

CITATION: Atlas (Brampton) Limited Partnership v. Canada Grace Park Ltd., 2021 ONCA 221
DATE: 20210409
DOCKET: C68360

Lauwers, Miller and Nordheimer JJ.A.

BETWEEN

Atlas (Brampton) Limited Partnership, Romlex International Ltd. and Peter Grigoras

Applicants (Appellants)

and

Canada Grace Park Ltd., Xing Ou Yang and Atlas Springbank Developments Ltd.

Respondents (Respondents)

Jeffrey A. Kaufman and Bradley Adams, for the appellants

Paul H. Starkman, for the respondents

Heard: December 3, 2020 by video conference

On appeal from the judgment of Justice David Aston of the Superior Court of Justice, dated April 6, 2020, with reasons reported at 2020 ONSC 1861.

Lauwers J.A.:

A. OVERVIEW

[1] Atlas (Brampton) Limited Partnership borrowed $1,800,000 from Canada Grace Park Ltd. The loan was secured by a pledge of shares in Atlas Springbank Developments Ltd. given by Romlex International Ltd. to Canada Grace Park Ltd.

Less than a year after the loan was made, Atlas Brampton defaulted and Canada Grace purported to foreclose on the pledged shares and to retain them in satisfaction of the debt. As the result, Canada Grace argues that it now owns Atlas Springbank. Both respondent companies are owned by Xing Ou Yang, also known as Jenny O. The appellant Peter Grigoras owns the appellants Romlex and Atlas Brampton.

[2] The appellants applied for a declaration that Canada Grace's foreclosure on the shares in Atlas Springbank was void for noncompliance with the notice requirements of the *Personal Property Security Act*, R.S.O. 1990, c. P.10 ("*PPSA*") and sought an order that the pledged shares be returned to Romlex. The application judge dismissed the application and denied equitable relief from forfeiture.

[3] For the reasons that follow, I would dismiss the appeal.

B. ISSUES

[4] The appellants argue that the application judge erred in:

1. Failing to apply Part V of the *PPSA*, which would have given the appellants a right to redeem the pledged shares by tendering payment of the outstanding debt;
2. Misinterpreting the text of the security agreement between the parties to find that it gave Canada Grace a right of foreclosure;

3. Misapplying the case of *Harry Shields Ltd. v. Bank of Montreal* (1992), 7 O.R. (3d) 57, [1992] O.J. No. 68 (Gen. Div.), in finding that Canada Grace could rely on the freestanding contractual right of foreclosure outside of the *PPSA*.

[5] Before the hearing, the panel requested the parties to make submissions on the role, if any, that s. 17.1 of the *PPSA* might play in this case. Section 17.1(2) provides that "a secured party having control… of investment property as collateral may sell, transfer, use or otherwise deal with the collateral in the manner and to the extent provided in the security agreement." The pledged shares in Atlas Springbank are "investment property" as defined in s. 1 of the *PPSA*. The respondents argue that they had control of the pledged shares and were therefore entitled to foreclose under s. 17.1(2) without notice to the appellants.

[6] The analysis is structured under three issues:

1. What is the nature of Canada Grace's security interest in the pledged Atlas Springbank shares?
2. Does s. 17.1(2) of the *PPSA* permit Canada Grace to foreclose on the pledged shares?
3. Does Part V of the *PPSA* permit Canada Grace to foreclose on the pledged shares?

I address these issues after setting out the factual context and the application judge's decision.

C. FACTUAL CONTEXT

[7] Romlex owned a commercial real estate development property located on Springbank Drive in London, Ontario. In 2018, Jenny O approached Mr. Grigoras, the owner of Romlex, about the possibility of her investing in the Springbank property. Mr. Grigoras agreed.

[8] The parties incorporated Atlas Springbank Developments Ltd. in order to develop the Springbank properties together. Romlex transferred the Springbank properties to the new entity, Atlas Springbank, in return for $2,400,000 and 55 percent of Atlas Springbank's shares. Jenny O acquired 45 percent of Atlas Springbank's shares through Canada Grace. Romlex and Canada Grace entered into a shareholder agreement governing the affairs of Atlas Springbank on May 1, 2018. This left Mr. Grigoras with control of Atlas Springbank.

[9] On May 10, 2018, Atlas Springbank loaned $1,800,000 to Atlas Brampton for a purpose that is not disclosed by the record before us. The first interest payment by Atlas Brampton to Atlas Springbank was due November 10, 2018 and the loan was to come due on February 28, 2019. There was some dispute between the parties as to whether the February 28, 2019 due date was agreed but the application judge found that February 28, 2019 was the proper due date.

[10] Atlas Brampton failed to make the first interest payment on November 10, 2018 and the loan then fell into default. To address Atlas

Brampton's default, in December 2018 the parties negotiated and signed a "Supplementary Agreement to the Loan Agreement with Security and Guarantor" (the "Security Agreement"). The Security Agreement contained three key provisions. First, Mr. Grigoras agreed to personally guarantee the loan from Atlas Springbank to Atlas Brampton. Second, Romlex agreed to pledge all of its shares in Atlas Springbank to Canada Grace such that, upon default by Atlas Brampton, the shares would be "transferred" to Canada Grace for the nominal sum of $2, paid in advance. Jenny O received an "irrevocable Power of Attorney" to effect the transfer of Atlas Springbank's shares from Romlex to Canada Grace upon Atlas Brampton's default. Third, in the event of such default, Mr. Grigoras would be "deemed as being removed" as a director of Atlas Springbank. In short, if Atlas Brampton defaulted on the loan, Jenny O could unilaterally take ownership and control of Atlas Springbank.

[11] The parties finalized and signed the Security Agreement on or around December 12, 2018. However, almost simultaneously, Atlas Brampton was put into receivership by a third party. The precise cause of the receivership is not on the record. Mr. Grigoras knew about the receivership when he signed the Security Agreement but he did not tell Jenny O, who found out about it on December 17, 2018. Falling into receivership was an act of default by Atlas Brampton. (The receivership was discharged in April 2019.)

[12] Atlas Brampton also failed to pay the balance of the loan when it came due on February 28, 2019. Consequently, as of March 1, 2019, there were two defaults: one for Atlas Brampton falling into receivership and the other for its failure to pay the loan off.

[13] On March 1, 2019, Atlas Springbank's solicitor wrote to Mr. Grigoras on behalf of Canada Grace to inform him that she had transferred Romlex's shares in Atlas Springbank to Canada Grace in accordance with the Security Agreement and had removed him as a director of the corporation. The letter stated that Canada Grace was now the sole shareholder of Atlas Springbank and did not offer any possibility of curing the default or redeeming the pledged, now transferred, shares.

[14] On July 25, 2019, the appellants issued a notice of application seeking a declaration that the transfer of Romlex's shares in Atlas Springbank to Canada Grace was null and void and that Romlex remained the beneficial owner of the shares. They also sought an order that Mr. Grigoras be reinstated as a director of Atlas Springbank. The appellants asserted that they were entitled to notice under s. 63(4) of the *PPSA* of Canada Grace's intention to foreclose on the pledged shares and were also entitled to an opportunity under s. 66 of the *PPSA* to redeem the pledged shares by paying the amount due under the loan.

[15] In the alternative, the appellants sought a new opportunity to redeem the transferred shares by paying the amount due. In the further alternative, the

appellants sought equitable relief from forfeiture under s. 98 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43.

D. THE APPLICATION JUDGE'S REASONS

[16] It was not in dispute before the application judge that the *PPSA* applied to the Security Agreement. The application judge noted that s. 63 of the *PPSA* authorizes a secured party to "dispose" of collateral upon default, subject to the requirement under s. 63(4) to give notice to the debtor and any other person having an interest in the collateral. He also noted that any person entitled to receive notice is also entitled, under s. 66 of the *PPSA*, to redeem the collateral by "tendering fulfillment of all obligations secured by the collateral."

[17] The application judge found that Canada Grace had not given the requisite notice and therefore had no "statutory right" to "dispose" of the collateral under the *PPSA*: at para. 19. However, he found that "their failure to avail themselves of their statutory right under the *PPSA* does not matter because they acted within their contractual right under the Security Agreement": at para. 19 (emphasis in original). The application judge characterized Canada Grace's contractual right as "effectively amount[ing] to foreclosure."

[18] In so concluding, the application judge pointed out that s. 59(5) of the *PPSA* prohibits the waiver or variation of the rights of a debtor or the duties of a secured party when the secured party pursues the remedies set out in Part V of the *PPSA*:

at para. 20. However, he noted that the respondents had "never invoked their right to any remedy authorized under the *PPSA*" and that the "applicants only have a right of redemption under the *PPSA* if the secured party chooses to pursue a remedy under the *PPSA*."

[19] In stepping outside the *PPSA*, the application judge relied on *Harry Shields*. In that case, the plaintiff, Harry Shields Ltd., executed a demand debenture in favour of Bank of Montreal and then pledged the debenture to the bank. The court held that the bank was entitled to enforce the debenture without regard to the duties of a pledgee under the *PPSA*. In this case, the application judge found that "[l]ike the Bank of Montreal in *Harry Shields*, Canada Grace Park and Jenny O did not rely on the *PPSA* for a remedy. They did not need to do so": at para. 23. He concluded: "The applicants cannot rely on the *PPSA* for the relief they seek": at para. 24.

[20] The application judge refused the appellants' request for equitable relief from forfeiture. He took into account the conduct of the appellants and weighed four factors against them:

1. The appellants had not disclosed the receivership order against Atlas Brampton when they signed the Security Agreement.

2. Mr. Grigoras denied agreeing to change the due date of the loan and falsely accused Jenny O of fraudulently changing the date on the agreement.

3. Romlex continued to collect rent from the tenants of the Springbank property without accounting to Atlas Springbank, the owner of the property, for that rent.

4. The appellants waited too long before bringing the application for relief, without explanation.

[21] Finally, the application judge observed that Canada Grace did not gain a windfall in foreclosing on the pledged shares because the principal loan amount of $1.8 million, with interest, was now nearly equal to the value of the underlying Springbank property. The application judge denied equitable relief from forfeiture, noting that the appellants had not established their ability to pay.

E. ISSUE ONE: WHAT WAS THE NATURE OF CANADA GRACE'S SECURITY INTEREST IN THE PLEDGED ATLAS SPRINGBANK SHARES?

[22] The parties' principal arguments on appeal focused on the application judge's finding that Canada Grace had an independent contractual right to foreclose on the pledged shares outside of the *PPSA*. However, the panel requested the parties' submissions on s. 17.1 of the *PPSA*, which grants additional rights to a "secured party having control of investment property", in order to determine whether and how its provisions might apply in this case.

[23] The respondents cited s. 17.1(2), which provides:

> … a secured party having control under subsection 1 (2) of investment property as collateral may sell, transfer, use or otherwise deal with the collateral in the manner and to the extent provided in the security agreement.

[24] The respondents argued that Canada Grace, as a secured party with control of the pledged shares, was entitled to "transfer, use, or otherwise deal with the collateral" in the manner provided in the security agreement, which was to take the shares in satisfaction of the debt.

[25] The application judge did not specifically address whether Canada Grace could be considered a "secured party having control of investment property as collateral" for the purposes of s. 17.1 because it was not argued before him. However, the question was fully joined in the parties' written submissions on appeal and it is appropriate for this court to make the determination.

[26] As I will explain, Canada Grace did have control of the pledged shares as collateral for the purposes of s. 17.1. I begin by setting out the governing principles.

(1) The Governing Principles

[27] Contemporary personal property security legislation was intended to simplify and rationalize the law of secured transactions. Under s. 2(a), the *PPSA* applies to "every transaction without regard to its form and without regard to the person who has title to the collateral that in substance creates a security interest." The *PPSA* adopts a "functional approach to determining what security interests are covered by its provisions": *Bank of Montreal v. Innovation Credit Union*, 2010 SCC 47, [2010] 3 S.C.R. 3, at para. 18. Almost anything that serves functionally as a security interest is a security interest for the purposes of the Act: *I Trade*

Finance Inc. v. Bank of Montreal, 2011 SCC 26, [2011] 2 S.C.R. 306, at para. 26. Subsection 2(a)(i) of the *PPSA* specifically includes a pledge among the forms of transaction that give rise to a security interest.

[28] The steps required to create a security interest in collateral, on the one hand, must not be confused with the steps required to make a security agreement enforceable against third parties, on the other hand. Under s. 9(1) of the *PPSA*, a consensual security agreement is "effective according to its terms between the parties to it." By contrast, under s. 11, "[a] security interest is not enforceable against a third party unless it has attached". Attachment can be achieved in different ways, under s. 11(2) of the *PPSA*, depending on the nature of the collateral. The question of attachment is not strictly at issue in this case since there is no third-party claim on the pledged collateral. I use the language of attachment to reflect the fact that Canada Grace's security interest did attach to the pledged shares.

[29] If Canada Grace became a "secured party having control of investment property" for the purposes of s. 17.1 of the *PPSA*, then Canada Grace could in theory "sell, transfer, use or otherwise deal with the collateral", subject only to the terms of the security agreement. Each of the terms "investment property" and "control" requires analysis.

(a) "Investment property"

[30] The term "investment property" is defined in s. 1 of the *PPSA* as "a security, whether certificated or uncertificated, security entitlement, securities account, futures contract or futures account". The word "security" is in turn defined by reference to the *Securities Transfer Act, 2006*, S.O. 2006, c. 8 ("*STA*"). Under ss. 1 and 10 of the *STA*, the term security includes a share or equity interest issued by a corporation. In this case, the pledged shares fit the *STA* definition of "security" and, by extension, "investment property".

(b) "Control"

[31] The concept of "control" was introduced into Ontario law through the *STA* in 2006, accompanied by simultaneous amendments to the *PPSA*.

[32] The 2006 amendments to the *PPSA* responded to a concern that the *PPSA* was ill-equipped to deal with declining physical share ownership and the growth of the "indirect holding system" in capital markets. In the indirect holding system, shareholders own shares and other securities through securities intermediaries, clearing services, banks, or other financial institutions. The development of the indirect holding system permitted greater efficiency in securities trading but left the law of secured transactions to rely on increasingly unwieldy analogies to physical share ownership in order to accommodate use of securities accounts and book entries as collateral: see Richard McLaren, *Secured Transactions in Personal*

Property in Canada, loose-leaf, 3rd ed. (Toronto: Carswell, 2016), at para. 1.04; Robert Scavone, "Stronger than Fictions: Canada Rethinks the Law of Securities Transfers in the Indirect Holding System" (2007) 45 Can. Bus. L.J. 67, at p. 77.

[33] Professor McLaren concisely sets out the concept of control, at para. 14.03:

> Control is the functional equivalent of the prior law's notion of physical possession of a certificated security, but has been expanded to conform to current market practices with regard to investment property. Under the STA, control is not limited to physical possession, however includes it within the concept.

See also Eric Spink, "Securities Transfer Act – Fitting New Concepts in Canadian Law" (2007), 45 Can. Bus. L.J. 167, at p. 184. Control exists when the secured party is in a position to liquidate the property without any further involvement from the owner of the property: Scavone, at pp. 23-30; Spink, at p. 185.

[34] The *STA* defines "control" by reference to the different means of acquiring it, depending on the nature of the collateral. Sections 23-26 of the *STA* describe how a purchaser can acquire control of certificated securities (s. 23), uncertificated securities (s. 24), or "security entitlements", which is the broader category encompassing, most notably, securities accounts (s. 25). The *PPSA* incorporates each manner of obtaining control in s. 1(2), which refers to a "secured party" rather than a "purchaser". In each case, "control" essentially mimics a pledge arrangement.

[35] If the parties employ certificated securities, s. 23 of the *STA* states that control may be established by simple possession of the certificates. This arrangement resembles a traditional pledge whereby one party places the physical share certificates in the other's possession.

[36] In the case of uncertificated securities such as the pledged shares in Atlas Springbank, s. 24 of the *STA* establishes that the secured party will have control of an uncertificated security if (a) the uncertificated security is delivered to the secured party (i.e. registered in the secured party's name on the books of the issuer); or (b) the issuer has agreed that the issuer will comply with instructions that are originated by the secured party without the further consent of the registered owner. This latter arrangement is referred to as a "control agreement".

[37] While the *STA* enumerates a fixed set of methods for obtaining control based on the nature of the investment property, the notion of control must be applied functionally rather than formalistically. For instance, a control agreement governing uncertificated securities need not take a particular form so long as it grants the secured party rights to give instructions to the issuer and to deal with the securities without the further consent of the registered owner.

[38] Control, as defined in the *STA*, plays a number of roles in the *PPSA* scheme. Under s. 11(2)(d) of the *PPSA*, a secured party's security interest in investment property attaches when the secured party has control of it. Similarly, a secured

party may perfect a security interest in investment property by control under s. 22.1 in order to establish priority in a dispute between secured parties. For the purposes of this appeal, control is a pre-requisite to the application of certain remedies, including the remedies set out in s. 17.1 on which Canada Grace relies.

(2) The Principles Applied

(a) Canada Grace acquired control of the pledged shares

[39] Neither party disputes that the *PPSA* applies to the Security Agreement in this case. The Security Agreement was plainly designed to secure Atlas Brampton's debt. Instead, the disagreement turns on whether and when Canada Grace obtained control of the pledged shares.

[40] The respondents argue that Canada Grace's security interest in the pledged shares attached on or around December 12, 2018, when the Security Agreement was signed. In their submission, the Security Agreement also functioned as a control agreement within the meaning of the *STA* because Romlex (which the respondents mistakenly identify as the "issuer" of the pledged shares) agreed to comply with Canada Grace's future instructions. Canada Grace therefore acquired control of the shares simultaneously with the signing of the Security Agreement.

[41] The appellants argue, by contrast, that Canada Grace's security interest in the pledged shares only attached on March 1, 2019, when the solicitor for Atlas

Springbank transferred ownership of the shares to Canada Grace on the books of the corporation. The appellants rely on s. 17.1(1)(c) of the *PPSA*, which states that "a secured party having control … of investment property as collateral … (c) may create a security interest in the collateral." They argue that March 1, 2019 was the first time Canada Grace could "create a security interest in the collateral" because it was the first time Canada Grace had "control" of the shares as their owner. Following the appellants' logic, the March 1 transfer should be seen as the true creation of the pledge and not as the moment of foreclosure on previously pledged property.

[42] I generally agree with the respondents. However, I note that Romlex is not the "issuer" of the pledged shares. Atlas Springbank issued the shares to Romlex, which in turned pledged them to Canada Grace. However, this error in terminology does not affect the validity of the respondent's underlying argument.

[43] In my view, the Security Agreement gave Canada Grace control over the pledged shares. Because the shares in issue are uncertificated, the control analysis is governed by s. 24(1)(b) of the *STA*, which I repeat for convenience:

> A [secured party] has control of an uncertificated security if:
>
> …
>
> (b) the issuer has agreed that the issuer will comply with instructions that are originated by the [secured party] without the further consent of the registered owner.

[44] The relevant text of the Security Agreement provides:

> 3. Considering the risks to Canada Grace, as the shareholder of the Lender, caused by the Borrower's performance under the Loan Agreement, Romlex agrees to pledge all Romlex's Share of Lender and any further shares issued, rights and interest entitled (collectively the "Pledged Shares") to the Canada Grace [sic]. If the Borrower becomes default [sic] for any reason, the Pledged Shares shall be transferred to Canada Grace at $2 nominal costs (the "Share Transfer"), the receipt of payment of such $2 nominal costs is hereby confirmed by Romlex.
>
> To effect such Shares Transfer, all parties agrees that:
>
> …
>
> (3) Romlex shall provide its cooperation to facilitate such Shares Transfer and removal of the Guarantor as director and officers; Romlex hereby provides its irrevocable power of attorney to Jenny to sign relevant documents for Romlex to effect such Shares Transfer and removal, although signing such documents is not required under this agreement.

[45] Taking the functional approach to control, I find that this clause creates a control agreement between the parties. The parties to the Security Agreement included all the parties necessary to a control agreement, including the issuer of the shares (Atlas Springbank), the registered owner (Romlex), the debtor (Atlas Brampton), and the secured party (Canada Grace). The effect of subclause (3) is to grant Jenny O authority to cause the shares to be transferred on instructions to Atlas Springbank (the issuer) without the further consent of Romlex (the registered

owner), and that is what occurred on March 1, 2019, the date of default. Canada Grace had control over the pledged shares for all practical purposes on December 12, 2018.

[46] The appellants' position is based on a mistaken interpretation of s. 17.1(1)(c). It is incorrect to say that Canada Grace "created" a security interest in the pledged shares at any time. Canada Grace acquired a security interest in the pledged shares from Romlex, the owner of the shares, by virtue of the Security Agreement. Canada Grace could only be described as "creating" a security interest in the pledged shares if it were to grant a security interest to a third party. Moreover, as discussed above, Canada Grace did not need to transfer the pledged shares to itself in order to acquire a security interest in them. Canada Grace's security interest attached at the moment it obtained control.

F. ISSUE TWO: DOES S. 17.1(2) OF THE *PPSA* PERMIT CANADA GRACE TO FORECLOSE ON THE PLEDGED SHARES?

[47] The appellants point out that secured parties are generally not permitted to foreclose on collateral without following the procedures set out in Part V of the *PPSA*, including the mandatory notice period and objection process. The respondents argue to the contrary, that, as secured parties with control over investment property, they were entitled under s. 17.1(2) of the *PPSA* to deal with the pledged shares in the manner provided in the Security Agreement, which imposes no notice requirement, and without regard to the formalities of the *PPSA*.

[48] In my view, s. 17.1(2) does not entitle the respondents to foreclose on the pledged shares without notice, as I will explain.

(1) The Governing Principles

(a) The rights and remedies of secured parties

[49] The rights, remedies, and duties of a secured party under the *PPSA* are set out in Part V of the *PPSA*. Section 59(1) identifies three sources or categories of remedies:

> Where the debtor is in default under a security agreement, the secured party has the [1] rights and remedies provided in the security agreement and [2] the rights and remedies provided in this Part [V] and, when in possession or control of the collateral, [3] the rights, remedies and duties provided in section 17 or 17.1, as the case may be. [Numbers and emphasis added.]

[50] The principal remedies available under Part V include the sale of the collateral or the acceptance of the collateral in satisfaction of the debt, commonly known as foreclosure. Like the rest of the *PPSA*, Part V was intended to harmonize a previously unstructured area of the law in which parties were required to select an appropriate remedy from among a patchwork of common law rights: see McLaren, at para. 15.01; Ronald Cuming, Catherine Walsh & Roderick Wood, *Personal Property Security Law* (Toronto: Irwin Law, 2012), at p. 616.

[51] In order to ensure greater certainty and predictability in commercial matters, the remedies set out in Part V are only to a limited extent subject to modification

by contract in advance. Section 59(5) provides that the remedies contained in ss. 63-66, including the rules governing sale and foreclosure remedies, cannot be waived or varied by contract to the extent that they give rights to the debtor and impose duties on the secured party. Contractual modifications are only permissible if they benefit the debtor. Ronald Cuming *et al.* describe Part V in the following terms, at pp. 618-619:

> For the most part, this scheme of enforcement remedies is mandatory and a secured party has only a limited ability to vary it by contract. The PPSA provides that to the extent that the enforcement provisions give rights to the debtor or impose obligations on the secured party, they cannot be waived or varied except as provided by the Act.
>
> …
>
> Although the PPSA provides that a secured party also has the rights and remedies provided in the security agreement, these cannot detract from the rights conferred upon the debtor by Part V and by section 17. The PPSA permits contractual variation of the remedial scheme if the variation expands the rights available to the debtor on default. [Emphasis added.]

[52] It is noteworthy that s. 59 identifies ss. 17 and 17.1 as potential sources of "rights, remedies and duties". Section 17.1 is the relevant provision when dealing with investment property:

> (1) Unless otherwise agreed by the parties and despite section 17, a secured party having control under subsection 1 (2) of investment property as collateral,

> (a) may hold as additional security any proceeds received from the collateral;
>
> (b) shall either apply money or funds received from the collateral to reduce the secured obligation or remit such money or funds to the debtor; and
>
> (c) may create a security interest in the collateral.
>
> (2) Despite subsection (1) and section 17, a secured party having control under subsection 1 (2) of investment property as collateral may sell, transfer, use or otherwise deal with the collateral in the manner and to the extent provided in the security agreement. [Emphasis added.]

[53] Section 17.1 creates an exception to the enforcement regime in Part V of the *PPSA*. It exempts certain forms of investment property held as collateral by removing some of the formal and procedural requirements that could impede a secured party's ability to deal with the collateral expeditiously. Like other 2006 amendments to the *PPSA* and *STA*, the exception in s. 17.1 is aimed at improving efficiency in capital markets. It does this in two ways.

[54] First, s. 17.1(1)(c) permits a secured party with control of investment property to create a new security interest in the collateral. This provision permits secured parties with control of investment property to "reuse" shares and other securities held in connection with structured transactions, derivatives, or brokerage accounts. For example, a secured party may re-pledge the collateral to a third party or grant a new security interest in it, subject to the security agreement: Scavone, at p. 86; see also McLaren, at para. 1.04; Jacob Ziegel, David Denomme &

Anthony Duggan, *Ontario Personal Property Security Act: Commentary and Analysis*, 3rd ed. (Toronto: LexisNexis, 2020), at p. 184.

[55] Second, s. 17.1(2) removes restrictions on the secured party's right to dispose of the investment property it holds as collateral, subject only to the terms of the security agreement. Borrowing again from Professor McLaren, s. 17.1(2) "dispels any ambiguities as to whether the secured party can be allowed to sell collateral and prompts the parties to use the security agreement to establish the rights of the secured party to transfer the collateral": at para. 14.09. I agree, and I would add that s. 17.1(2) presupposes, or at least acknowledges, that parties giving security in investment property are sophisticated actors capable of drafting contracts to suit their mutual need for expeditiousness in fast-moving capital markets. It could be used, for example, to permit contracting parties to define in advance the conditions under which a securities broker would be entitled to liquidate a client's rapidly depreciating margin account.

[56] Section 17.1(2) does not state that a secured party is permitted to accept collateral in satisfaction of the debt under the security agreement. Do the words "sell, transfer, use or otherwise deal" include a right of foreclosure?

(2) The Principles Applied

[57] As noted, Canada Grace had control of the pledged shares from December 12, 2018. Was Canada Grace, as a secured party with control of

investment property, permitted to foreclose on the pledged shares without notice under the Security Agreement?

[58] The analysis has two parts. The first construes the Security Agreement. The second construes s. 17.1(2) of the *PPSA*.

(a) The parties intended to create a contractual right of foreclosure

[59] The appellants argue that even if s. 17.1(2) could be used to foreclose on the shares, the terms of the Security Agreement itself were not sufficiently precise to give rise to a right of foreclosure. A right of foreclosure could only be created using clear and unequivocal language.

[60] I reproduce the terms of the Security Agreement for convenience:

> 3. Considering the risks to Canada Grace, as the shareholder of the Lender, caused by the Borrower's performance under the Loan Agreement, Romlex agrees to pledge all Romlex's Share of Lender and any further shares issued, rights and interest entitled (collectively the "Pledged Shares") to the Canada Grace [sic]. If the Borrower becomes default [sic] for any reason, the Pledged Shares shall be transferred to Canada Grace at $2 nominal costs (the "Share Transfer"), the receipt of payment of such $2 nominal costs is hereby confirmed by Romlex.
>
> To effect such Shares Transfer, all parties agrees that:
>
> …
>
> (3) Romlex shall provide its cooperation to facilitate such Shares Transfer and removal of the Guarantor as director and officers; Romlex hereby provides its irrevocable

> power of attorney to Jenny to sign relevant documents for Romlex to effect such Shares Transfer and removal, although signing such documents is not required under this agreement. (Emphasis added.)

[61] The appellants argue that the "Share Transfer" in question was not intended to enable foreclosure but only to permit the transfer of possession required to create the pledge. I disagree.

[62] The Security Agreement is not ambiguous. The application judge correctly found, at para. 22 of his reasons, that the parties had contemplated a contractual right that "effectively amounts to foreclosure". I come to this conclusion for two reasons. First, as the respondent argues, the words "pledge" and "transfer" must be given different meanings within the Security Agreement. The Security Agreement refers to two distinct operations on the shares: first, that "Romlex agrees to pledge" the shares and, second, that upon default the "Pledged Shares shall be transferred to Canada Grace". Read in context, the word "transfer" clearly refers to a further conveyance or disposition of the shares after the initial "pledge". Canada Grace would already be in possession of the shares at the time of the "transfer", and the Security Agreement explicitly states that the pledged shares would be "transferred to Canada Grace" as opposed to a third party.

[63] Second, the appellants' argument that the word "transfer" refers to the creation of the pledge upon default does not make sense in the context of the negotiations between the parties. The Security Agreement came about because

Atlas Brampton defaulted under the Loan Agreement by failing to make the first interest payment. Romlex offered a pledge of shares with immediate effect to provide additional security for the loan and to cure Atlas Brampton's existing default. It cannot plausibly be argued Canada Grace was agreeing that it was only upon the next default that it could take and hold the shares as a pledge. The pledge's immediate effect is also confirmed by the email exchanges between the parties: "Once the fund is returned the pledged shares will be released in full and returned" (emphasis added). There could be no return of shares that had not already been given.

[64] In my view, the parties intended cl. 3 of the Security Agreement to function as a foreclosure provision. I turn now to the question of whether the clause is effective under s. 17.1(2) of the *PPSA* and entitles Canada Grace to foreclose without notice to the debtor.

(b) May Canada Grace rely on s. 17.1(2) to foreclose without notice?

[65] To repeat for convenience, the language in s. 17.1(2) provides:

> Despite subsection (1) and section 17, a secured party having control under subsection 1 (2) of investment property as collateral may sell, transfer, use or otherwise deal with the collateral in the manner and to the extent provided in the security agreement. [Emphasis added.]

[66] This court's task is to interpret this language, "sell, transfer, use or otherwise deal with the collateral", especially "otherwise deal". In this task the court must

interpret the words of the *PPSA* "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of parliament": *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21.

[67] In my view, s. 17.1(2) does not permit Canada Grace to foreclose on the pledged shares under the Security Agreement without notice. I say this for four reasons.

[68] First, s. 17.1(2) creates an exception to the general enforcement scheme set out in Part V of the *PPSA*. The exception reduces the statutory protections available to the debtor in favour of greater contractual freedom between the parties. This is not, in itself, contrary to the overall scheme of the *PPSA*, but it does run contrary to the debtor-protective elements of Part V governing remedies, including the prohibition on contractual modifications to the enforcement scheme that would reduce protections for the debtor. It follows that the exception must be construed narrowly.

[69] Second, a plain reading of the words "sell, transfer, use or otherwise deal" would exclude a power of foreclosure because it is not one of the enumerated rights. I would bring the principle of implied exclusion to bear on this point. In *University Health Network v. Ontario (Minister of Finance)* (2001), 208 D.L.R. (4th) 459, [2001] O.J. No. 4485, Laskin J.A. explained the principle at paras. 30-31. He

quoted Professor Ruth Sullivan: “An implied exclusion argument lies whenever there is reason to believe that if the legislature had meant to include a particular thing within the ambit of its legislation, it would have referred to that thing expressly.” Laskin J.A. added: “In other words, legislative exclusion can be implied when an express reference is expected but absent.”

[70] In my view, s. 17.1(2) is such a provision. I draw the inference that the legislature did not intend the words “or otherwise deal” in s 17.1(2) to include foreclosure. The *PPSA*’s elaborate treatment of foreclosure in Part V leads to the conclusion that if the legislature meant to make foreclosure available as a remedy related to investment property, it would have done so. Recall that the word “foreclose” is used in the marginal notes to ss. 65(6) and (6.1) of the *PPSA*, and the coordinate expressions “accept the collateral in satisfaction of the obligation secured” and “accept the collateral in full satisfaction of the obligation” are used in ss. 65(2) and 65(6) respectively, along with an elaborate procedure leading to foreclosure.

[71] Similarly, the words “or otherwise deal” do not open the door to any imaginable transaction. Rather, the words “otherwise deal” are constrained by the earlier words, “sell”, “transfer”, and “use”, which tend toward disposition rather than foreclosure.

[72] Third, reading the words “or otherwise deal” with the pledged shares to permit foreclosure does not fit well into the elaborate debtor-protective statutory scheme governing foreclosure that is set out in Part V of the *PPSA*.

[73] Foreclosure entails different legal and practical consequences than sale, transfer, or use. Foreclosure extinguishes the debt, but it may cause the debtor to object that a better result could be obtained through sale. That is the reason for the notice and objection procedure in Part V, which I sketch out briefly.

[74] Section 65(2) requires a foreclosing creditor to give notice that it “propose[s] to accept collateral in satisfaction of the obligation secured” – in other words - to foreclose as the marginal note to s. 65(6) states. The secured party “shall serve notice of the proposal [to foreclose] on the persons mentioned in clauses 63(4)(a) to (d),” which includes the debtor, the owner of the collateral, and every person who has a security interest in the collateral.

[75] Under s. 65(6), “the secured party shall be deemed to have irrevocably elected to accept the collateral in full satisfaction of the obligation secured at the earlier of” the 15-day notice period or any extension of it.

[76] Under s. 66, any person entitled to notice has a right of redemption. If the foreclosure comes into effect without redemption, then under s. 65(6.1) “the secured party is entitled to the collateral free from all rights and interests in it of any person entitled to notification” who is in a position subordinate to the secured

party. The words “otherwise deal” in s. 17.1(2) are not sufficiently precise to displace this important mechanism.

[77] Fourth, an interpretation permitting foreclosure in this case would not be consistent with the purpose for which s 17.1(2) was enacted. The types of “otherwise dealing” must also be understood in light of the purposes for which s. 17.1(2) was introduced: to ease capital markets transactions, derivatives, and margin trading. As noted, the pledged shares in question are “investment property” and Canada Grace, as pledgee, had control within the definitions of the *PPSA* and *STA*. However, the Security Agreement between the appellants and respondents does not engage any of the complexities of the indirect holding system or the fast-moving dynamic of modern capital markets. Canada Grace is not in the same position as a broker or securities intermediary, for example, who must act quickly to liquidate rapidly depreciating accounts. The Security Agreement in this case more closely resembles a traditional pledge of physical collateral. This dispute between real estate investors for control of a development property is not the typical situation that s. 17.1(2) was designed to address.

[78] Put simply, this is not a s. 17.1(2) case. Section 17.1(2) was intended to provide a special accommodation for certain capital markets participants. It should not be understood as a general exception to the foreclosure procedure in Part V of the *PPSA*.

[79] I conclude that the words "or otherwise deal" in s. 17.1(2) do not contemplate foreclosure on investment property free of compliance with the foreclosure provisions of Part V of the *PPSA*.

G. WAS CANADA GRACE PERMITTED TO FORECLOSE UNDER PART V OF THE *PPSA*?

[80] The appellants point out that the application judge found Canada Grace had "failed to give the requisite notice" to foreclose under Part V of the *PPSA*: at para. 22. However, it is not clear from the application judge's reasons whether he found, as a matter of fact, that no notice was given or whether, as a matter of law, that the notice given was inadequate.

[81] In my view, Canada Grace followed the *PPSA* procedure for accepting the shares in satisfaction of Atlas Brampton's debt. Further, Atlas Brampton has not demonstrated its ability to redeem the shares by paying its debt.

[82] The respondents produced at least five communications with the appellants, which they submit constituted adequate notice for the purpose of foreclosure under Part V of the *PPSA*:

1. On December 24, 2018, citing Romlex's receivership, the respondents' solicitor demanded that Romlex transfer its shares to Canada Grace no later than January 5, 2019;
2. On January 4, 2019, Mr. Grigoras signed a note confirming that Romlex would transfer its shares to Canada Grace on or before January 15, 2019;

3. On January 14, 2019, the respondents' solicitor made email and letter demands for the transfer for the shares before January 25, 2019;

4. On February 12, 2019, in response to Romlex's offer to repay the loan in installments, the respondents' solicitor demanded either repayment of the full amount of the loan or transfer of the pledged shares by February 28, 2019;

5. On March 1, 2019, the solicitor for Atlas Springbank, Diana Young, sent a "Notice of Default" to Romlex, Mr. Grigoras and Atlas Brampton stating that the share transfer had been completed.

[83] Faced with these communications, the application judge seems to have accepted that notice was given but was inadequate. This was an error stemming from a lack of clarity in the law in this area. In my view, the notice was adequate.

[84] As I describe below, courts have taken inconsistent approaches to the notice requirement for foreclosure under the *PPSA*. Part V of the *PPSA* requires a foreclosing creditor to give notice of its "proposal" to accept collateral in satisfaction of a secured debt – in other words – to foreclose. The notice requirement set out in s. 65(2) of the *PPSA* states that the secured party "shall serve a notice of the proposal [to foreclose] on the persons mentioned in clauses 63(4)(a) to (d)," including the debtor, the owner of the collateral, and every person who has a security interest in the collateral.

[85] However, it is important to note that while s. 65(2) incorporates by reference the list of recipients of notice mandated by s. 63(4), it does not import from s. 63(5)

the detailed rules that set out the required contents of a notice of disposition of collateral (for example, by sale). The task of establishing the appropriate contents of a notice of foreclosure and, by extension, the adequacy of the notice, has fallen to the courts in the absence of express requirements in the *PPSA*.

[86] Creditors should give adequate notice. A notice of intention to foreclose on collateral should ordinarily expressly cite the *PPSA* and include a) the amount of the secured obligation, b) a description of the collateral, c) expression of the clear intention to retain the collateral in satisfaction of the debt (and not as continuing security), and d) an indication that the parties receiving notice have 15 days to object. Such a notice would be difficult to attack on the ground of sufficiency. However, in line with the functional approach courts have been instructed to take, there will be cases in which the secured party's intention to foreclose on the collateral is clear in the circumstances, even when one or more of these elements is absent, and the debtor is under no illusion about the consequences of failing to pay. In that context, it not unfair to expect the debtor to attempt to redeem the collateral within 15 days.

[87] The law in Ontario was well-described by Lax J. in *Casse v. Credifinance Securities Ltd* (1999), 14 P.P.S.A.C. (2d) 352, [1999] O.J. No. 1908 (S.C.). In *Casse*, Lax J. reviewed the case law and held that the notice of intention to retain collateral must be expressed in clear and precise terms: at para. 7. However, she

also held that "[t]he court must be able to conclude on all the evidence that the debtor knew that the purpose of the secured party in retaining the collateral was to satisfy the obligation secured" (emphasis added). She added: "If the Legislature had wished to specify the contents of the notice, it could have prescribed this as it did in s 63(5) in regard to disposal of collateral. In my opinion, the Legislature did not do so as it intended that the contents of the notice be flexible so as to accommodate a variety of commercial circumstances": at para. 7. I agree.

[88] In my view, Lax J.'s approach in *Casse* strikes the appropriate balance. There will be circumstances in which, on the basis of all the evidence, it is obvious that the debtor knows its creditor is foreclosing on the collateral in satisfaction of the secured obligation, even if the formal notice might be deficient in some sense.

[89] I would agree that Canada Grace's first four notices were individually inadequate. These notices generally provided minor extensions of time for Atlas Brampton to repay the loan in the face of what Canada Grace viewed as state of continuing default, but, taken together, they adequately signal Canada Grace's intent to take ownership of the Atlas Springbank shares in accordance with the Security Agreement if the default is not remedied.

[90] The March 1 Notice of Default would not have come as a surprise to the appellants. It was addressed to Romlex, Atlas Brampton, and Mr. Grigoras. It had as its subject: "Re: Notice of Default under Loan Agreement and Supplementary

Agreement; Share Transfer Deemed upon Default; removal of the positions as Director and Officer." The notice specifically referred to the Security Agreement (using the term "Supplementary Agreement" and "Loan Documents") dated December 12, 2018 and reproduced the terms of the share pledge.

[91] The March 1 Notice then identified Atlas Brampton's failure to pay the loan as the operative event of default and culminated with an assertion that the pledged shares had been transferred so that Canada Grace was now the sole shareholder of Atlas Springbank:

> Pursuant to the Loan Documents, please be advised that the Pledged Shares have been transferred to Canada Grace who is now the sole shareholder of the Lender, and the Guarantor has been removed from the positions of director and officer(s) of the Lender.

[92] The appellants rely on three cases, all of which I would distinguish. First, in *Klein v. Lemore Investments Ltd.* (1983), 2 P.P.S.A.C. 252, [1983] O.J. No. 204 (H.C.), White J. held that a notice of intention to retain collateral must express a "proposal" to retain the collateral, that is, it must express an intention "as to the future" instead of a "fait accompli". In that case, a plaintiff real estate investor, Klein, pledged his shares in a real estate holding company to a fellow investor to secure a loan for roughly $60,000. Shortly after the plaintiff's default, the secured party notified him that "our said client, [the secured party], is now the legal owner of twenty common shares in the above noted company." White J. held that this was

an improper notice of fait accompli and therefore "even to [the date of the judgment], having regard to the provisions of the *Personal Property Security Act*, Klein has a right to redeem his shares": at para. 46.

[93] I acknowledge that the situation in this case resembles somewhat the "fait accompli" that was fatal to the foreclosure notice in *Lemore*. Canada Grace did not expressly state its intention to retain the shares or offer Romlex an opportunity to redeem them; it simply asserted its sole ownership of Atlas Springbank. However, taking into account the context and the words of the communications from Canada Grace's counsel as the default persisted, there is no doubt that the appellants were aware of the respondents' intention to foreclose if the default was not remedied. Moreover, as the application judge noted, neither Romlex nor any of the Grigoras' companies tendered fulfillment of the loan within 15 days after any of the notices, or at any time since. He noted that they did not put forward any reliable evidence of Atlas Brampton's ability to pay. That failure persisted in this court.

[94] The appellants also invoke *Angelkovski v. Trans-Canada Foods Ltd.*, [1986] 3 W.W.R. 723, [1986] M.J. No. 148 (Q.B.). In that case, the court held that notice must be given "in clear and precise terms" not only that the creditor intends to retain the collateral but that it intends to retain the collateral <u>in satisfaction of the obligation secured</u>: at para. 21. The defendants had taken possession of a restaurant under a chattel mortgage. Wright J. found that they had manifested an

intention to retain it in satisfaction of the debt and operate it as a going concern. However, Wright J. rejected an argument that the plaintiff's awareness of the defendant's intention constituted constructive notice and held that the plaintiffs retained a right to redeem the property until there had been compliance with the notice requirements of the *PPSA*. Wright J. found that the debtor had not received the required notice and held open the right to redeem. I would simply respond as Lax J. did in *Casse*, at para. 13, in words that apply equally to Mr. Grigoras:

> He was given an opportunity to redeem the shares when the debt fell due…. He was under no misapprehension as to the legal effect of the pledge, nor of the consequences of failing to redeem.

[95] Finally, the respondents cite *Tureck et al. v. Hanston Investments Ltd. et al.* (1986), 56 O.R. (2d) 393 (H.C.). As the application judge noted at para. 22, in that case the pledge of shares reserved to the pledgor all the incidents of ownership and title in the pledged shares. The security agreement did not confer a right to foreclose. The court held that the only remedy available to the security holder was the statutory right under the *PPSA* but because the security holder had not given notice of an intention to retain the collateral in satisfaction of the secured obligation, the remedy was denied. By contrast, in this case the notice was adequate, as I have explained.

H. A NOTE ON *HARRY SHIELDS*

[96] As noted earlier, the appellants assert that the application judge misapplied the ruling in *Harry Shields* in finding that Canada Grace could rely entirely on the freestanding contractual right of foreclosure outside of the *PPSA*. Because I have found that the respondents' notices were *PPSA* compliant, I need not address this issue but I will do so in light of the argument.

[97] In my view, the ruling in *Harry Shields* has been superseded by later cases interpreting the *PPSA* such as *Bank of Montreal v. Innovation Credit Union* and *i Trade Finance Inc. v. Bank of Montreal*, and especially by the 2006 amendments to the *PPSA* and *STA*, all of which were discussed earlier.

[98] The proper understanding and application of the ruling in *Harry Shields* was the focus of argument before the application judge and in the parties' submissions on appeal. The plaintiff, Harry Shields Ltd., executed a demand debenture in favour of the Bank of Montreal. The debenture agreement gave the bank the right to appoint a receiver in the event of default. The bank also required Shields to pledge the debenture back to the bank under a separate pledge agreement. This was to ensure that the bank had possession of the debenture upon default. When Shields began to experience financial difficulties, the bank demanded payment and appointed a receiver under the debenture. Shields argued that the bank was not entitled to enforce the debenture directly because it held the debenture as a

pledgee and was therefore required to resort to its remedies as a pledgee under the *PPSA*. Shields submitted that the bank might be required to sell the debenture, potentially to itself, before it could enforce it.

[99] Lane J. defined the issue before him as whether, "where the parties have expressly agreed that the security holder has received the debenture both as a continuing collateral security enforceable directly and as a pledge, the security holder is confined to the remedies of a pledgee." He reasoned: "I see nothing in the *PPSA* that compels this conclusion," adding, "This view leads to the commercially sensible result intended by the parties: that the bank may enforce the debenture as owner without any ritual need to sell it to itself."

[100] Section 17.1, which was introduced after *Harry Shields*, simplifies the analysis. To the extent that most share pledges will give the secured party control over investment property (securities), secured parties can now rely on s. 17.1 instead of *Harry Shields* to "sell, transfer, use or otherwise deal with collateral". The issue, in most cases, will be to determine whether the pledged instrument is "investment property" within the meaning of the *PPSA*. Whether a debenture of the kind used in *Harry Shields* could be considered "investment property" under the *PPSA* is a matter for another day. If it is not, *Harry Shields* may still provide some guidance. However, in most cases dealing with a pledge of shares or other securities, s. 17.1 sets out the framework.

I. DISPOSITION

[101] Canada Grace complied adequately with the notice requirements under Part V of the *PPSA*. I would dismiss the appeal.

Released: April 9, 2021 “P.L.”

“P. Lauwers J.A.”
“I agree. B.W. Miller J.A.”
“I agree. I.V.B. Nordheimer J.A.”

TAB 6

MARY BRAUN, ADMINISTRATRIX OF THE ESTATE OF JACOB G. BRAUN (CLAIMANT) } APPELLANT;

AND

THE CUSTODIAN (RESPONDENT)..... RESPONDENT.

1944
*June 12, 13,14.
*Oct. 3.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

International law—Companies—Contracts—Certificates of shares in Canadian company issued from an office of the company in the United States to a German corporation as registered holder—Subsequent state of war against Germany—Certificates, endorsed with transfer in blank signed by such registered holder, bought in 1919 in Germany by a United States citizen—Transfers registrable only at said United States office—Right to the shares as between the purchaser and the Canadian Custodian of enemy property—Consolidated Orders Respecting Trading with the Enemy, 1916 (and order of court thereunder)—Treaty of Versailles (signed 28th June, 1919)—Treaties of Peace Act, 1919 (Dom., 1919, 2nd Sess., c. 30)—Treaty of Peace (Germany) Order,1920—Situs of the shares—Jurisdiction of Canada.

The claimant, as administratrix of B.'s estate, claimed, as against the Canadian Custodian of enemy property, right of ownership of 470 shares of common stock of the C.P. Ry. Co., a company incorporated by special Act of the Parliament of Canada. B. was a citizen of and resident in the United States. The Government of the United States, at war with Germany from April 6, 1917, granted on July 14, 1919, a general licence (subject to exceptions) to trade with the enemy. B. went to Germany in September, 1919, and in October, 1919, purchased there the shares in question, receiving 48 certificates of shares, all in the same form and dated between 1894 and 1913, and being in the name of one or the other of two German banking houses as registered holders, which were at all relevant times enemy alien corporations. Each certificate was countersigned by the company's transfer agent and registrar of transfers in New York (U.S.A.) and on each was endorsed a transfer in blank signed by the registered holder. These certificates formed part of a group of certificates issued by the company to the said two banking houses covering a total of about 140,000 shares. They were so issued in order that the shares might be traded in on the stock exchanges in Germany and certain other European countries as bearer securities without being presented for transfer at a transfer office maintained by the company upon each transfer of ownership. The certificates covering the said 140,000 shares were registered in the company's transfer office which it had been authorized to establish and had established in New York and transfers were registrable on the books of that office and nowhere else. Dividends on shares so transferable were payable at New York in United States funds.

On April 23, 1919, the shares standing in the name of the said two banking houses (as well as other shares) had been the subject of an order of the Superior Court of Quebec made under the *Consolidated Orders Respecting Trading with the Enemy*, 1916 (enacted under

*PRESENT:—Rinfret C.J. and Kerwin, Hudson, Taschereau and Rand JJ.

1944
BRAUN
v.
THE
CUSTODIAN.

the authority of the *War Measures Act*, R.S.C. 1927, c. 206); which court order in its terms vested the shares in the Custodian; and when B., in November, 1919, presented his certificates for transfer and registration in his own name at the company's New York office, that office (having received a copy of the order, with instructions) refused acceptance of the transfers. The certificattes have since remained in the possession of B. or the claimant.

Held: The shares in question were vested in the Custodian, and did not at any time belong to B. or the claimant. (Judgment of Thorson J., President of the Exchequer Court of Canada, [1944] Ex. C.R. 30, affirmed).

The *Consolidated Orders Respecting Trading with the Enemy*, 1916 (particularly ss. 6 (1) (2), 1 (1) (*d*)), *The Treaty of Versailles* (signed on June 28, 1919) (particularly paragraphs (*b*) and (*d*) of Article 297, and paragraphs 1, 3, of the Annex to Article 297), *The Treaties of Peace Act, 1919* (Dom., 1919, 2nd Sess., c. 30), *The Treaty of Peace (Germany) Order, 1920* (particularly ss. 33, 34), referred to. The court order of April 23, 1919, vested the shares in the Custodian, and that order was confirmed, and all subsequent dealings with the shares by the Custodian were authorized, by the *Treaty of Versailles* and by *The Treaty of Peace (Germany) Order, 1920*.

While the Governor in Council (enacting the said *Consolidated Orders Respecting Trading with the Enemy*, 1916, and *The Treaty of Peace (Germany) Order, 1920*) could not prevent the share certificates from being physically endorsed by the holder and handed over to a purchaser, he could provide that no transfer should confer on the transferee any rights or remedies in respect of such securities. The situs of the shares, as distinguished from that of the certificates, was in Canada; and the conditions under which title to the company's shares might be acquired was exclusively matter for the law-making authority of Canada. The fact that the company was authorized to, and did in fact, establish a transfer office in the State of New York where, only, transfers of the shares in question were registrable, could not make any difference; this was a mere matter of convenience and did not detract from the power of Canada to deal with the title to the shares of the Canadian company. (*Spitz* v. *Secretary of State of Canada*, [1939] Ex. C.R. 162, approved. *The King* v. *Cutting* (dealing with a different problem), [1932] S.C.R. 410, at 414, 418, referred to. The considerations which applied in *Rex.* v. *Williams*, [1942] A.C. 541, cannot affect the matter for consideration in the present case). Even assuming that a transfer of the certificates to B. (in Germany) was valid by German law, yet such transfer did not, in the language of s. 6 (1) of said Consolidated Orders of 1916, "confer on the transferee any rights or remedies in respect thereof".

APPEAL by the claimant from the judgment of Thorson J., President of the Exchequer Court of Canada (1), dismissing her action, in which action (brought by

(1) [1944] Ex. C.R. 30; [1944] 3 D.L.R. 412.

consent of the Custodian under s. 41 (2) of *The Treaty of Peace (Germany) Order, 1920*) she claimed a declaration that she, as the administratrix of the estate of Jacob G. Braun, deceased, was (as against the Custodian, respondent) the owner of certain shares of the common stock of the Canadian Pacific Railway Company, and for further relief.

The material facts, and relevant enactments, are stated in the reasons for judgment in this Court now reported and in the reasons for judgment in the Exchequer Court (above cited).

Thorson J. dismissed the action, holding that the shares in dispute never at any time belonged to the late Jacob G. Braun or the claimant but as at January 10, 1920, and since that date belonged to Canada and were vested in the Custodian.

D. L. McCarthy K.C. and *W. R. Wadsworth K.C.* for the appellant.

Aimé Geoffrion K.C. and *C. Robinson* for the respondent.

The judgment of the Court was delivered by

KERWIN J.—The circumstances giving rise to the present dispute are set forth in a statement of facts agreed to by the parties. The appellant is the administratrix of the estate of Jacob G. Braun, and the respondent is charged with the administration of enemy property under the Canadian *Treaty of Peace (Germany) Order* (P.C. 755 of 1920) and amendments thereto. Braun, born a German subject, was naturalized in the United States of America in 1886 and was thereafter until his death a citizen thereof. The United States was at war with Germany from April 6th, 1917, and until July 14th, 1919, United States citizens were forbidden by statute to enter into any business relations with residents in Germany. On that date the government of the United States granted to its citizens general licences to trade with the enemy, subject to certain immaterial exceptions.

On September 5th, 1919, Braun went to Germany where he purchased, between the sixth and seventeenth days of October, 1919, 470 shares of common stock of the Canadian Pacific Railway Company, a company incorporated by

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special Act of the Parliament of Canada. In consideration of this payment Braun received 48 certificates of shares of the common stock of the Company, all in the same form and dated between 1894 and 1913. Four of them were in the name of C. Schlessinger-Trier & Co. as registered holders and the remainder in the name of the National-bank fur Deutschland. Both registered holders were German banking houses and at all relevant times enemy alien corporations. Each of the certificates was countersigned by the Bank of Montreal as the Canadian Pacific Railway Company's transfer agent in New York and by the Central Trust Company of New York as its Registrar of Transfers, and on each there was endorsed a transfer in blank signed by the registered holder.

These certificates formed part of a group of certificates issued by the Railway Company to the two banking houses mentioned covering a total of about 140,000 shares. They were so issued in order that the shares might be traded in on the stock exchanges in Germany and certain other European countries as bearer securities without being presented for transfer at a transfer office maintained by the company under each transfer of ownership. The certificates covering the 140,000 shares issued to the two banking houses were registered in the company's transfer office which it had been authorized to establish and had in fact established in New York City and transfers were registrable on the books of that office and nowhere else. Dividends on shares so transferable were payable at New York in United States funds.

Braun brought the 48 certificates with him from Germany to the United States and in November, 1919, presented them for transfer and registration in his own name at the office of the Central Trust Company of New York. The acceptance of the transfers was refused on the ground that they could not be accepted having regard to the Canadian *Consolidated Orders Respecting Trading with the Enemy,* 1916, and an order of the Superior Court of Quebec made thereunder. The certificates have since remained in the possession of Braun or the claimant.

On April 23rd, 1919, the shares standing in the name of C. Schlessinger-Trier & Company and the Nationalbank fur Deutschland as well as other shares had been the sub-

ject of the order of the Superior Court of Quebec referred to. A copy of this order had been furnished to the Central Trust Company of New York on October 9th, 1919, with instructions from the Minister of Finance, who was then Custodian of Enemy Property, to make appropriate notations on the records, and between October 9th and October 24th the transfer agents placed against the accounts in the share register of each of the shareholders named in the order a note in the following terms:

> Vested in the custodian appointed under Consolidated Orders respecting Trading with the Enemy by virtue of the judgment of the Superior Court of the Province of Quebec, Canada, made in the matter of Consolidated Orders respecting Trading with the Enemy, and the Secretary of State of Canada, Petitioner, and the Canadian Pacific Railway Company, Respondent, and dated April 23rd, 1919.

In view of the result of this appeal, we are not concerned with various agreements made between the respondent and the Railway Company or with what was done by the Custodian with the shares standing in the name of the two banking houses. The claim advanced by Braun, and by the appellant after his death, was always disputed by the Custodian and after certain litigation in the United States had been allowed to lapse, this action, by the consent of the respondent under section 41 (2) of *The Treaty of Peace (Germany) Order, 1920,* was brought by the appellant in the Exchequer Court of Canada. The relief sought is a declaration that the claimant is the owner of the certificates of shares obtained by Braun and of the shares themselves; judgment against the respondent for the amount of the quarterly dividends declared upon the said shares in United States funds with interest from the respective due dates of the dividends; and for a certain sum in United States funds stated to have been received by the respondent in respect of the sale by him of "rights" declared to attach to the shares with interest.

The question submitted by the parties for the decision of the Court by the agreed statement of facts was as to what remedy or relief, if any, the claimant was entitled. The President of the Exchequer Court decided that the shares in question never at any time belonged to Braun or the claimant but as at January 10th, 1920, and since that date belonged to Canada and were vested in the

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respondent, and that the claimant was not entitled to the declaration of ownership asked by her statement of claim. The action was accordingly dismissed.

The crux of the matter is the proper interpretation of subsections 1 and 2 of section 6 of the *Consolidated Orders Respecting Trading with the Enemy,* 1916, enacted by the Governor General in Council under the authority of the *War Measures Act,* R.S.C. 1927, c. 206. These subsections read as follows:—

> 6. (1) No transfer made after the publication of these orders and regulations in the *Canada Gazette* (unless upon licence duly granted exempting the particular transaction from the provisions of this subsection), by or on behalf of an enemy of any securities shall confer on the transferee any rights or remedies in respect thereof and no company or municipal authority or other body by whom the securities were issued or are managed shall, except as hereinafter appears, take any cognizance of or otherwise act upon any notice of such a transfer.
>
> (2) No entry shall hereafter, during the continuance of the present war, be made in any register or branch register or other book kept within Canada of any transfer of any securities therein registered, inscribed or standing in the name of an enemy, except by leave of a court of competent jurisdiction or of the Secretary of State.

With these should be read clause (*d*) of subsection 1 of section 1 whereby:—

> (1) For the purposes of these orders and regulations, the following expressions shall be construed so that—
>
> * * *
>
> (*d*) "Securities" shall extend to and include stock, shares, annuities, bonds, debentures or debenture stock or other obligations issued by or on behalf of any government, municipal or other authority, or any corporation or company whether within or without Canada.

The appellant contends that these provisions apply only to persons, property and transactions within the territorial boundaries of Canada and have neither authority nor effect to restrain persons, property or transactions of foreigners in foreign countries. So far as the Exchequer Court is concerned that argument was disposed of by the decision of the late President in *Spitz* v. *Secretary of State of Canada* (1). I may say at once that I approve that judgment and the reasons therefor but add the following to emphasize some of the matters dealt with therein and to cover any new arguments that have been adduced.

(1) [1939] Ex. C.R. 162.

While undoubtedly the Governor in Council could not prevent the share certificates from being physically endorsed by the holder and handed over to a purchaser, he could provide that no transfer should confer on the transferee any rights or remedies in respect of such securities. Such a power was necessary to attain the desired object of preventing any material aid being secured by the enemy. While ordinarily (in the present instance) the law of Germany would determine the effect of the contract to transfer the certificates, "the distinction", as Professor Beale points out in volume 1 of his Conflict of Laws, page 446, "between the certificate of stock and the stock itself is an important one. The latter has its situs at the domicile of the corporation and there only".

We are not concerned with disputes between the Custodians of Enemy Property of allied countries as was this Court in *Secretary of State of Canada* v. *Alien Property Custodian (U.S.)* (1), and the Supreme Court of the United States in *Disconto-Gesellschaft* v. *U.S. Steel Co.* (2). Nor is the problem the same as that considered in *The King* v. *Cutting* (3), but in the opinions delivered in that case are two statements that are not without significance and bearing upon the present appeal. The first appears at page 414 in the judgments of Duff and Smith JJ., delivered by the former:—

> But there is nothing in the *Bank Act* to prevent a purchaser or creditor acquiring by contract a right legal and equitable to require the vendor or debtor to do whatever is necessary in order to effect a legal transfer of such share; and the question whether such is the effect of the contract will depend upon the law of the place where the contract is made—*Colonial Bank* v. *Cady* (4), nor I apprehend—is there any doubt that the conditions under which title to its shares may be acquired is exclusively matter for the law making authority of the jurisdiction where the Corporation has its proper domicile.

The present Chief Justice of this Court agreed with that judgment and also with the judgments of Lamont and Cannon JJ., delivered by the former. At page 418, Lamont J. said something to the same effect:—

> The effect of a contract to transfer shares made in another country must depend upon the laws of that country. But, subject to that law, it is within the competence of the Parliament of Canada in legislating on the subject of banks and banking—a matter over which it is given

(1) [1931] S.C.R. 169.
(2) (1925) 267 U.S. 22.
(3) [1932] S.C.R. 410.
(4) (1890) 15 App. Cas. 267.

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exclusive jurisdiction by section 91 of the *British North America Act*, 1867,—to compel a bank, its own creature, to recognize as valid a lawful transfer made outside of Canada, when made in the manner prescribed by the Act. *Secretary of State of Canada* v. *Alien Property Custodian (U.S.)* (1).

Here the situs of the shares, as distinguished from that of the certificates, was in Canada and the New York Uniform Stock Transfer Law, relied upon by the appellant, has no bearing upon the question. The fact that the Railway Company was authorized to, and did in fact, establish a transfer office in the State of New York where, only, transfers of the shares in question were registrable, cannot make any difference. This was a mere matter of convenience and did not detract from the power of Canada to deal with the title to the shares of the Canadian company.

The appellant also relied on the decision of the Privy Council in *Rex* v. *Williams* (2). There the Province of Ontario attempted to collect succession duty upon shares of a mining company incorporated by letters patent under the Ontario *Companies Act* and which had two transfer offices, one in Toronto and the other in Buffalo, New York, at either of which shareholders might have their shares registered and transferred in the books of the company. The shares in question were those of a testator who died domiciled in New York and the share certificates themselves were physically located there. Viscount Maughan pointed out that "One or other of the two possible places where the shares can be effectively transferred must therefore be selected on a rational ground" (p. 559); and further: "In a business sense the shares at the date of the death could effectively be dealt with in Buffalo and not in Ontario" (p. 560). The considerations which apply to a discussion as to the situs of shares for provincial succession duty purposes where a provincial legislature is restricted to direct taxation within the province cannot affect the matter at present under review.

The respondent contended that at the relevant time the law of Germany, so far as it could be ascertained, prohibited in that country the transfer of the certificates and of any interest in the shares. It is unnecessary to deal with this contention because, assuming a transfer to

(1) [1931] S.C.R. 169. (2) [1942] A.C. 541.

Braun of the certificates valid by German law, such transfer did not, in the language of subsection 1 of section 6 of the *Consolidated Orders Respecting Trading with the Enemy* "confer on the transferee any rights or remedies in respect thereof"; and furthermore "no company * * * shall * * * take any cognizance of or otherwise act upon any notice of such a transfer". Subsection 1 by itself is sufficient to justify the conclusion that when Braun bought the certificates, he actually secured nothing that would enable him to claim title to the shares. Clause (*d*) of subsection 1 of section 1 and subsection 2 of section 6 may be considered as having been included for extra precaution or to cover cases with which we are not concerned.

The *Treaty of Versailles* was signed on June 28th, 1919, and by para. (*d*) of Article 297 (contained in Section IV), as between the Allied and Associated Powers or their nationals, on the one hand, and Germany or her nationals, on the other hand, all the exceptional war measures or measures of transfer, or acts done or to be done in execution of such measures shall be considered as final and binding upon all persons. The definition of these measures in paragraphs 1 and 3 of the Annex to Article 297 is wide enough to include *Consolidated Orders Respecting Trading with the Enemy,* 1916, and the order of the Superior Court of Quebec of April 23rd, 1919. Furthermore, by paragraph (*b*) of Article 297 of the Treaty, the Allied and Associated Powers reserve the right to retain and liquidate all the property, rights and interests belonging at the date of the coming into force of the Treaty to German nationals. By *The Treaties of Peace Act, 1919,* being chapter 30 of the Dominion statutes of that year (2nd Sess.), the Governor in Council was authorized to make such appointments, establish such offices, make such Orders in Council and do such things as would appear to him to be necessary for carrying out the *Treaty of Versailles* and for giving effect to any of the provisions thereof.

The Treaty of Peace (Germany) Order, 1920, was accordingly enacted by the Governor in Council and subsequently amended. By this Order—"During the war" means "at any time between six o'clock (eastern standard

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time) in the afternoon of the fourth day of August, 1914, and midnight (eastern standard time) of the tenth-eleventh day of January, 1920". Section 33 provides that all property, rights and interests in Canada belonging on the tenth day of January, 1920, to enemies or heretofore belonging to enemies and in the possession or control of the Custodian at the date of the Order are vested in and subject to the control of the Custodian, and notwithstanding anything in any order heretofore made vesting in the Custodian any property, right or interest formerly belonging to an enemy, such property, right or interest shall be vested in and subject to the control of the Custodian who shall hold the same on the same terms and with the same powers and duties in respect thereof as the property, rights and interests vested in him by this Order. By section 34, all vesting orders made or given or purporting to be made or given in pursuance of the *Consolidated Orders Respecting Trading with the Enemy,* 1916, and all actions taken with regard to any property, business or company, whether as regards its investigation, sequestration, compulsory administration, use, requisition, supervision or winding up, the sale or management of property, rights or interests, the collection or discharge of debts, the payment of costs, charges or expenses, or any other matter whatsoever in pursuance of any such order, direction, decision or instruction, and in general all exceptional war measures or measures of transfer or acts done or to be done in the execution of any such measures, are hereby validated and confirmed and shall be considered as final and binding upon all persons.

The order of the Superior Court of Quebec of April 23rd, 1919, was such an order and it is not necessary to refer further to it except to state that it vested the shares in question in the Minister of Finance and Receiver-General of Canada as the Custodian appointed by the *Consolidated Orders Respecting Trading with the Enemy.* The shares were subsequently dealt with by the Minister of Finance or his successor as Custodian. The order of the Superior Court was confirmed, and all such dealings were authorized, by the *Treaty of Versailles* and by *The Treaty of Peace (Germany) Order, 1920.*

The appeal should be dismissed. In accordance with the terms of the consent of the Custodian to the bringing of this action, such dismissal is without costs.

Appeal dismissed.

Solicitor for the appellant: *W. R. Wadsworth.*

Solicitors for the respondent: *Smart & Biggar.*

TAB 7

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***In the Matter of the Proposal of Cantrail Coach Lines Ltd.***
2005 BCSC 351

Date: 20050301
Docket: B050363
Registry: Vancouver

IN THE MATTER OF THE PROPOSAL OF CANTRAIL COACH LINES LTD.

Before: Master Groves

Oral Reasons for Judgment

In Chambers
March 1, 2005

Counsel for Petitioner	H. Ferris
Counsel for Creditor (Volvo)	R. Finlay
Place of Trial/Hearing:	Vancouver

[1] **THE COURT:** This is my decision on the matter of the proposal of Cantrail Coach Lines Ltd. who I will refer to as Cantrail.

[2] Cantrail applies to the Court pursuant to s. 50.4(9) of the ***Bankruptcy and Insolvency Act*** for extension of time for filing a proposal.

[3] VFS Canada Inc., who I will refer to as Volvo, a secured creditor of Cantrail, opposes the application and cross-

applies for a termination of the proposal period and for an order to substitute the current trustee for a trustee of their choosing, though the substance of the substitution of the trustee application was not argued before me.

[4] The facts are that Cantrail is a tour bus operation, a family-owned business, operating in the Lower Mainland of British Columbia, on Vancouver Island and into Washington State. They are a company of some 25 years standing. They have 26 employees and they have 22 buses in their operations and two headquarters, one in Delta, British Columbia and one in Port Alberni.

[5] Over one half of their buses, 13 in total, are secured by the secured creditor Volvo. Cantrail appears to have been facing some financial difficulties recently which a number of companies in the travel industry are facing. It is certainly true in this part of the world that there has been a general decline in the travel industry related to what are now historical factors such as September 11th and SARS. More recently, and more significantly, the decline in the US dollar has made the travel industry generally and the travel industry specifically for Cantrail difficult. It appears to have caused a significant challenge for Cantrail to continue to operate profitably.

[6] Cantrail was apparently able to meet its obligations up until the 16th of January 2005. On that date it missed a payment to its secured creditor Volvo. Demand was made by Volvo on the 20th of January 2005 and perhaps in response to that, but in any event, on the 1st of February, 2005 Cantrail issued a Notice of Intention to make a Proposal. There are, I am advised, 81 creditors of Cantrail who have been notified of this application and only Volvo objects.

[7] I am satisfied that under the proposal thus far, and this is not contested in the affidavit, Cantrail has been able to meet its obligations to its employees as well as the obligations to statutory authorities. The suggestion in the materials is that Cantrail has been operating within the initial budget set by the trustee under the proposal.

[8] As indicated, Cantrail is applying purport to s. 50.4(9) of the ***Bankruptcy and Insolvency Act***. That reads and I will take out some of the language that is not necessary:

> The insolvent person may, before the expiration of a 30-day period mentioned in subsection (8), apply to the Court for an extension of that period and the Court may grant such extensions not exceeding 45 days for any individual extension and not exceeding in the aggregate five months after the expiration of the 30-day period mentioned in subsection (8), if satisfied on each application that:
>
> > (a) the insolvent person has acted and is acting in good faith and with due diligence;

> (b) the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and
>
> (c) no creditor would be materially prejudiced if the extension being applied for were granted.

[9] Volvo applies under s. 50.4(11), the section relating to termination of proposals. That section reads, and again I am taking out some unnecessary language:

> The Court may, on application by a creditor, declare terminated before it actually expires the 30-day period mentioned subsection (8) or any extension thereof granted under subsection (9) if the Court is satisfied that:
>
> (a) the insolvent person has not acted or is not acting in good faith and with due diligence,
>
> (b) the insolvent person will not likely be able to make a viable proposal before the expiry of the period in question,
>
> (c) the insolvent person will not likely be able to make a proposal before the expiry of the period in question that will be accepted by the creditors, or
>
> (d) the creditors as a whole would be materially prejudiced were the application under this subsection rejected.

Essentially, s. 50.4(11) is the mirror of s.50.4(9).

[10] The test that Cantrail has to meet is essentially threefold. The first consideration is, are they acting in

good faith? I would say on this point it was not argued nor does it appear to be disputed that they are. Secondly, would they likely make a viable proposal if the extension were granted. Thirdly, they must show no creditor would be materially prejudiced by the extension.

[11] I am satisfied on reading the case law provided by counsel that in considering this type of application an objective standard must be applied. In other words, what would a reasonable person or creditor do in the circumstances. The case of ***Re: N.T.W. Management Group Ltd.*** [1993] O.J. No. 621, a decision of the Ontario Court of Justice, is authority for the proposition that the intent of the ***Act*** and these specific sections is rehabilitation, and that matters considered under these sections are to be judged on a rehabilitation basis rather than on a liquidation basis.

[12] I am also satisfied that it would be important in considering the various applications before me to take a broad approach and look at a number of interested and potentially affected parties, including employees, unsecured creditors, as well as the secured creditor that is present before the Court.

[13] Considering those factors and considering the remaining two steps of the test under s. 50.4(9), the second aspect of the test is would Cantrail likely be able to make a viable

proposal. On this point Volvo says that it has lost faith in Cantrail and intends to vote against the proposal, any proposal, that would be generated.

[14] If that was simply the test to be applied then one wonders why Parliament would have gone to the trouble, and creativity perhaps, of setting out proposals as an option in the ***Bankruptcy and Insolvency Act***. Secured creditors or major creditors not uncommonly, in light of general security agreements and other type of security available, are in a position to claim to be over 50 percent of the indebtedness. Thus they will be the determining creditor or, I should say, are likely to be the determining creditor in any vote on any proposal.

[15] If a creditor with over 50 percent of the indebtedness could take the position that it would vote no, prior to seeing any proposal, and thus terminate all efforts under the proposal provisions, one wonders why Parliament would not simply set up the legislation that way. One wonders what the point would be of the proposal sections in the ***Bankruptcy and Insolvency Act*** if that were the case.

[16] If the test to be applied was simply one of majority rules then in my view Parliament would not have set the test as it did in s. 50.4(9). They would simply set a test that if

50 percent of the creditors object at any point the proposal would be over. That is not the test that has been set.

[17] Here, as indicated, there are 81 creditors. There is no proposal as of yet. The trustee has set out in a lengthy affidavit and letter attached to it the possibility of a buy-out of this operation, or a merger, and even the possibility of a refinancing. There is a possibility, though as of yet uncertain, that Volvo could be paid out in full. It is in my view somewhat disingenuous for the secured creditor to say that they would vote no to any proposal under any circumstances when on the facts here there is no evidence of bad faith and there is no determination at this stage as to what the proposal will actually be. It may be a proposal which gets them out of the picture completely by some form of payout -- a proposal which if they voted against they would probably be viewed as irrational businesspeople.

[18] In my view, the current attitude of the secured creditor is not determinative of this issue especially in light of the fact that the proposal has not yet been formulated.

[19] I note the words in the legislation are “a viable proposal”. According to the *Concise Oxford Dictionary* viable means feasible. Viable also means practicable from an economic standpoint.

[20] I am impressed thus far with the efforts of Cantrail and with the efforts of the trustee, Patty Wood, in trying to get this matter resolved. I am satisfied that the insolvent company, in my view, would likely be able to make a viable proposal, a proposal that is at least feasible, a proposal that would be practicable from an economic standpoint, if the extension being applied for were granted.

[21] Under the third aspect of the test, I must be satisfied that no creditor would be materially prejudiced if extension being applied for were granted. That aspect of the test uses the term "materially prejudiced." There is a difference, in my view, between being prejudiced and being materially prejudiced. Again, consulting the *Concise Oxford Dictionary* materially means substantially or considerably. The creditor here must be substantially or considerably prejudiced if the extension being applied for is granted.

[22] There is no doubt that Volvo has been prejudiced by the circumstances which have befallen Cantrail and befallen Volvo as a secured creditor. The ***Act*** in and of itself, and the possibility of a proposal, does create simple prejudice by staying the obligations of a person attempting to make a proposal during the period of time in which the proposal is being formulated. There is no evidence before me of anything

other than normal or perhaps average prejudice to Volvo. There is no evidence of substantial prejudice or considerable prejudice. There is no evidence that in not being allowed to realize their security at this time that there is, for example reduced security or, for example, that there are buyers out there for these assets they wish to seize under their security who will not be around once the proposal has had its opportunity to succeed or fail, once it has been completely formulated and presented to creditors. There is no worse case scenario for Volvo if the proposal is allowed to run a reasonable course. In my view, there is no evidence on which Volvo can rely to show that it has been materially prejudiced.

[23] That being said, I am satisfied that Cantrail has met the test of applying for an extension of time for filing a proposal and I am granting the extension for a further 45 days from the 3rd of March 2004.

[24] It stands to reason from this analysis that the applications of Volvo are dismissed.

"Master J. Groves"

TAB 8

COURT FILE NO.: CV-09-8241-OOCL
DATE: 20091013

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT,

R.S.C. 1985, C-36. AS AMENDED

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST GLOBAL COMMUNICATIONS CORP. AND THE OTHER APPLICANTS LISTED ON SCHEDULE "A"

BEFORE: PEPALL J.

COUNSEL: *Lyndon Barnes, Edward Sellers and Jeremy Dacks* for the Applicants
Alan Merskey for the Special Committee of the Board of Directors
David Byers and Maria Konyukhova for the Proposed Monitor, FTI Consulting Canada Inc.
Benjamin Zarnett and Robert Chadwick for Ad Hoc Committee of Noteholders
Edmond Lamek for the Asper Family
Peter H. Griffin and Peter J. Osborne for the Management Directors and Royal Bank of Canada
Hilary Clarke for Bank of Nova Scotia,
Steve Weisz for CIT Business Credit Canada Inc.

REASONS FOR DECISION

Relief Requested

[1] Canwest Global Communications Corp. ("Canwest Global"), its principal operating subsidiary, Canwest Media Inc. ("CMI"), and the other applicants listed on Schedule "A" of the Notice of Application apply for relief pursuant to the *Companies' Creditors Arrangement Act.*[1] The applicants also seek to have the stay of proceedings and other provisions extend to the following partnerships: Canwest Television Limited Partnership ("CTLP"), Fox Sports World Canada Partnership and The National Post Company/La Publication National Post ("The National Post Company"). The businesses operated by

[1] R.S.C. 1985, c. C. 36, as amended

the applicants and the aforementioned partnerships include (i) Canwest's free-to-air television broadcast business (ie. the Global Television Network stations); (ii) certain subscription-based specialty television channels that are wholly owned and operated by CTLP; and (iii) the National Post.

[2] The Canwest Global enterprise as a whole includes the applicants, the partnerships and Canwest Global's other subsidiaries that are not applicants. The term Canwest will be used to refer to the entire enterprise. The term CMI Entities will be used to refer to the applicants and the three aforementioned partnerships. The following entities are not applicants nor is a stay sought in respect of any of them: the entities in Canwest's newspaper publishing and digital media business in Canada (other than the National Post Company) namely the Canwest Limited Partnership, Canwest Publishing Inc./Publications Canwest Inc., Canwest Books Inc., and Canwest (Canada) Inc.; the Canadian subscription based specialty television channels acquired from Alliance Atlantis Communications Inc. in August, 2007 which are held jointly with Goldman Sachs Capital Partners and operated by CW Investments Co. and its subsidiaries; and subscription-based specialty television channels which are not wholly owned by CTLP.

[3] No one appearing opposed the relief requested.

Backround Facts

[4] Canwest is a leading Canadian media company with interests in twelve free-to-air television stations comprising the Global Television Network, subscription-based specialty television channels and newspaper publishing and digital media operations.

[5] As of October 1, 2009, Canwest employed the full time equivalent of approximately 7,400 employees around the world. Of that number, the full time equivalent of approximately 1,700 are employed by the CMI Entities, the vast majority of whom work in Canada and 850 of whom work in Ontario.

[6] Canwest Global owns 100% of CMI. CMI has direct or indirect ownership interests in all of the other CMI Entities. Ontario is the chief place of business of the CMI Entities.

[7] Canwest Global is a public company continued under the *Canada Business Corporations Act*[2]. It has authorized capital consisting of an unlimited number of preference shares, multiple voting shares, subordinate voting shares, and non-voting shares. It is a "constrained-share company" which means that at least 66 2/3% of its voting shares must be beneficially owned by Canadians. The Asper family built the Canwest enterprise and family members hold various classes of shares. In April and May, 2009, corporate decision making was consolidated and streamlined.

[8] The CMI Entities generate the majority of their revenue from the sale of advertising (approximately 77% on a consolidated basis). Fuelled by a deteriorating economic environment in Canada and elsewhere, in 2008 and 2009, they experienced a decline in their advertising revenues. This caused problems with cash flow and circumstances were exacerbated by their high fixed operating costs. In response to these conditions, the CMI Entities took steps to improve cash flow and to strengthen their balance sheets. They commenced workforce reductions and cost saving measures, sold certain interests and assets, and engaged in discussions with the CRTC and the Federal government on issues of concern.

[9] Economic conditions did not improve nor did the financial circumstances of the CMI Entities. They experienced significant tightening of credit from critical suppliers and trade creditors, a further reduction of advertising commitments, demands for reduced credit terms by newsprint and printing suppliers, and restrictions on or cancellation of credit cards for certain employees.

[10] In February, 2009, CMI breached certain of the financial covenants in its secured credit facility. It subsequently received waivers of the borrowing conditions on six

[2] R.S.C. 1985, c.C.44.

occasions. On March 15, 2009, it failed to make an interest payment of US$30.4 million due on 8% senior subordinated notes. CMI entered into negotiations with an ad hoc committee of the 8% senior subordinated noteholders holding approximately 72% of the notes (the "Ad Hoc Committee"). An agreement was reached wherein CMI and its subsidiary CTLP agreed to issue US$105 million in 12% secured notes to members of the Ad Hoc Committee. At the same time, CMI entered into an agreement with CIT Business Credit Canada Inc. ("CIT") in which CIT agreed to provide a senior secured revolving asset based loan facility of up to $75 million. CMI used the funds generated for operations and to repay amounts owing on the senior credit facility with a syndicate of lenders of which the Bank of Nova Scotia was the administrative agent. These funds were also used to settle related swap obligations.

[11] Canwest Global reports its financial results on a consolidated basis. As at May 31, 2009, it had total consolidated assets with a net book value of $4.855 billion and total consolidated liabilities of $5.846 billion. The subsidiaries of Canwest Global that are not applicants or partnerships in this proceeding had short and long term debt totalling $2.742 billion as at May 31, 2009 and the CMI Entities had indebtedness of approximately $954 million. For the 9 months ended May 31, 2009, Canwest Global's consolidated revenues decreased by $272 million or 11% compared to the same period in 2008. In addition, operating income before amortization decreased by $253 million or 47%. It reported a consolidated net loss of $1.578 billion compared to $22 million for the same period in 2008. CMI reported that revenues for the Canadian television operations decreased by $8 million or 4% in the third quarter of 2009 and operating profit was $21 million compared to $39 million in the same period in 2008.

[12] The board of directors of Canwest Global struck a special committee of the board ("the Special Committee") with a mandate to explore and consider strategic alternatives in order to maximize value. That committee appointed Thomas Strike, who is the President, Corporate Development and Strategy Implementation of Canwest Global, as Recapitalization Officer and retained Hap Stephen, who is the Chairman and CEO of Stonecrest Capital Inc., as a Restructuring Advisor ("CRA").

[13] On September 15, 2009, CMI failed to pay US$30.4 million in interest payments due on the 8% senior subordinated notes.

[14] On September 22, 2009, the board of directors of Canwest Global authorized the sale of all of the shares of Ten Network Holdings Limited (Australia) ("Ten Holdings") held by its subsidiary, Canwest Mediaworks Ireland Holdings ("CMIH"). Prior to the sale, the CMI Entities had consolidated indebtedness totalling US$939.9 million pursuant to three facilities. CMI had issued 8% unsecured notes in an aggregate principal amount of US$761,054,211. They were guaranteed by all of the CMI Entities except Canwest Global, and 30109, LLC. CMI had also issued 12% secured notes in an aggregate principal amount of US$94 million. They were guaranteed by the CMI Entities. Amongst others, Canwest's subsidiary, CMIH, was a guarantor of both of these facilities. The 12% notes were secured by first ranking charges against all of the property of CMI, CTLP and the guarantors. In addition, pursuant to a credit agreement dated May 22, 2009 and subsequently amended, CMI has a senior secured revolving asset-based loan facility in the maximum amount of $75 million with CIT Business Credit Canada Inc. ("CIT"). Prior to the sale, the debt amounted to $23.4 million not including certain letters of credit. The facility is guaranteed by CTLP, CMIH and others and secured by first ranking charges against all of the property of CMI, CTLP, CMIH and other guarantors. Significant terms of the credit agreement are described in paragraph 37 of the proposed Monitor's report. Upon a CCAA filing by CMI and commencement of proceedings under Chapter 15 of the Bankruptcy Code, the CIT facility converts into a DIP financing arrangement and increases to a maximum of $100 million.

[15] Consents from a majority of the 8% senior subordinated noteholders were necessary to allow the sale of the Ten Holdings shares. A Use of Cash Collateral and Consent Agreement was entered into by CMI, CMIH, certain consenting noteholders and others wherein CMIH was allowed to lend the proceeds of sale to CMI.

[16] The sale of CMIH's interest in Ten Holdings was settled on October 1, 2009. Gross proceeds of approximately $634 million were realized. The proceeds were applied to

fund general liquidity and operating costs of CMI, pay all amounts owing under the 12% secured notes and all amounts outstanding under the CIT facility except for certain letters of credit in an aggregate face amount of $10.7 million. In addition, a portion of the proceeds was used to reduce the amount outstanding with respect to the 8% senior subordinated notes leaving an outstanding indebtedness thereunder of US$393.25 million.

[17] In consideration for the loan provided by CMIH to CMI, CMI issued a secured intercompany note in favour of CMIH in the principal amount of $187.3 million and an unsecured promissory note in the principal amount of $430.6 million. The secured note is subordinated to the CIT facility and is secured by a first ranking charge on the property of CMI and the guarantors. The payment of all amounts owing under the unsecured promissory note are subordinated and postponed in favour of amounts owing under the CIT facility. Canwest Global, CTLP and others have guaranteed the notes. It is contemplated that the debt that is the subject matter of the unsecured note will be compromised.

[18] Without the funds advanced under the intercompany notes, the CMI Entities would be unable to meet their liabilities as they come due. The consent of the noteholders to the use of the Ten Holdings proceeds was predicated on the CMI Entities making this application for an Initial Order under the CCAA. Failure to do so and to take certain other steps constitute an event of default under the Use of Cash Collateral and Consent Agreement, the CIT facility and other agreements. The CMI Entities have insufficient funds to satisfy their obligations including those under the intercompany notes and the 8% senior subordinated notes.

[19] The stay of proceedings under the CCAA is sought so as to allow the CMI Entities to proceed to develop a plan of arrangement or compromise to implement a consensual "pre-packaged" recapitalization transaction. The CMI Entities and the Ad Hoc Committee of noteholders have agreed on the terms of a going concern recapitalization transaction which is intended to form the basis of the plan. The terms are reflected in a

support agreement and term sheet. The recapitalization transaction contemplates amongst other things, a significant reduction of debt and a debt for equity restructuring. The applicants anticipate that a substantial number of the businesses operated by the CMI Entities will continue as going concerns thereby preserving enterprise value for stakeholders and maintaining employment for as many as possible. As mentioned, certain steps designed to implement the recapitalization transaction have already been taken prior to the commencement of these proceedings.

[20] CMI has agreed to maintain not more than $2.5 million as cash collateral in a deposit account with the Bank of Nova Scotia to secure cash management obligations owed to BNS. BNS holds first ranking security against those funds and no court ordered charge attaches to the funds in the account.

[21] The CMI Entities maintain eleven defined benefit pension plans and four defined contribution pension plans. There is an aggregate solvency deficiency of $13.3 million as at the last valuation date and a wind up deficiency of $32.8 million. There are twelve television collective agreements eleven of which are negotiated with the Communications, Energy and Paperworkers Union of Canada. The Canadian Union of Public Employees negotiated the twelfth television collective agreement. It expires on December 31, 2010. The other collective agreements are in expired status. None of the approximately 250 employees of the National Post Company are unionized. The CMI Entities propose to honour their payroll obligations to their employees, including all pre-filing wages and employee benefits outstanding as at the date of the commencement of the CCAA proceedings and payments in connection with their pension obligations.

Proposed Monitor

[22] The applicants propose that FTI Consulting Canada Inc. serve as the Monitor in these proceedings. It is clearly qualified to act and has provided the Court with its consent to act. Neither FTI nor any of its representatives have served in any of the capacities prohibited by section of the amendments to the CCAA.

Proposed Order

[23] I have reviewed in some detail the history that preceded this application. It culminated in the presentation of the within application and proposed order. Having

reviewed the materials and heard submissions, I was satisfied that the relief requested should be granted.

[24] This case involves a consideration of the amendments to the CCAA that were proclaimed in force on September 18, 2009. While these were long awaited, in many instances they reflect practices and principles that have been adopted by insolvency practitioners and developed in the jurisprudence and academic writings on the subject of the CCAA. In no way do the amendments change or detract from the underlying purpose of the CCAA, namely to provide debtor companies with the opportunity to extract themselves from financial difficulties notwithstanding insolvency and to reorganize their affairs for the benefit of stakeholders. In my view, the amendments should be interpreted and applied with that objective in mind.

(a) Threshhold Issues

[25] Firstly, the applicants qualify as debtor companies under the CCAA. Their chief place of business is in Ontario. The applicants are affiliated debtor companies with total claims against them exceeding $5 million. The CMI Entities are in default of their obligations. CMI does not have the necessary liquidity to make an interest payment in the amount of US$30.4 million that was due on September 15, 2009 and none of the other CMI Entities who are all guarantors are able to make such a payment either. The assets of the CMI Entities are insufficient to discharge all of the liabilities. The CMI Entities are unable to satisfy their debts as they come due and they are insolvent. They are insolvent both under the *Bankruptcy and Insolvency Act*[3] definition and under the more expansive definition of insolvency used in *Re Stelco*[4]. Absent these CCAA proceedings, the applicants would lack liquidity and would be unable to continue as going concerns. The CMI Entities have acknowledged their insolvency in the affidavit filed in support of the application.

[3] R.S.C. 1985, c. B-3, as amended.
[4] (2004), 48 C.B.R. (4th) 299; leave to appeal refused 2004 CarswellOnt 2936 (C.A.).

[26] Secondly, the required statement of projected cash-flow and other financial documents required under section 11(2) of the CCAA have been filed.

(b) Stay of Proceedings

[27] Under section 11 of the CCAA, the Court has broad jurisdiction to grant a stay of proceedings and to give a debtor company a chance to develop a plan of compromise or arrangement. In my view, given the facts outlined, a stay is necessary to create stability and to allow the CMI Entities to pursue their restructuring.

(b) Partnerships and Foreign Subsidiaries

[28] The applicants seek to extend the stay of proceedings and other relief to the aforementioned partnerships. The partnerships are intertwined with the applicants' ongoing operations. They own the National Post daily newspaper and Canadian free-to-air television assets and certain of its specialty television channels and some other television assets. These businesses constitute a significant portion of the overall enterprise value of the CMI Entities. The partnerships are also guarantors of the 8% senior subordinated notes.

[29] While the CCAA definition of a company does not include a partnership or limited partnership, courts have repeatedly exercised their inherent jurisdiction to extend the scope of CCAA proceedings to encompass them. See for example *Re Lehndorff General Partners Ltd.*[5]; *Re Smurfit-Stone Container Canada Inc.*[6]; and *Re Calpine Canada Energy Ltd.*[7]. In this case, the partnerships carry on operations that are integral and closely interrelated to the business of the applicants. The operations and obligations of the partnerships are so intertwined with those of the applicants that irreparable harm would ensue if the requested stay were not granted. In my view, it is just and convenient to grant the relief requested with respect to the partnerships.

[5] (1993), 9 B.L.R. (2d) 275.
[6] [2009] O.J. No. 349.
[7] (2006), 19 C.B.R. (5th) 187.

[30] Certain applicants are foreign subsidiaries of CMI. Each is a guarantor under the 8% senior subordinated notes, the CIT credit agreement (and therefore the DIP facility), the intercompany notes and is party to the support agreement and the Use of Cash Collateral and Consent Agreement. If the stay of proceedings was not extended to these entities, creditors could seek to enforce their guarantees. I am persuaded that the foreign subsidiary applicants as that term is defined in the affidavit filed are debtor companies within the meaning of section 2 of the CCAA and that I have jurisdiction and ought to grant the order requested as it relates to them. In this regard, I note that they are insolvent and each holds assets in Ontario in that they each maintain funds on deposit at the Bank of Nova Scotia in Toronto. See in this regard *Re Cadillac Fairview*[8] and *Re Global Light Telecommunications Ltd.*[9]

(c) DIP Financing

[31] Turning to the DIP financing, the premise underlying approval of DIP financing is that it is a benefit to all stakeholders as it allows the debtors to protect going-concern value while they attempt to devise a plan acceptable to creditors. While in the past, courts relied on inherent jurisdiction to approve the terms of a DIP financing charge, the September 18, 2009 amendments to the CCAA now expressly provide jurisdiction to grant a DIP financing charge. Section 11.2 of the Act states:

> (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.
>
> (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

[8] (1995), 30 C.B.R. (3d) 29.
[9] (2004), 33 B.C.L.R. (4th) 155.

> (3) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.
>
> (4) In deciding whether to make an order, the court is to consider, among other things,
>
> (*a*) the period during which the company is expected to be subject to proceedings under this Act;
>
> (*b*) how the company's business and financial affairs are to be managed during the proceedings;
>
> (*c*) whether the company's management has the confidence of its major creditors;
>
> (*d*) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
>
> (*e*) the nature and value of the company's property;
>
> (*f*) whether any creditor would be materially prejudiced as a result of the security or charge; and
>
> (*g*) the monitor's report referred to in paragraph 23(1)(*b*), if any.

[32] In light of the language of section 11.2(1), the first issue to consider is whether notice has been given to secured creditors who are likely to be affected by the security or charge. Paragraph 57 of the proposed order affords priority to the DIP charge, the administration charge, the Directors' and Officers' charge and the KERP charge with the following exception: "any validly perfected purchase money security interest in favour of a secured creditor or any statutory encumbrance existing on the date of this order in favour of any person which is a "secured creditor" as defined in the CCAA in respect of any of source deductions from wages, employer health tax, workers compensation, GST/QST, PST payables, vacation pay and banked overtime for employees, and amounts under the Wage Earners' Protection Program that are subject to a super priority claim under the BIA". This provision coupled with the notice that was provided satisfied me that secured creditors either were served or are unaffected by the DIP charge. This approach is both consistent with the legislation and practical.

[33] Secondly, the Court must determine that the amount of the DIP is appropriate and required having regard to the debtors' cash-flow statement. The DIP charge is for up to

$100 million. Prior to entering into the CIT facility, the CMI Entities sought proposals from other third party lenders for a credit facility that would convert to a DIP facility should the CMI Entities be required to file for protection under the CCAA. The CIT facility was the best proposal submitted. In this case, it is contemplated that implementation of the plan will occur no later than April 15, 2010. The total amount of cash on hand is expected to be down to approximately $10 million by late December, 2009 based on the cash flow forecast. The applicants state that this is an insufficient cushion for an enterprise of this magnitude. The cash-flow statements project the need for the liquidity provided by the DIP facility for the recapitalization transaction to be finalized. The facility is to accommodate additional liquidity requirements during the CCAA proceedings. It will enable the CMI Entities to operate as going concerns while pursuing the implementation and completion of a viable plan and will provide creditors with assurances of same. I also note that the proposed facility is simply a conversion of the pre-existing CIT facility and as such, it is expected that there would be no material prejudice to any of the creditors of the CMI Entities that arises from the granting of the DIP charge. I am persuaded that the amount is appropriate and required.

[34] Thirdly, the DIP charge must not and does not secure an obligation that existed before the order was made. The only amount outstanding on the CIT facility is $10.7 in outstanding letters of credit. These letters of credit are secured by existing security and it is proposed that that security rank ahead of the DIP charge.

[35] Lastly, I must consider amongst others, the enumerated factors in paragraph 11.2(4) of the Act. I have already addressed some of them. The Management Directors of the applicants as that term is used in the materials filed will continue to manage the CMI Entities during the CCAA proceedings. It would appear that management has the confidence of its major creditors. The CMI Entities have appointed a CRA and a Restructuring Officer to negotiate and implement the recapitalization transaction and the aforementioned directors will continue to manage the CMI Entities during the CCAA proceedings. The DIP facility will enhance the prospects of a completed restructuring. CIT has stated that it will not convert the CIT facility into a DIP facility if the DIP charge

is not approved. In its report, the proposed Monitor observes that the ability to borrow funds from a court approved DIP facility secured by the DIP charge is crucial to retain the confidence of the CMI Entities' creditors, employees and suppliers and would enhance the prospects of a viable compromise or arrangement being made. The proposed Monitor is supportive of the DIP facility and charge.

[36] For all of these reasons, I was prepared to approve the DIP facility and charge.

(d) Administration Charge

[37] While an administration charge was customarily granted by courts to secure the fees and disbursements of the professional advisors who guided a debtor company through the CCAA process, as a result of the amendments to the CCAA, there is now statutory authority to grant such a charge. Section 11.52 of the CCAA states:

> (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of
>
> > (*a*) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
> >
> > (*b*) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and
> >
> > (*c*) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.
>
> (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

[38] I must therefore be convinced that (1) notice has been given to the secured creditors likely to be affected by the charge; (2) the amount is appropriate; and (3) the charge should extend to all of the proposed beneficiaries.

[39] As with the DIP charge, the issue relating to notice to affected secured creditors has been addressed appropriately by the applicants. The amount requested is up to $15 million. The beneficiaries of the charge are: the Monitor and its counsel; counsel to the CMI Entities; the financial advisor to the Special Committee and its counsel; counsel to the Management Directors; the CRA; the financial advisor to the Ad Hoc Committee; and RBC Capital Markets and its counsel. The proposed Monitor supports the aforementioned charge and considers it to be required and reasonable in the circumstances in order to preserve the going concern operations of the CMI Entities. The applicants submit that the above-note professionals who have played a necessary and integral role in the restructuring activities to date are necessary to implement the recapitalization transaction.

[40] Estimating quantum is an inexact exercise but I am prepared to accept the amount as being appropriate. There has obviously been extensive negotiation by stakeholders and the restructuring is of considerable magnitude and complexity. I was prepared to accept the submissions relating to the administration charge. I have not included any requirement that all of these professionals be required to have their accounts scrutinized and approved by the Court but they should not preclude this possibility.

(e) Critical Suppliers

[41] The next issue to consider is the applicants' request for authorization to pay pre-filing amounts owed to critical suppliers. In recognition that one of the purposes of the CCAA is to permit an insolvent corporation to remain in business, typically courts exercised their inherent jurisdiction to grant such authorization and a charge with respect to the provision of essential goods and services. In the recent amendments, Parliament codified the practice of permitting the payment of pre-filing amounts to critical suppliers and the provision of a charge. Specifically, section 11.4 provides:

> (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring a person to be a critical supplier to the company if the court is satisfied that

> the person is a supplier of goods or services to the company and that the goods or services that are supplied are critical to the company's continued operation.
>
> (2) If the court declares a person to be a critical supplier, the court may make an order requiring the person to supply any goods or services specified by the court to the company on any terms and conditions that are consistent with the supply relationship or that the court considers appropriate.
>
> (3) If the court makes an order under subsection (2), the court shall, in the order, declare that all or part of the property of the company is subject to a security or charge in favour of the person declared to be a critical supplier, in an amount equal to the value of the goods or services supplied under the terms of the order.
>
> (4) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

[42] Under these provisions, the Court must be satisfied that there has been notice to creditors likely to be affected by the charge, the person is a supplier of goods or services to the company, and that the goods or services that are supplied are critical to the company's continued operation. While one might interpret section 11.4 (3) as requiring a charge any time a person is declared to be a critical supplier, in my view, this provision only applies when a court is compelling a person to supply. The charge then provides protection to the unwilling supplier.

[43] In this case, no charge is requested and no additional notice is therefore required. Indeed, there is an issue as to whether in the absence of a request for a charge, section 11.4 is even applicable and the Court is left to rely on inherent jurisdiction. The section seems to be primarily directed to the conditions surrounding the granting of a charge to secure critical suppliers. That said, even if it is applicable, I am satisfied that the applicants have met the requirements. The CMI Entities seek authorization to make certain payments to third parties that provide goods and services integral to their business. These include television programming suppliers given the need for continuous and undisturbed flow of programming, newsprint suppliers given the dependency of the National Post on a continuous and uninterrupted supply of newsprint to enable it to publish and on newspaper distributors, and the American Express Corporate Card Program and Central Billed Accounts that are required for CMI Entity employees to perform their job functions. No payment would be made without the consent of the

Monitor. I accept that these suppliers are critical in nature. The CMI Entities also seek more general authorization allowing them to pay other suppliers if in the opinion of the CMI Entities, the supplier is critical. Again, no payment would be made without the consent of the Monitor. In addition, again no charge securing any payments is sought. This is not contrary to the language of section 11.4 (1) or to its purpose. The CMI Entities seek the ability to pay other suppliers if in their opinion the supplier is critical to their business and ongoing operations. The order requested is facilitative and practical in nature. The proposed Monitor supports the applicants' request and states that it will work to ensure that payments to suppliers in respect of pre-filing liabilities are minimized. The Monitor is of course an officer of the Court and is always able to seek direction from the Court if necessary. In addition, it will report on any such additional payments when it files its reports for Court approval. In the circumstances outlined, I am prepared to grant the relief requested in this regard.

(f) Directors' and Officers' Charge

[44] The applicants also seek a directors' and officers' ("D &O") charge in the amount of $20 million. The proposed charge would rank after the administration charge, the existing CIT security, and the DIP charge. It would rank pari passu with the KERP charge discussed subsequently in this endorsement but postponed in right of payment to the extent of the first $85 million payable under the secured intercompany note.

[45] Again, the recent amendments to the CCAA allow for such a charge. Section 11.51 provides that:

> (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the company is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company
>
> (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.
>
> (3) The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

> (4) The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

[46] I have already addressed the issue of notice to affected secured creditors. I must also be satisfied with the amount and that the charge is for obligations and liabilities the directors and officers may incur after the commencement of proceedings. It is not to extend to coverage of wilful misconduct or gross negligence and no order should be granted if adequate insurance at a reasonable cost could be obtained.

[47] The proposed Monitor reports that the amount of $20 million was estimated taking into consideration the existing D&O insurance and the potential liabilities which may attach including certain employee related and tax related obligations. The amount was negotiated with the DIP lender and the Ad Hoc Committee. The order proposed speaks of indemnification relating to the failure of any of the CMI Entities, after the date of the order, to make certain payments. It also excludes gross negligence and wilful misconduct. The D&O insurance provides for $30 million in coverage and $10 million in excess coverage for a total of $40 million. It will expire in a matter of weeks and Canwest Global has been unable to obtain additional or replacement coverage. I am advised that it also extends to others in the Canwest enterprise and not just to the CMI Entities. The directors and senior management are described as highly experienced, fully functional and qualified. The directors have indicated that they cannot continue in the restructuring effort unless the order includes the requested directors' charge.

[48] The purpose of such a charge is to keep the directors and officers in place during the restructuring by providing them with protection against liabilities they could incur during the restructuring: *Re General Publishing Co.*[10] Retaining the current directors and officers of the applicants would avoid destabilization and would assist in the restructuring. The proposed charge would enable the applicants to keep the experienced board of directors supported by experienced senior management. The proposed Monitor

believes that the charge is required and is reasonable in the circumstances and also observes that it will not cover all of the directors' and officers' liabilities in the worst case scenario. In all of these circumstances, I approved the request.

(g) Key Employee Retention Plans

[49] Approval of a KERP and a KERP charge are matters of discretion. In this case, the CMI Entities have developed KERPs that are designed to facilitate and encourage the continued participation of certain of the CMI Entities' senior executives and other key employees who are required to guide the CMI Entities through a successful restructuring with a view to preserving enterprise value. There are 20 KERP participants all of whom are described by the applicants as being critical to the successful restructuring of the CMI Entities. Details of the KERPs are outlined in the materials and the proposed Monitor's report. A charge of $5.9 million is requested. The three Management Directors are seasoned executives with extensive experience in the broadcasting and publishing industries. They have played critical roles in the restructuring initiatives taken to date. The applicants state that it is probable that they would consider other employment opportunities if the KERPs were not secured by a KERP charge. The other proposed participants are also described as being crucial to the restructuring and it would be extremely difficult to find replacements for them

[50] Significantly in my view, the Monitor who has scrutinized the proposed KERPs and charge is supportive. Furthermore, they have been approved by the Board, the Special Committee, the Human Resources Committee of Canwest Global and the Ad Hoc Committee. The factors enumerated in *Re Grant Forest*[11] have all been met and I am persuaded that the relief in this regard should be granted.

[51] The applicants ask that the Confidential Supplement containing unredacted copies of the KERPs that reveal individually identifiable information and compensation information be sealed. Generally speaking, judges are most reluctant to grant sealing

[10] (2003), 39 C.B.R. (4th) 216.

orders. An open court and public access are fundamental to our system of justice. Section 137(2) of the *Courts of Justice Act* provides authority to grant a sealing order and the Supreme Court of Canada's decision in *Sierra Club of Canada v. Canada (Minister of Finance)*[12] provides guidance on the appropriate legal principles to be applied. Firstly, the Court must be satisfied that the order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk. Secondly, the salutary effects of the order should outweigh its deleterious effects including the effects on the right to free expression which includes the public interest in open and accessible court proceedings.

[52] In this case, the unredacted KERPs reveal individually identifiable information including compensation information. Protection of sensitive personal and compensation information the disclosure of which could cause harm to the individuals and to the CMI Entities is an important commercial interest that should be protected. The KERP participants have a reasonable expectation that their personal information would be kept confidential. As to the second branch of the test, the aggregate amount of the KERPs has been disclosed and the individual personal information adds nothing. It seems to me that this second branch of the test has been met. The relief requested is granted.

Annual Meeting

[53] The CMI Entities seek an order postponing the annual general meeting of shareholders of Canwest Global. Pursuant to section 133 (1)(b) of the CBCA, a corporation is required to call an annual meeting by no later than February 28, 2010, being six months after the end of its preceding financial year which ended on August 31, 2009. Pursuant to section 133 (3), despite subsection (1), the corporation may apply to the court for an order extending the time for calling an annual meeting.

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[11] [2009] O.J. No. 3344. That said, given the nature of the relationship between a board of directors and senior management, it may not always be appropriate to give undue consideration to the principle of business judgment.
[12] [2002] 2 S.C.R. 522.

[54] CCAA courts have commonly granted extensions of time for the calling of an annual general meeting. In this case, the CMI Entities including Canwest Global are devoting their time to stabilizing business and implementing a plan. Time and resources would be diverted if the time was not extended as requested and the preparation for and the holding of the annual meeting would likely impede the timely and desirable restructuring of the CMI Entities. Under section 106(6) of the CBCA, if directors of a corporation are not elected, the incumbent directors continue. Financial and other information will be available on the proposed Monitor's website. An extension is properly granted.

Other

[55] The applicants request authorization to commence Chapter 15 proceedings in the U.S. Continued timely supply of U.S. network and other programming is necessary to preserve going concern value. Commencement of Chapter 15 proceedings to have the CCAA proceedings recognized as "foreign main proceedings" is a prerequisite to the conversion of the CIT facility into the DIP facility. Authorization is granted.

[56] Canwest's various corporate and other entities share certain business services. They are seeking to continue to provide and receive inter-company services in the ordinary course during the CCAA proceedings. This is supported by the proposed Monitor and FTI will monitor and report to the Court on matters pertaining to the provision of inter-company services.

[57] Section 23 of the amended CCAA now addresses certain duties and functions of the Monitor including the provision of notice of an Initial Order although the Court may order otherwise. Here the financial threshold for notice to creditors has been increased from $1000 to $5000 so as to reduce the burden and cost of such a process. The proceedings will be widely published in the media and the Initial Order is to be posted on the Monitor's website. Other meritorious adjustments were also made to the notice provisions.

[58] This is a "pre-packaged" restructuring and as such, stakeholders have negotiated and agreed on the terms of the requested order. That said, not every stakeholder was before me. For this reason, interested parties are reminded that the order includes the usual come back provision. The return date of any motion to vary, rescind or affect the provisions relating to the CIT credit agreement or the CMI DIP must be no later than November 5, 2009.

[59] I have obviously not addressed every provision in the order but have attempted to address some key provisions. In support of the requested relief, the applicants filed a factum and the proposed Monitor filed a report. These were most helpful. A factum is required under Rule 38.09 of the Rules of Civil Procedure. Both a factum and a proposed Monitor's report should customarily be filed with a request for an Initial Order under the CCAA.

Conclusion

[60] Weak economic conditions and a high debt load do not a happy couple make but clearly many of the stakeholders have been working hard to produce as desirable an outcome as possible in the circumstances. Hopefully the cooperation will persist.

Pepall J.

Released: October 13, 2009

TAB 9

CITATION: Colossus Minerals Inc. (Re), 2014 ONSC 514
COURT FILE NO.: CV-14-10401-00CL
DATE: 20140207

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT,* R.S.C. 1985, c. B-3, As Amended

AND IN THE MATTER OF THE NOTICE OF INTENTION OF COLOSSUS MINERALS INC., OF THE CITY OF TORONTO IN THE PROVINCE OF ONTARIO

BEFORE: Mr. Justice H.J. Wilton-Siegel

COUNSEL: S. Brotman and D. Chochla, for the Applicant Colossus Minerals Inc.

L. Rogers and A. Shalviri, for the DIP Agent, Sandstorm Gold Inc.

H. Chaiton, for the Proposal Trustee

S. Zweig, for the Ad Hoc Group of Noteholders and Certain Lenders

HEARD: January 16, 2014

ENDORSEMENT

[1] The applicant, Colossus Minerals Inc. (the "applicant" or "Colossus"), seeks an order granting various relief under the *Bankruptcy and Insolvency Act,* R.S.C. 1985, c. B-3 (the "BIA"). The principal secured creditors of Colossus were served and no objections were received regarding the relief sought. In view of the liquidity position of Colossus, the applicant was heard on an urgent basis and an order was issued on January 16, 2014 granting the relief sought. This endorsement sets out the Court's reasons for granting the order.

Background

[2] The applicant filed a notice of intention to make a proposal under s. 50.4(1) of the BIA on January 13, 2014. Duff & Phelps Canada Restructuring Inc. (the "Proposal Trustee") has been named the Proposal Trustee in these proceedings. The Proposal Trustee has filed its first report dated January 14, 2014 addressing this application, among other things. The main asset of Colossus is a 75% interest in a gold and platinum project in Brazil (the "Project"), which is held by a subsidiary. The Project is nearly complete. However, there is a serious water control issue that urgently requires additional de-watering facilities to preserve the applicant's interest in the Project. As none of the applicant's mining interests, including the Project, are producing, it has

no revenue and has been accumulating losses. To date, the applicant has been unable to obtain the financing necessary to fund its cash flow requirements through to the commencement of production and it has exhausted its liquidity.

DIP Loan and DIP Charge

[3] The applicant seeks approval of a Debtor-in-Possession Loan (the "DIP Loan") and DIP Charge dated January 13, 2014 with Sandstorm Gold Inc. ("Sandstorm") and certain holders of the applicant's outstanding gold-linked notes (the "Notes") in an amount up to $4 million, subject to a first-ranking charge on the property of Colossus, being the DIP Charge. The Court has the authority under section 50.6(1) of the BIA to authorize the DIP Loan and DIP Charge, subject to a consideration of the factors under section 50.6(5). In this regard, the following matters are relevant.

[4] First, the DIP Loan is to last during the currency of the sale and investor solicitation process ("SISP") discussed below and the applicant has sought an extension of the stay of proceedings under the BIA until March 7, 2014. The applicant's cash flow statements show that the DIP Loan is necessary and sufficient to fund the applicant's cash requirements until that time.

[5] Second, current management will continue to operate Colossus during the stay period to assist in the SISP. Because Sandstorm has significant rights under a product purchase agreement pertaining to the Project and the Notes represent the applicant's largest debt obligation, the DIP Loan reflects the confidence of significant creditors in the applicant and its management.

[6] Third, the terms of the DIP Loan are consistent with the terms of DIP financing facilities in similar proceedings.

[7] Fourth, Colossus is facing an imminent liquidity crisis. It will need to cease operations if it does not receive funding. In such circumstances, there will be little likelihood of a viable proposal.

[8] Fifth, the DIP Loan is required to permit the SISP to proceed, which is necessary for any assessment of the options of a sale and a proposal under the BIA. It will also fund the care and maintenance of the Project without which the asset will deteriorate thereby seriously jeopardizing the applicant's ability to make a proposal. This latter consideration also justifies the necessary adverse effect on creditors' positions. The DIP Charge will, however, be subordinate to the secured interests of Dell Financial Services Canada Limited Partnership ("Dell") and GE VFS Canada Limited Partnership ("GE") who have received notice of this application and have not objected.

[9] Lastly, the Proposal Trustee has recommended that the Court approve the relief sought and supports the DIP Loan and DIP Charge.

[10] For the foregoing reasons, I am satisfied that the Court should authorize the DIP Loan and the DIP Charge pursuant to s. 50.6(1) of the BIA.

Administration Charge

[11] Colossus seeks approval of a first-priority administration charge in the maximum amount of $300,000 to secure the fees and disbursements of the Proposal Trustee, the counsel to the Proposal Trustee, and the counsel to the applicant in respect of these BIA proceedings.

[12] Section 64.2 of the BIA provides jurisdiction to grant a super-priority for such purposes. The Court is satisfied that such a charge is appropriate for the following reasons.

[13] First, the proposed services are essential both to a successful proceeding under the BIA as well as for the conduct of the SISP.

[14] Second, the quantum of the proposed charge is appropriate given the complexity of the applicant's business and of the SISP, both of which will require the supervision of the Proposal Trustee.

[15] Third, the proposed charge will be subordinate to the secured interests of GE and Dell.

Directors' and Officers' Charge

[16] Colossus seeks approval of an indemnity and priority charge to indemnify its directors and officers for obligations and liabilities they may incur in such capacities from and after the filing of the Notice of Intention (the "D&O Charge"). It is proposed that the D&O Charge be in the amount of $200,000 and rank after the Administration Charge and prior to the DIP Charge.

[17] The Court has authority to grant such a charge under s. 64.1 of the BIA. I am satisfied that it is appropriate to grant such relief in the present circumstances for the following reasons.

[18] First, the Court has been advised that the existing directors' and officers' insurance policies contain certain limits and exclusions that create uncertainty as to coverage of all potential claims. The order sought provides that the benefit of the D&O Charge will be available only to the extent that the directors and officers do not have coverage under such insurance or such coverage is insufficient to pay the amounts indemnified.

[19] Second, the applicant's remaining directors and officers have advised that they are unwilling to continue their services and involvement with the applicant without the protection of the D&O Charge.

[20] Third, the continued involvement of the remaining directors and officers is critical to a successful SISP or any proposal under the BIA.

[21] Fourth, the Proposal Trustee has stated that the D&O Charge is reasonable and supports the D&O Charge.

The SISP

[22] The Court has the authority to approve any proposed sale under s. 65.13(1) of the BIA subject to consideration of the factors in s. 65.13(4). At this time, Colossus seeks approval of its proposed sales process, being the SISP. In this regard, the following considerations are relevant.

[23] First, the SISP is necessary to permit the applicant to determine whether a sale transaction is available that would be more advantageous to the applicant and its stakeholders than a proposal under the BIA. It is also a condition of the DIP Loan. In these circumstances, a sales process is not only reasonable but also necessary.

[24] Second, it is not possible at this time to assess whether a sale under the SISP would be more beneficial to the creditors than a sale under a bankruptcy. However, the conduct of the SISP will allow that assessment without any obligation on the part of the applicant to accept any offer under the SISP.

[25] Third, the Court retains the authority to approve any sale under s. 65.13 of the BIA.

[26] Lastly, the Proposal Trustee supports the proposed SISP.

[27] Accordingly, I am satisfied that the SISP should be approved at this time.

Engagement Letter with the Financial Advisor

[28] The applicant seeks approval of an engagement letter dated November 27, 2013 with Dundee Securities Limited ("Dundee") (the "Engagement Letter"). Dundee was engaged at that time by the special committee of the board of directors of the applicant as its financial advisor for the purpose of identifying financing and/or merger and acquisition opportunities available to the applicant. It is proposed that Dundee will continue to be engaged pursuant to the Engagement Letter to run the SISP together with the applicant under the supervision of the Proposal Trustee.

[29] Under the Engagement Letter, Dundee will receive certain compensation including a success fee. The Engagement Letter also provides that amounts payable thereunder are claims that cannot be compromised in any proposal under the BIA or any plan of arrangement under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA").

[30] Courts have approved success fees in the context of restructurings under the CCAA. The reasoning in such cases is equally applicable in respect of restructurings conducted by means of proposal proceedings under the BIA. As the applicant notes, a success fee is both appropriate and necessary where the debtor lacks the financial resources to pay advisory fees on any other basis.

[31] For the following reasons, I am satisfied that the Engagement Letter, including the success fee arrangement, should be approved by the Court and that the applicant should be authorized to continue to engage Dundee as its financial advisor in respect of the SISP.

[32] Dundee has considerable industry experience as well as familiarity with Colossus, based on its involvement with the company prior to the filing of the Notice of Intention.

[33] As mentioned, the SISP is necessary to permit an assessment of the best option for stakeholders.

[34] In addition, the success fee is necessary to incentivize Dundee but is reasonable in the circumstances and consistent with success fees in similar circumstances.

[35] Importantly, the success fee is only payable in the event of a successful outcome of the SISP.

[36] Lastly, the Proposal Trustee supports the Engagement Letter, including the success fee arrangement.

Extension of the Stay

[37] The applicant seeks an extension for the time to file a proposal under the BIA from the thirty-day period provided for in s. 50.4(8). The applicant seeks an extension to March 7, 2014 to permit it to pursue the SISP and assess whether a sale or a proposal under the BIA would be most beneficial to the applicant's stakeholders.

[38] The Court has authority to grant such relief under section 50.4(9) of the BIA. I am satisfied that such relief is appropriate in the present circumstances for the following reasons.

[39] First, the applicant is acting in good faith and with due diligence, with a view to maximizing value for the stakeholders, in seeking authorization for the SISP.

[40] Second, the applicant requires additional time to determine whether it could make a viable proposal to stakeholders. The extension of the stay will increase the likelihood of a feasible sale transaction or a proposal.

[41] Third, there is no material prejudice likely to result to creditors from the extension of the stay itself. Any adverse effect flowing from the DIP Loan and DIP Charge has been addressed above.

[42] Fourth, the applicant's cash flows indicate that it will be able to meet its financial obligations, including care and maintenance of the Project, during the extended period with the inclusion of the proceeds of the DIP Loan.

[43] Lastly, the Proposal Trustee supports the requested relief.

Wilton-Siegel J.

Released: February 7, 2014

TAB 10

Montreal Trust Company, Administrator of the Estate of **Eli Prelutsky,** deceased, Plaintiff,

and

Her Majesty the Queen, Defendant.

Federal Court—Trial Division (Collier, J), August 21, 1974, on appeal from an assessment of the Minister of National Revenue.

Warren Mitchell for the plaintiff.
M R V Storrow for the defendant.

Collier J:—This is an appeal on behalf of the Prelutsky estate against an assessment of estate tax by the Minister of National Revenue.

Eli Prelutsky died intestate on January 25, 1971 at Vancouver, BC. He was at the date of his death the beneficial owner of 71 shares of BC Glass and Lumber Ltd, a private company (hereafter "the company"). The plaintiff contends the situs of those shares at the time of Prelutsky's death was in British Columbia. If the shares in fact can be deemed to be situated in British Columbia at the relevant time, then the Minister, it is contended by the plaintiff, ought to have allowed certain deductions, pursuant to section 9 of the *Estate Tax Act*, RSC 1970, c E-9, from the tax otherwise payable. The Minister disallowed the deduction. He took the view the shares were situate in the Province of Saskatchewan which was not, under the *Estate Tax Act*, a prescribed province. This appeal followed.

The amounts of tax here involved are large indeed. The net value of the estate is about $2,077,000. The tax as assessed by the Minister is $613,396 64. If the shares are situate in British Columbia the deduction or rebate will amount to $460,047.48 leaving a net federal tax payable of $153,349.16.

The Province of British Columbia has tentatively, under its legislation, assessed the estate for succession duties in the amount of $606,378.24.

If the present assessment by the Minister stands, and if the tentative assessment by the Province of British Columbia is levied, then the total tax payable on this estate is $1,219,774.88. If the estate is entitled to the rebate or deduction in question here, the total tax payable will (according to my calculations) be $759,727.40.

It is therefore possible, in the ultimate result, there may be double taxation of this estate. One has sympathy to this claim for relief by the administrator and the beneficiaries. Neither the possibility of double taxation, nor sympathy, can, however, influence the legal result if the facts and the law are against the submission on behalf of the estate.

The parties have agreed on a number of facts. I quote from the statement:

> 1. Eli Prelutsky ("Prelutsky") died intestate on January 25, 1971, and at the time of his death was resident and domiciled in the Province of British Columbia.
>
> 2. By a grant of letters of administration, Montreal Trust Company was appointed administrator of the estate of Prelutsky on May 17, 1971.
>
> 3. At the time of his death, Prelutsky was the beneficial owner of seventy-one (71) shares in the capital stock of BC Glass and Lumber Ltd being all of the issued and outstanding share capital in the company. Seventy of the shares were registered in the name of Prelutsky, while one share was registered in the name of Mr J D Cooper of the City of Moose Jaw in the Province of Saskatchewan as Trustee for Prelutsky.

4. BC Glass and Lumber Ltd is a body corporate incorporated pursuant to the laws of the Province of Saskatchewan as Saskatoon Glass Limited on February 26, 1935. The name of the company was changed to Saskatoon Glass and Lumber Ltd on September 2, 1942, and was further changed to BC Glass and Lumber Ltd on August 15, 1955.

5. The company at all times has maintained a registered office in Saskatchewan and at the time of Prelutsky's death the company was in good standing in the Province of Saskatchewan.

6. During or before 1941, Prelutsky moved from the Province of Saskatchewan to the Province of British Columbia and has, since that time, resided and been domiciled in the Province of British Columbia.

7. In 1955, the company was registered as an extra-provincial company in the Province of British Columbia pursuant to the provisions of the British Columbia Companies Act. Since that time the company has always maintained a head office of the company within the Province of British Columbia.

8. The Company's Minute Book was retained in the Province of British Columbia from and after 1941, and there was also retained in British Columbia a share certificate stub book from and after that date.

9. Two shares in the capital stock of the company have been transferred since the company was registered as an extra-provincial company. The first was a transfer on August 20, 1958 from William Prelutsky, a son of Prelutsky, to Clarence H Waldo of the City of Moose Jaw in the Province of Saskatchewan. The second was a transfer on October 15, 1970, from Mr Waldo, deceased, to Mr J D Cooper who has held the share in trust for Prelutsky.

10. In the case of each of the transfers, minutes of meetings in the Province of British Columbia approving each of the transfers were prepared in the Province of British Columbia and were retained in the Company's Minute Book. Notations were made on the share certificate stubs in the share certificate book which was retained in the Province of British Columbia wherein the transfer of the separate shares was recorded.

11. There was no book or document entitled a "Register of Transfers" maintained in the Province of Saskatchewan or in the Province of British Columbia. The company did not have any assets in the Province of Saskatchewan and did not carry on any business in the Province of Saskatchewan from and after 1955.

12. From and after 1955, the Minute Book and the share certificate stub book were retained at 789 West Pender Street, Vancouver, British Columbia, except on isolated occasions when the books may have been retained in the Prelutsky residence for short periods of time.

13. The Minute Book and share certificate stub book were never returned to the Province of Saskatchewan for any period of time after the company was registered as an extra-provincial corporation in the Province of British Columbia.

14. The only corporate seal of the company was retained in the Province of British Columbia subsequent to extra-provincial registration in the Province and was situated in the Province of British Columbia at the date of Prelutsky's death.

In addition the following was agreed (I have numbered these facts 15 and 16).

15. The company at the date of death of the deceased was in good standing under the *Companies Act* of the Province of British Columbia.

16. At no time did the articles of association of the company provide for the keeping outside of Saskatchewan a branch register of members resident outside of that province.

It is common ground the particular provisions of the *Estate Tax Act* relevant here are found in paragraph 9(7)(d). I quote in part:

> (d) shares, stocks and debenture stocks of a corporation and rights to subscribe for or purchase shares or stocks of a corporation (including any such property held by a nominee, whether the beneficial ownership is evidenced by scrip certificates or otherwise) shall be deemed to be situated
>
> (i) in the province where the deceased was domiciled at the time of his death, if any register of transfers or place of transfer is maintained by the corporation in that province for the transfer thereof,

There are some additional facts which, to my mind, flow from the evidence in this case and which have some relevance. These are:

(a) When the company registered in British Columbia in 1955, a statement of extra-provincial registration as required by the British Columbia *Companies Act* was filed.

(b) An attorney was appointed, again in compliance with the requirements of the British Columbia statute.

(c) The transfers of shares referred to in paragraph 9 of the agreed statement of facts were made in order to comply with the provisions of *The Companies Act of Saskatchewan* requiring one director to be resident in that province.

(d) The share certificate stubs, in respect of the only two transfers of shares ever made since the company was registered extra-provincially in British Columbia, by their very words indicate the particular shares were in fact being "transferred" and indicated the name of the transferor and the transferee.

(e) Copies of the annual reports required to be filed under the British Columbia legislation were kept, as I understand it, among the other records of the company. These reports cover the years 1955 to 1970 inclusive. In each case they indicate the location of the head office of the company both within and without the Province of British Columbia, the names, addresses and occupations of persons holding shares in the company who reside in the Province of British Columbia and the full names, addresses and occupations of the directors of the company. At all times only 71 shares of an authorized capital of 200 shares were issued. From 1955 to 1957 inclusive the annual reports showed the deceased as the holder of 70 shares and his son as the holder of one share. In those years the deceased was shown as the sole director except for 1957 when his wife was listed as a director as well. The return for 1958 lists the deceased as holding 70 shares and Waldo as holding one. Under the heading in the report ". . . particulars of shares transferred since the date of the last report . . ." there is typed the word "nil". The reports for 1959 and 1960 are the same. The returns for 1961 and 1963 (1962 appears to be missing) show Prelutsky and Waldo as the directors, and Prelutsky and Waldo as the shareholders (holding 70 and 1 respectively). Particulars of transfers of shares is marked "nil". For the years 1964 to 1969, the deceased and Waldo are listed as directors but Prelutsky is shown as the only shareholder, holding 70 shares. The particulars regarding transfer of shares has

the word "nil" in those years.* The return for 1970 reports the deceased, his wife and Cooper as directors, and as before (since 1964) the deceased as the only shareholder, holding 70 shares. The word "nil" appears in respect of particulars of shares transferred since the last report.

The plaintiff submits that on all these facts, the company maintained in the Province of British Columbia a register of transfers or a place of transfer for the transfer of the shares of BC Glass and Lumber Ltd; therefore by virtue of subparagraph 9(7)(d)(i) the deceased's shares are deemed to have been situated in British Columbia.

Both counsel were in agreement that the two cases most closely in point were *A N Leckie Estate* v *MNR*, 39 Tax ABC 397; 65 DTC 744; [1966] Ex CR 1048; [1966] CTC 310; 66 DTC 5237, (Gibson, J, Exchequer Court); [1967] SCR 291; [1967] CTC 79; 67 DTC 5062, and *H M Schiller Estate* v *MNR*, [1968] CTC 233; 68 DTC 5164 (Jackett, P (now CJ), Exchequer Court); [1969] CTC 348; 69 DTC 5256 (Can SC). In the *Leckie* case, the deceased held shares in two companies. At the date of his death he was domiciled, and had been for some time prior, in Ontario One of the companies was a Manitoba public company, but the deceased was, for practical purposes, the sole shareholder. *The Companies Act* of Manitoba provided that the register of transfers was to be kept at its head office, but permitted the directors to authorize the keeping of branch transfer registers elsewhere, either within or without the province. One of the by-laws of the company provided for the keeping of a register of transfers The directors never at any time established a branch register. The main register was, in fact, always kept at the company's head office in Winnipeg. Mr Davis of the Tax Appeal Board (after a review of authorities) considered the shares of the company could be effectively dealt with only at Winnipeg, Manitoba: their situs was therefore Manitoba, and not Ontario, as contended by the estate. This decision was ultimately affirmed in the Supreme Court of Canada Cartwright, J, giving the judgment of the Court, said at pages 293-4 [80-81, 5063]:

> At the time of his death Adam Newton Leckie, hereinafter referred to as "the deceased", was domiciled and ordinarily resident at Oakville in the County of Halton in the Province of Ontario. He was the beneficial owner of the 30,003 common shares which were all the issued common shares of the Company and the registered owner of all of these except two used to qualify

*There was no evidence adduced to explain why particulars of the two share transfers (earlier referred to) in 1958 and 1970 were not set out in the annual reports for those years. I do not attach any real significance to the omission The transfers were mere formalities in order that a resident of Saskatchewan be appointed a director. Nor was there any evidence before me to explain why from 1964 to 1970 the reports in setting out the shareholdings in the company listed only the deceased as a shareholder (with 70 shares). In previous reports the deceased and one other shareholder had been listed Again, I do not place much weight on these errors. It is well known that annual reports, particularly for tightly held private companies are often prepared by legal secretaries in the office of a solicitor and frequently not scrutinized personally by the attending solicitor. I think the errors here are quite understandable and do not militate against the legal efficacy, if any, these reports have in deciding the issue in this case.

directors who were his nominees and acted entirely on his instructions. The preferred shares had no voting rights and it is not questioned that the deceased was at all times in complete control of the company.

The Company was incorporated pursuant to the provisions of the Manitoba *Companies Act* on October 2, 1957. Its head office was at all times in the City of Winnipeg. It maintained only one register for the transfer of shares and that register was at its head office in Winnipeg.

Section 346(1) of the Manitoba Act provides as follows:

> "346. (1) The register of transfers of every corporation with capital stock shall be kept at the head office of the corporation, and one or more branch registers of transfers, at which transfers may be validly registered, may be kept at such office or offices of the corporation or other place or places within or without the province as the directors, from time to time, appoint. Both registrars and transfer agents may issue and deliver share certificates in such manner as the directors of the company from time to time authorize."

The directors did not authorize a branch register to be kept at any office of the Company in Ontario or at any other place in Ontario.

On this state of facts it seems plain that the condition prescribed in clause (i) of paragraph (d) of subsection 8 of Section 9 of the *Estate Tax Act*, quoted above, was not fulfilled and for the purposes of that Act the situs of these shares is governed by clause (ii) of that paragraph and accordingly they shall be deemed to be situated in the place where the register of transfers or place of transfer nearest to the place where the deceased was ordinarily resident at the time of death was maintained by the company for the transfer thereof.

The wording of this provision is mandatory and appears to me to be clear and free from any ambiguity. On the admitted facts it has the inevitable result of declaring that the shares in question shall be deemed to be situated in Manitoba.

In the *Leckie* case, it appears the company at all times kept its records and carried on business in Manitoba. Its only connection with Ontario was because the sole shareholder resided there for some years and was domiciled there at the time of his death. The facts in the case before me are, of course, dissimilar.

The *Schiller* case also was concerned with the situs of shares for the purposes of estate tax. The estate contended the shares in question were situated in Ontario; the Minister contended their situs was in Saskatchewan. I think it convenient to quote at length from the decision of Ritchie, J, with whose judgment the other sitting members of the Court concurred. At pages 348-52 [5256-8]:

> The following portions of *The Companies Act*, RSS 1955, c 124 as amended by c 18 of the Statutes of Saskatchewan 1956, appear to me to be particularly relevant
>
> "76. (1) Every company shall keep in one or more books a register of its members, and shall enter therein the names of the subscribers to the memorandum and the name of every other person who agrees to become a member of the company, together with the following particulars:
>
> (a) the full name, address and occupation of every such subscriber and person, and of every person to whom section 91 or 92 applies, and who requests the company to enter his name in a representative capacity;
>
> (b) the date at which each person was entered in the register as a member;

(c) the date at which any person ceased to be a member;

(d) the kind and class of the shares held by each member, their nominal amount or par value, if any, and the amount paid or agreed to be considered as paid on each share;

(e) particulars of the transfer by any member of his shares;

(f) in the case of a person to whom section 91 or 92 applies, a description of the capacity in which such person represents any share in the company so held by him and the name of the estate or person so represented.

77. On the application of the transferor of any share in a company, the company shall enter in its register of members the name of the transferee in the same manner and subject to the same conditions as if the application for the entry were made by the transferee."

Section 78a

"78a. The register of members shall be kept at the registered office of the company; provided that the register may be kept at an office in the province of a trust company licensed under *The Companies Inspection and Licensing Act*, and so long as the register is so kept the trust company shall be subject to the provisions of this Act respecting the register in the same manner and to the same extent as if the register were kept at the registered office of the company, but the trust company shall under no circumstances be entitled to a lien on the register."

The Company in question was incorporated on May 26, 1927. By its Memorandum of Association it was provided that the registered office was to be situate at the City of Regina in the Province of Saskatchewan and no provision was ever made, either in the Company's Articles of Association or otherwise for any other registered office or branch registry.

From the time of its incorporation until the date of his death, the late Mr Schiller owned or controlled all the issued common shares of the Company; he was its president and exercised the full degree of control and management consequent upon his ownership of the shares and his office as president. Until March 1953, Mr Schiller resided in the City of Regina where he was domiciled and where the business of the Company was conducted, but from that date until his death he became resident and domiciled in the City of Toronto to which City he removed the Minute Book, Share Register Book and Shareholders' Register of the Company, and where he conducted all its affairs, although the Company continued to file annual returns as required by *The Companies Act* of Saskatchewan wherein it reported the address of its "Registered Office" as being 1702 Hamilton Street in the City of Regina, which was a building owned by it.

It is agreed between the parties that at the time of Mr Schiller's death the Share Register of the Company was physically situate in Toronto where entries were made in it from time to time as appears therein, but neither *The Companies Act* of Saskatchewan nor the Articles of Association of the Company authorized it to keep a Register of Members or a branch Register of Members anywhere except in the Province of Saskatchewan, and the whole question raised by this appeal is whether, notwithstanding the provisions of the Saskatchewan *Companies Act* requiring the Register of Members of a company to be kept in that Province, the fact that such Register was kept in the Province of Ontario at the time of Mr Schiller's death, had the effect of giving the Company's shares a situs in the Province of Ontario within the meaning of Section 9(8)(d) of the *Estate Tax Act*. In my view this case is governed by the direct authority of the decision of the Privy Council in *Erie Beach Company, Limited* v *The Attorney-General for Ontario*, [1930] AC 161. In that case the question for determination was whether the shares of a company incorporated under the Ontario *Companies Act* were situate in the Province of Ontario or the State of New York for succession duty purposes.

Under the Ontario *Companies Act* (RSO 1914, c 178) companies incorporated under that statute were required to keep a Register of Shares and Shareholders at the head office "within Ontario", but Mr Bardol, who owned or controlled all the shares in the company managed his business from his office in Buffalo, New York, where the books, records and documents of the company were kept, and such transfers as took place were made and recorded. In delivering the judgment on behalf of the Privy Council, Lord Merrivale said:

> "In *Attorney-General* v *Higgins*, [1914] AC 176, as in *Brassard* v *Smith*, [1925] AC 371, duty upon shares was in question. In *Attorney-General* v *Higgins, supra,* Baron Martin held that when transfer of shares in a company must be effected by a change in the register, the place where the register is required by law to be kept determines the locality of the shares. Lord Dunedin, in delivering the judgment of this Board in *Brassard* v *Smith,* epitomized the crucial inquiry in a sentence—Where could the shares be effectually dealt with? The circumstances relied upon by the appellants which show the predilection of the members of the plaintiff company for transacting its business in Buffalo—so far as they might—have, in their Lordships' opinion, no material weight. The shares in question can be effectually dealt with in Ontario only. They are therefore property situate in Ontario and subject to succession duty there"
>
> I take this to be authority for the proposition that the situs of a company's shares is at the place where its share register is required to be kept by law and that the physical presence of the share register in another jurisdiction has no effect upon the matter. I am accordingly of opinion that the words "...if any register of transfers or place of transfer is maintained by the corporation in that province..." as they are used in Section 9(8)(d)(i) of the *Estate Tax Act* must be construed as meaning "maintained" in accordance with the requirements of the statute under which the company in question was incorporated and that in the present case this must mean in the Province of Saskatchewan.

Counsel for the defendant here contends that on the authority of the *Schiller* case, the Prelutsky shares had a situs in Saskatchewan, not in British Columbia. He argues that the fact of extra-provincial registration by the company and the carrying on of business in British Columbia is insufficient to distinguish the *Schiller* decision; that there was no register of transfers or place of transfer in British Columbia; the only register of transfers and the only place of transfer was Saskatchewan; that province was the sole place where the shares of this company could be effectually dealt with.

To my mind, the first issue in this case is whether or not the share records kept by the company amounted to the maintenance by it of a register of transfers. The terms "register of transfers or place of transfer" are not defined in the *Estate Tax Act.* Some jurisdictions, in their legislation in respect of corporations, provide for a register of transfers in addition to what is commonly called a shareholder's register or register of members. One normally associates a register of transfers with a public company, and as inapplicable to a private company. The Companies Acts do not appear to make any distinction. The *Canada Corporations Act,* RSC 1970, c C-32 provides for the keeping of a register of transfers (see sections 109-110). The predecessor statute merely required that the company books record all transfers, with particulars. *The Business Corporations Act* of Ontario, RSO 1970, c 53, requires the keeping of a register of transfers, and makes provi-

sion for branch registers (see sections 158-160). The present British Columbia legislation (*Companies Act*, SBC 1973, c 18) has similar provisions (see sections 64 and 186).

In respect of this company, however, and at the relevant times there was no mention in the Saskatchewan legislation,* nor in the British Columbia legislation,† of a register of transfers, branch registers of transfers, or places of transfer. Companies incorporated under either statute, or registered extra-provincially in either province, were not required in law to keep a separate record called a "register of transfers" or to maintain a "place of transfer". In both provinces, companies were required to keep a register of members with prescribed information, including "particulars of the transfer by any member of his shares" (section 77 Saskatchewan; section 79 BC). The register of members was to be kept at its registered office, or at the office of a trust company (section 80 Saskatchewan; section 82 BC). If authorized by its articles, a company was permitted to keep without the province a register of members resident outside the company's "home" province (section 85 Saskatchewan; section 87 BC). A transfer of shares could not be registered unless a proper instrument of transfer was delivered to the company (section 95 Saskatchewan; section 97 BC).

In the case of this company, its minute book contained a sheet headed "Register of Shareholders" (Exhibit 25). This sheet is obviously a printed form similar to those easily obtained from any printer of legal stationery. It contains various headings including one: "Particulars of Transfer". The whole sheet is blank. I see no magic in printed forms. Nor do I think a shareholders' register need be kept with the particularity of the register filed as Exhibit 24 (obviously a copy of the register in the *Schiller* case). In my opinion, the minute book kept by this company, the share certificate stub book, and the copies of the annual reports, when looked at from a practical and businesslike point of view, complied with the requirements of the Saskatchewan statute in respect of the keeping of a register of members. I think also there was compliance with section 200 of the British Columbia statute. That section is as follows:

> 200. An extra-provincial company registered under this Act shall keep at its head office in the Province or at the office of its transfer agent or registered attorney a register of its members who reside in the Province, and enter therein their full names, addresses, and occupations, and full particulars of any transfer of shares to or from such members, and the register may be inspected and copies required in accordance with the provisions of section 83.

It should be remembered that the requirements set out in section 200 are minimum requirements only. Here the company, by means of the records I have mentioned, kept more than a register of its British Columbia members. It kept a register, in British Columbia, of all its members and by means of the share certificate stubs, particulars of the

**The Companies Act*, RSS 1965, c 131.

†*Companies Act*, RSBC 1960, c 67.

only two transfers of shares. The defendant points to section 85 of the Saskatchewan statute and says there was never any authority for the keeping of a branch register. It is true there is no article of association to that effect. *De facto*, however, as opposed to *de jure*, a branch register (and as I see it the principal register as well) were kept in British Columbia. By section 200 of that province's legislation, some form of register was required to be maintained.

I have little difficulty in taking the next step: that the records which I have concluded are sufficient to constitute a register of members, are equally sufficient to constitute the maintenance of a "register of transfers". I am also of the view the head office of the company in British Columbia (see the various annual reports) was a "place of transfer" for the company's shares in that province Jackett, P (now Chief Justice) found the shareholders' register in the *Schiller* case to be a "register of transfers" within the provisions of the *Estate Tax Act* I quote from page 237 [5166-7]:

> Insofar as Schiller's Limited is concerned, I am of the view that its Shareholders' Register, which, as I have already indicated, is in my view the "register of members" that it was required by *The Companies Act* to keep, was a "register of transfers" within section 9(8)(d) of the *Estate Tax Act*, that its "registered office" was a "place of transfer" within that section, and that both the Shareholders' Register and the registered office were "maintained" by the company *inter alia* "for the transfer" of shares in the company as required by the Saskatchewan law under which the company operates I come to that conclusion by reason of the view that the "transfer" contemplated by section 9(8)(d) is one that is effective as between the holder of the shares and the company, and not one that is merely effective between transferor and transferee.

To my mind the function of a register of transfers (when it is required by statute) is twofold: firstly to provide certain information so it is available to and for the benefit of the public, and secondly to provide a system whereby shares may be conveniently dealt with without the necessity of always being driven to the so-called home base of the particular company Similarly, providing various places of transfer is, in my view, aimed at facilitating (in public companies, particularly) dealings in shares In the case of a private company such as the one here, even less formality, in the sense of records, ought to be demanded, provided the minimum requirements of the relevant statutes are met * In this case, the principal statute is of course, the *Estate*

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*In the *Leckie* case, Gibson, J (although his judgment was reversed in the Supreme Court of Canada) has this to say as to the practical manner in which small, tightly-controlled companies are operated. See pages 314-15 [1052-3]:

> "The evidence adduced at the trial of this action established the kind of company that Leckie Enterprises Limited is and how it operated. It is a public company incorporated under the Manitoba *Companies Act*. Mr D A Thompson, QC, Winnipeg, Manitoba, gave evidence that at the material time only public companies could be incorporated under the Manitoba *Companies Act*. He described from the minute book Exhibit A-4 and the so-called stock ledger Exhibit A-5 how in fact this company did operate.
>
> This evidence established that the late Adam Newton Leckie was the sole beneficial shareholder and the sole operative officer and sole director with authority of this company; that in the minute book of the company *ex post*

Tax Act; the statute giving birth to the company and the statutes of the places where it chooses to carry on business must also be considered.

The facts in this case go much beyond the circumstances in the *Schiller* case. In that case the company apparently still carried on business in Saskatchewan (although the deceased Shiller managed its affairs from his residence and domicile in Ontario). The company's minute book, share register book and shareholders' register were

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facto from time to time were recorded various transactions entered into by the late Mr Leckie which required some corporate record; that there was no reference in the minutes of the company to the maintaining of any "register of transfers of shares" or "place of register".

In brief, the evidence established that the late Mr. Leckie operated Leckie Enterprises Limited as if it was a sole proprietorship owned by him.

The so-called share "register of transfers" in fact consisted merely of stubs from printed forms of share certificates. And at all material times the actual share certificate were endorsed in blank, and in such street form were pledged to and were in the custody of the Bank of Montreal head office branch in Winnipeg, Manitoba as collateral security for a loan; so that the "register of transfers" that the parties have agreed was kept at Winnipeg was a very basic thing, but quite satisfactory for a company such as this.

The problem is, what would a company such as this do to maintain a "place of transfer". Certainly, as indicated in the evidence, it would be ridiculous for it to have a public trust company as such, which, as stated, a company with many public shareholders often does.

To reach a practical answer to this problem it is relevant to keep in mind that the deceased Adam Newton Leckie considered and treated Leckie Enterprises Limited as part of himself, in the same manner as so many lay persons do in reference to corporations they wholly own and control. They do not look on such corporations as third parties separate and distinct from themselves even though legally it is uncontrovertible that such corporations are separate legal entities.

Taking this into consideration, there is no doubt in my mind on the facts of this case that the deceased in effect considered the shares of Leckie Enterprises Limited could be transferred at any material time where he was, as, for example, where he resided, namely, in Oakville, Ontario The question is whether or not this is sufficient to constitute Oakville a place of transfer to bring it within the statutory prescription that the corporation at the time of the deceased's death must in fact have maintained a "place of transfer" in the Province of Ontario before the provincial credit to this estate is allowable.

It is unequivocal that this statutory provision is remedial and it is also patent on the facts of this case that a grievous injustice and absurd result will obtain if this estate is denied this deduction of provincial tax credit.

On considering this sub-section in the *Estate Tax Act* it would seem clear that this provision was enacted having in mind the usual situation that obtains with a public corporation, namely, a large number of public shareholders, substantial corporate staff, good corporate business practice which would dictate the necessity of having a register of transfers of shares and places of transfers in all provinces where there were any number of shareholders, and so forth. But this provision also in law does not apply to Leckie Enterprises Limited which it is clear is an entirely different kind of corporation and one which the drafters of the legislation may not have had in mind. But the proper rules of construction of statutes must also apply to the case of this corporation."

kept in Toronto where the deceased lived, apparently as a matter of convenience. With the Prelutsky company, it ceased to carry on business in Saskatchewan (it moved its business activities to British Columbia); it became registered in accordance with the law; it maintained (not as a matter of convenience, but as required by British Columbia law) its records in respect of shareholders of the province. I have already pointed out the company complied (for practical purposes) with the minimum requirements of British Columbia law in respect of a list of resident shareholders. In fact, the company kept a register there of all shareholders. Here, in distinction to the *Schiller* case, there was more than the mere ". . . physical presence of the share register in another jurisdiction".

I have designedly expressed no opinion as to whether this company on the facts here, maintained a "register of transfers or place of transfer" in the province of Saskatchewan as well as in British Columbia. That may well be.*

For the reasons I have given, the appeal is allowed. The assessment will be referred back to the Minister for reassessment with the direction that at the date of death of the deceased the shares in question are deemed to have been situated in the Province of British Columbia. The plaintiff is entitled to the costs of this action.

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*The question of situs of shares has been described by Laskin, J. (now Chief Justice) as a fiction. See *Minister of Finance BC* v *First National Bank of Nevada,* [1974] CTC 92 at 96:

"But because the situs of shares has come to depend on a test that looks to a transfer on a share registry, a logical difficulty exists if one envisages a transfer a moment before death (and hence before the *Succession Duty Act* operates) and, similarly, a moment after death (when the Act has already taken effect).

The event upon which duty becomes payable, namely, death, involves at the same time a determined situs of property on which it must be paid if the property is in the Province. In my view, it would be compounding fiction to apply the test for situs of shares according to an event (as prescribed by the challenged subsection 94(1) taking place after the death of the person whose death is the occasion for the imposition of tax. Application of the test at that time, by reference to a supposed transfer according to the statutory prescription, would admittedly, result in changing the situs as it would otherwise be."

In the *Leckie* case, the Newfoundland company, in which the deceased held shares had, at the date of Leckie's death, a branch register in Ontario (where the deceased was domiciled). The "fiction" as to situs (for the purposes of estate tax) placed the Newfoundland shares in Ontario. Because there was no factual basis for a "fiction" in respect of the shares of the Manitoba company, those shares were, in law, situate in Manitoba. In the result, the Newfoundland shares escaped the full impact of federal tax.

TAB 11

CITATION: Electro Sonic Inc. (Re), 2014 ONSC 942
COURT FILE NO.: 31-1835443 and 31-1835488
DATE: 20140210

SUPERIOR COURT OF JUSTICE – ONTARIO

COMMERCIAL LIST

RE: IN THE MATTER OF the Notice of Intention to Make a Proposal of Electro Sonic Inc.

AND IN THE MATTER OF the Notice of Intention to Make a Proposal of Electro Sonic of America LLC

BEFORE: D. M. Brown J.

COUNSEL: H. Chaiton, for the Applicants, Electro Sonic Inc. and Electro Sonic of America LLC

I. Aversa, for the Royal Bank of Canada

HEARD: February 10, 2014

REASONS FOR DECISION

I. Motions for administrative consolidation of NOI proceedings, an Administrative Professionals Charge and authorization to initiate Chapter 15 proceedings

[1] Electro Sonic Inc. ("ESI") is an Ontario corporation with its registered office in Markham, Ontario. Electro Sonic of America LLC ("ESA") is a Delaware limited liability corporation which carries on business from a facility in Tonawanda, New York. Both companies are owned by the Rosenthal family. Both companies are involved in the distribution of electronic and electrical parts.

[2] On February 6, 2014, both companies filed notices of intention to make proposals pursuant to section 50.4 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3. MNP Ltd. was appointed proposal trustee.

[3] Both companies applied for three types of relief: (i) the administrative consolidation of the two proceedings; (ii) the approval of an Administrative Professionals Charge on the property of both companies to secure payment of the reasonable fees of the legal advisors; and, (iii) authorization that the proposal trustee could act as foreign representative of the NOI proceedings and could apply to the United States Bankruptcy Court for relief pursuant to Chapter 15 of the *United States Bankruptcy Code* (the "Code"). At the hearing I granted the orders sought; these are my reasons for so doing.

II. Administrative consolidation

[4] Bankruptcy proceedings in this Court operate subject to the general principle that the litigation process should secure the just, most expeditious and least expensive determination of every proceeding on its merits: *Bankruptcy and Insolvency General Rules*, s. 3; *Ontario Rules of Civil Procedure*, Rule 1.04(1). One practical application of that general principle occurs when courts join together two closely-related bankruptcy proceedings so that they can proceed and be managed together. This procedural or administrative consolidation does not involve the substantive merger or consolidation of the bankruptcy estates, merely their procedural treatment together by the court. Administrative consolidation of two bankruptcy proceedings would be analogous to bringing two separate civil actions under common case management.

[5] In the present case, the evidence disclosed that the operations of ESI and ESA are highly integrated, sharing a common managing director as well as consolidated accounting, finance and human resource functions, including payroll. As well, ESI has been the sole customer of ESA in 2013 and 2014.

[6] Given the possibility of the applicants applying together at future dates for relief such as stay extensions and sale approvals, and given that both companies share the same lender – Royal Bank of Canada – it made sense to order that both bankruptcy proceedings be consolidated for the purposes of future steps in this order. For those reasons, I granted the administrative consolidation order sought.

III. Administrative Charge

[7] The applicants seek a charge in the amount of $250,000 on the property of ESI and ESA to secure payment of the reasonable fees and expenses of the legal advisors retained by the applicants, MNP and its legal counsel (the "Administrative Professionals"). The applicants sought an order granting such an Administrative Professionals Charge priority over security interests and liens, save that the Charge would be subordinate to the security held by RBC and all secured claims ranking in priority thereto.

[8] The applicants filed evidence identifying their creditors, as well as the results of searches made under the Personal Property Registration systems in Ontario and British Columbia and under the Uniform Commercial Code in respect of ESA. The applicants complied with the service requirements of *BIA* s. 64.2(1).

[9] RBC did not oppose the Charge sought, but advised that it might later bring a motion to lift the stay of proceedings to enable it to enforce its security or to appoint an interim receiver.

[10] As noted, ESA is a Delaware corporation with its place of business in New York State. ESA filed evidence that it has a U.S. dollar bank account in Canada, although it did not disclose the amount of money in that account.

[11] *BIA* s. 50(1) authorizes an "insolvent person" to make a proposal. Section 2 of the *BIA* defines an "insolvent person" as, *inter alia*, one "who resides, carries on business or has property

in Canada". That statutory definition would seem to establish the criteria upon which an Ontario court can assume jurisdiction in proposal proceedings, rather than the common law real and substantial connection test articulated by the Supreme Court of Canada in *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17.

[12] In the present case, I took into account several factors in granting a Charge over the property of both applicants, including property in New York State:

(i) the senior secured for both companies, RBC, did not oppose the granting of the Charge;

(ii) according to the results of the UCC search, the other secured creditor of ESA which has filed a collateral registration is ESI, a related company, which seeks the Charge;

(iii) the operations of ESI and ESA are highly integrated;

(iv) ESA has filed evidence of some assets in Canada, thereby technically meeting the definition of "insolvent person" in the *BIA*: *Callidus Capital Corporation v. Xchange Technology Group LLC*, 2013 ONSC 6783, para. 19; and,

(v) the proposal trustee intends to apply immediately for recognition of these proceedings under Chapter 15 of the *Code* which will afford affected persons in the United States an opportunity to make submissions on the issue.

IV. Proposal trustee as representative in foreign proceedings

[13] The proposal trustee was the most appropriate person to act as a representative in respect of any proceeding under the *BIA* for the purpose of having it recognized in a jurisdiction outside Canada: *BIA*, s. 279. It followed that the proposal trustee should be authorized to apply to the United States Bankruptcy Court for relief pursuant to Chapter 15 of the *Code*.

D. M. Brown J.

Date: February 10, 2014

TAB 12

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Andover Mining Corp. (Re),*
2013 BCSC 1833

Date: 20131004
Docket: B131136
Registry: Vancouver

In the Supreme Court of British Columbia
in Bankruptcy and Insolvency

In the Matter of the notice of Intention to Make a Proposal of

Andover Mining Corp.

And in the matter of

The Application by Enirgi Group Corporation under ss. 50.4(11) and 47.1(1)(b) of the B*ankruptcy and Insolvency Act*, R.S.C. 1985, c. B-5

Between:

Enirgi Group Corporation

Creditor

And

Andover Mining Corp.

Insolvent Person

Before: The Honourable Mr. Justice Steeves

Reasons for Judgment

Counsel for the Creditor:	D.R. Brown M. Nied
Counsel for the Insolvent Person:	M.R. Davies
Place and Date of Trial/Hearing:	Vancouver, B.C. September 24, 2013
Place and Date of Judgment:	Vancouver, BC. October 4, 2013

Introduction

[1] Enirgi Group Corporation ("Enirgi") holds three promissory notes (by means of assignment) with a total value of $6.5 million against Andover Mining Corp. ("Andover"). One of the notes, in the amount of $2.5 million, was due on October 1, 2012 and it has not been paid. In August 2013 Andover filed an intention to file a proposal under s. 50.4(1) of the *Bankruptcy and Insolvency Act* R.S.C. 1985 c. B-3 ("*BIA*"). That proposal expires on October 4, 2013.

[2] This is a decision about two applications related to those notes.

[3] Andover seeks an order pursuant to s. 50.4(9) of the *BIA* for an extension of time for the filing of a proposal for a period of 45 days. According to Andover it has acted, and is acting, in good faith and with due diligence. Further, it would likely be able to make a viable proposal if the extension was granted and no creditor would be materially prejudiced if the extension was granted. Andover also submits that it has significantly more assets than debts and Enirgi has persistently been disruptive of the affairs of Andover as part of a campaign to target the assets of Andover.

[4] The second application is by Enirgi pursuant to s. 50.4(11) of the *BIA*. It seeks declarations that Andover's attempt to file a proposal is immediately terminated, a previous stay of proceedings is lifted, Andover is deemed bankrupt and a trustee in bankruptcy is appointed. The primary basis for Enirgi's application is the submission that Andover will not be able to make a proposal before the expiration of the period in question that will be accepted by Enirgi. Enirgi disputes that Andover has significantly more assets than debts. It also submits that it has a veto over any proposal by Andover because it is the largest creditor, it has lost faith in Andover's ability to manage its assets and it is concerned that Andover is restructuring its affairs to dissipate its assets. In the alternative, if there is to be an extension of Andover's proposal, Enirgi submits that a receiver should be appointed pursuant to s. 47.1 of the *BIA* to ensure transparency and fairness.

[5] Each party submits that its application should supersede the application of the other party. There are also disputes between the parties about a number of factual issues set out in affidavit evidence.

Background

[6] Andover is an advanced mineral exploration company incorporated under the laws of British Columbia in 2003. Its shares have been listed for trading on the TSX Venture Exchange since 2006. As of September 6, 2013 approximately 12,000,000 shares of Andover were issued and outstanding with more than 398 shareholders. Andover had a market capitalization of about $9 million, as of September 14, 2013; its payroll is $2,441 per month. According to publicly available audited financial statements, as of March 31, 2013, Andover had $42.5 million of assets and $9.1 million of liabilities.

[7] Andover has two main assets. It owns 83.5% of Chief Consolidated Mining Company ("Chief") that owns extensive amounts of land and mining equipment in Utah, U.S.A. Andover also owns 100% of the shares of Andover Alaska Inc. ("Alaska"), a company with large land holdings and mineral claims in Alaska, U.S.A. Affidavit evidence from Andover is that it has the prospect of significant and imminent cash flow from more than one project. This is discussed below.

[8] Enirgi is a natural resources development company incorporated under the laws of Canada.

[9] In 2011 and 2012 Andover issued non-interest bearing, unsecured promissory notes to Sentient Global Resources Fund IV ("Sentient"). The first note was dated September 23, 2011 with a principal of $2.5 million and a maturity date of October 1, 2012. The second note was dated April 30, 2012 with a principal of $2.5 million and a maturity date of May 1, 2014. The third note was dated August 31, 2012, the principal was $1.5 million and the maturity date was September 1, 2014.

[10] In September 2012 there were discussions between Andover, Enirgi and Chief in regards to a potential joint venture, with the possibility that Enirgi would take

majority ownership of Andover. A memorandum of understanding was executed and Enirgi commenced a process of due diligence. According to Enirgi, the due diligence revealed a complex joint venture agreement between Chief and another company. Ultimately, in March 2013, the parties were not able to agree on terms that were commercially acceptable to Enirgi. On March 27, 2013 Sentient assigned the above three promissory notes to Enirgi including all of the rights and obligations of Sentient under the terms of the notes. These notes are the subject of the current applications. According to Enirgi, it made a reasonable business decision to cease discussions with Enirgi, it became the assignee of the three promissory notes and it then sought repayment of the first promissory note.

[11] Andover had not paid the first promissory note at this time, March 2013 (and it had not been paid up to the date of the hearing of these applications). According to Andover, the reason it was not paid on the due date was because there was an expectation that Sentient and then Enirgi would become a partner of Andover in the joint venture (or something more significant) and discussions on this were taking place as late as January 2013. The expectation of all parties, according to Andover, was that any agreement would have included cancellation of the first promissory note. Andover says Enirgi knew this and agreed to it.

[12] By letter dated April 5, 2013 Enirgi advised Andover of the assignment of the notes from Sentient to it and that the full amount of the first note (with a maturity date of October 1, 2012) remained outstanding. The letter also expressly put Andover on notice that demand for repayment could occur at any time. According to Andover, Enirgi's demand was made at a meeting in Toronto in May 2013. Andover describes the demand from Enirgi as a "shock" because Andover believed Enirgi acquired the notes from Sentient as part of a process to become a partner with Andover. Because of the short demand period, three days, Andover had no ability to meet the demand. This was the beginning of Enirgi becoming "very aggressive", according to Andover.

[13] In a letter dated May 28, 2013 Andover advised Enirgi that it was making its best efforts to secure funding to repay the first promissory note. On May 30, 2013

Enirgi again demanded repayment of the first promissory note. In a letter of that date Enirgi advised Andover that failure to pay would be considered default and the second and third notes would become immediately due and payable. Enirgi takes the position that, by application of the wording of the other two notes, they are now due and owing. As above, the total for all three notes is $6.5 million and the due date for the second and third notes are May 1, 2014 and September 1, 2014, respectively. Whether Enirgi is correct in its interpretation of the notes and, therefore, all three notes are now due and owing is not an issue to be decided at this time.

[14] At the end of May 2013 Andover received $1.7 million as a result of a private placement. Enirgi objects to the fact that Andover did not make prior public disclosure of Enirgi's demand letter prior to closing the private placement. Andover did not use the funds from the private placement to repay the first note. There is a dispute between the parties as to how the $1.7 million was used.

[15] In a letter dated May 31, 2013 Andover advised Enirgi that it was expecting to receive funds from Chief greater than the amount of the first promissory note. The letter also offered a written undertaking to pay the first promissory note no later than September 3, 2013. On June 3, 2013 Enirgi demanded repayment of the first note, for the third time.

[16] Enirgi commenced this action on June 4, 2013 seeking to recover the total amount of the three promissory notes. At the end of July 2013 Andover filed affidavit evidence that it was engaged at the time in negotiations with third parties to raise funding to pay the $2.5 million of the first promissory note. This payment was expected to occur on or before August 22, 2013. On August 8, 2013 the parties agreed to a Consent Order in the following terms:

> . . .
>
> BY CONSENT the Defendant [Andover] is required to pay the Plaintiff [Enirgi] the amount of CAD $2,604,000 on August 22, 2013 and if that amount is not paid by the Defendant to the Plaintiff as of August 22, 2013 this order shall for all purposes be of the same effect as a judgment of This Honourable Court for the payment of CAD $2,604,000 by the Defendant to the Plaintiff;

. . .

[17] Andover says it agreed to the Consent Order because it expected to receive the funds to pay the Order. However, Enirgi obstructed the negotiations that were ongoing for the loan. Enirgi says that Andover's actions were misleading. These and other disputes between the parties are discussed below.

[18] According to Enirgi, Andover avoided having to meet its obligations pursuant to the first promissory note and the August Consent Order and this resulted in Enirgi losing confidence in Andover. Disclosure of information from the trustee was sought by Enirgi but, according to their submission, only very limited information was provided with regards to Andover's prospects and intentions. For example, Enirgi characterizes a September 6, 2013 letter from Andover as unresponsive and inconsistent with previous statements made by Andover. Enirgi also takes issue with a cash flow statement prepared by the trustee and it is submitted by Enirgi that subsequent requests for disclosure were also not complied with. Enirgi responds, in part, by saying that, as a result of a sophisticated tracking system, Andover has information available to it at a level of detail that is not normally available.

[19] As well, on September 4, 2013, Enirgi sent Andover a proof of claim and requested that Andover approve the claim. The claim was for payment of all three promissory notes as well as court order interest with respect to the first promissory note. In a letter dated September 12, 2013 the trustee acknowledged Enirgi's proof of claim but denied that the second and third promissory notes were due and payable. Further, according to the trustee, the proof of claim should be amended accordingly or it would be denied.

[20] On August 22, 2013 Andover filed a notice of intention to make a proposal under s. 50.4(1) of the *BIA* and a trustee was appointed. It would have been open to Enirgi to enforce the judgment described in the August 8, 2013 Consent Order the following day, August 23, 2013. The notice listed all of the creditors of Andover and the total is $7,476,961.43. Enirgi is listed as the largest single creditor of Andover with a claim of $6.5 million.

[21] During the hearing of these applications on September 24, 2013 counsel for Andover presented an affidavit filed the same day. Attached to the affidavits were two short emails and a letter from the president of Ophir Minerals LLC ("Ophir") in Payson Utah, U.S.A. The letter states:

> The following is a letter stating the intentions of Ophir Minerals LLC and Andover Ventures.. In an attempt to help secure the future of Andover Ventures, Al McKee, CEO of Ophir Minerals LLC, is in the process of securing a three dollar million loan ($3,000,000) privately. This loan will be provided to Gordon Blankstein, Operating Manager for Andover Ventures. This loan will be considered prepayment of royalties due to Andover Ventures through mining operations of Ophir Mineral LLC.; The repayment of the loan will be deducted from the royalties to be paid. The purpose of the loan is to assist in the future financial security between the two companies to ensure future business operations.
>
> [Reproduced as written].

[22] Andover relies on this letter as a basis for meeting its obligation to pay the first promissory note in the amount of $2.5 million. Enirgi points to the use of "in the process" in the letter and submits that the letter is of little weight.

[23] At the conclusion of argument I was advised by counsel that Andover's proposal expired that day, September 24, 2013. I extended the proposal to October 4, 2013.

Analysis

Review of the evidence

[24] There are some significant differences between the parties about the facts in this case. Some of these are portrayed by one party as evidence of bad faith on the part of the other party. These are primarily set out in original and reply affidavits from Gordon Blankstein, the CEO of Andover, and Robert Scargill, the North American Managing Director of Enirgi. There are the usual difficulties preferring one version of events over another on the basis of affidavit evidence. A full trial would be necessary to fully and conclusively decide these issues and this matter was set down for two hours, presumably because of the need to hear at least the application by Andover on the day its proposal expired.

[25] It is not in dispute that Enirgi holds three promissory notes (by means of assignment) with a total value of $6.5 million against Andover. One of the notes, in the amount of $2.5 million was due on October 1, 2012 and it has not been paid for the reasons discussed below. Enirgi's right to have the other two notes paid out is in dispute since they are due in 2014; that dispute is not part of the subject applications. All three notes are unsecured, non-interest bearing instruments.

[26] In April or May 2013 Enirgi demanded payment of the first note ($2.5 million). Enirgi made a second demand in May 2013 and a third in June 2013.

[27] In June 2013 Enirgi commenced this action and in August 2013 Andover filed a notice of intention to file a proposal pursuant to s. 50.4(1) of the *BIA.* A trustee was appointed. A Consent Order of this court, dated August 8, 2013, stated that Andover was to pay an amount of $2,604,000 to Enirgi on August 22, 2013.

[28] Andover has not paid the $2.5 million due on the first promissory note (or the amount of $2,604,000) for the reasons discussed below.

[29] I set out some of the factual differences between the parties as reflected in the affidavit evidence and my conclusions on that evidence as follows:

(a) Mr. Blankstein, on behalf of Andover, deposes that in May 2013 Enirgi issued an Insider Report advising the public of its demand on the first promissory note. According to Mr. Blankstein there "was no apparent legal basis to do so" and the directors of Andover "considered this a move to deflate Andover's share value and curtail its ability to raise funds."

In reply Mr. Scargill, with Enirgi, deposes that it "did not issue an insider report or otherwise advise the public that it had made demand on the first note at or about the time it made such demand on May 23, 2013." Further, "the first public announcement of the fact of the demand was made by Andover on June 5, 2013 only after Enirgi had commenced legal proceedings."

The result is that I am asked to prefer one person's affidavit evidence over another: either Enirgi issued an insider's report with the information of its demand, as deposed by Mr. Blankstein, or it did not, as deposed to by Mr. Scargill. However, since there is no evidence of an insider report with the statement in question I am unable to agree with Andover that such a report exists.

(b) There were negotiations between Andover and Enirgi (and Chief) in October 2012 about a potential joint venture. A memorandum of understanding was signed but, following due diligence by Enirgi, there was no agreement on the joint venture.

According to Mr. Blankstein the prospect of these negotiations being successful (as well as previous negotiations to a similar end with Sentient) was the main reason that the first note was not paid. It was anticipated, by Andover at least, that any joint venture agreement would include purchase of stock in Andover and cancellation of the first note. There were "verbal assurances" from Sentient and Enirgi that there was no intention to make demand on the note and it was intended to convert the note as part of a venture agreement. Further, according to Andover, the demand on the first note was the beginning of a very aggressive campaign by Enirgi to ultimately get access to the assets of Andover, assets which were and are worth significantly more than the first note or all three notes.

In his affidavit evidence Mr. Scargill agrees that there were negotiations as described by Mr. Blankstein. However, they ended when he (Mr. Scargill) asked Mr. Blankstein to consider all or majority ownership by Enirgi in Andover. This was the "only possible involvement" by Enirgi in Andover, according to Mr. Scargill. He asked Mr. Blankstein to consider "what sort of transaction" that he and Andover might be interested in "but no transaction was ever proposed by Mr. Blankstein outside of a sale by him and his family of their equity ownership stake." Since there was "no realistic likelihood" of a

transaction, Enirgi decided to cease its efforts and turn its attention on being repaid for the first note.

It is clear that negotiations between Andover and Enirgi did not work out. It is also clear that Andover was surprised that the three promissory notes were assigned from Sentient to Enirgi. The evidence does not suggest that either party was more responsible than the other for the lack of an agreement (assuming there is some legal significance to that issue).

Mr. Scargill does not deny or mention the point raised by Mr. Blankstein that Enirgi agreed not to demand payment of the first note. Therefore, I conclude that there was at least acquiescence between the parties at the time of their negotiations that cancellation of the first promissory note would be part of any agreement. This conclusion also explains why payment on a note worth $2.5 million and due in October 2012 was not demanded by Sentient and then Enirgi until after the negotiations failed.

In any event, the negotiations did fail and any commitment not to demand payment on the note ended. There is no evidence of any collateral agreement that amended the terms of payment and, therefore, the terms of the notes applied. That was obviously a shock to Andover's cash flow but it was permitted under the terms of the note, including the short period to make payment.

(c) As above, I am not determining the issue of whether the second and third promissory notes are now due and payable because the first note was not paid.

A related matter is that Enirgi says that one of the deficiencies by Andover in disclosure of information relates to the Proof of Claim sent by Enirgi to Andover in September 2013. It required the trustee of Andover to confirm that the second and third notes were due and payable. The trustee declined to do so as long as the proof of claim included all three notes.

Since the issue of whether the second and third notes are now due is very much in dispute, I can find nothing objectionable in the trustee's response.

(d) In May 2013 Andover obtained about $1.7 million from a private placement. According Mr. Scargill, none of this money was used to pay the first promissory note. Instead, it was used to repay a shareholder loan and to settle a wrongful dismissal lawsuit. Enirgi is concerned that all of the money from the private placement has been used for purposes other than payment of the first note.

Mr. Blankstein agrees that Andover received $1.7 million from a private placement. However, he deposes that Mr. Scargill "neglects to include" all of the facts although Mr. Scargill "knew all about" the placement "from its inception" and Enirgi "was invited to participate in it." Specifically, Mr. Scargill was "fully aware" of the payment of the shareholder loan (in the amount of $375,000). He was told about it at the time and he "never indicated any objection" to it then. Further, the funds from the placement were committed in April 2012 to "pay certain items" and for the operating expenses of Andover "for the next several months, well before the sudden demand for repayment by Energi [sic] on May 23, 2013." Despite knowing that Andover was to receive the money from the private placement at the time of its demand, Enirgi raised no complaints or allegations until Mr. Scargill's affidavit, filed September 17, 2013.

Mr. Blankstein also deposes that the former employee involved in the lawsuit was an employee of Chief and it made the settlement. The settlement was for $275,000 but it is to be paid in instalments and only $50,000 has thus far been paid. Chief is responsible for paying the balance.

Overall there was a private placement of about $1.7 million dollars that was received by Andover before its proposal was filed. It was used to pay for a shareholder loan and for operating expenses and some of these at least were committed to as early as April 2012. Further, the wrongful dismissal payment

was a matter involving Chief, rather than Andover, and only $50,000 has been paid by Chief. I conclude that Mr. Scargill did not have all of the pertinent information before him when he gave his affidavit evidence.

(e) According to the affidavit of Mr. Scargill, Andover's agreement to the August 2013 Consent Order:

> … was calculated to encourage Enirgi to consent to the Judgment and mislead Enirgi into believing that Andover would be in a position to pay the Judgment as required and that available funds would not be used in the interim, for the Preferential Payments [the private placement, discussed above] or other improper purposes.

On the other hand, Mr. Blankstein deposes that Andover agreed to the Consent Order because it thought at the time that it was to receive $3 million as a result of mortgaging assets of its Utah operations, through Chief. However, the mortgage did not complete. Efforts to obtain an unsecured loan were then unsuccessful. Mr. Blankstein has also deposed that in the summer of 2013, counsel for Enirgi contacted counsel for Andover, "[d]espite there being no apparent legal basis for doing so", and "insisted that Chief entering into a mortgage transaction would violate the agreements between Energi [sic] and Andover and was prohibited." This left Mr. Blankstein "scrambling to raise an unsecured loan in a very short time frame."

In argument, Enirgi described Mr. Blankstein's evidence on this issue as misleading. The basis of this is that the correspondence between counsel was without prejudice, it occurred on or about June 21, 2013 and, therefore, "the suggestion that Andover only learned after August 8, 2013 [the date of the Consent Order] that Enirgi refused to consent is clearly misleading."

From this I take it that Enirgi did contact Chief to say any mortgage by Chief would violate agreements between Andover and Enirgi. This took place before the date of the Consent Order. On its face it supports the contention by Andover that Enirgi has obstructed its efforts to obtain funding although there

is no evidence or argument before me to decide whether Enirgi was correct in taking the view it did with Chief.

(f) Enirgi asserts, through Mr. Scargill, that Andover is attempting to restructure its assets and this is evidenced from its "continued failure to engage Enirgi" by refusing to provide information regarding its plans or opportunities, despite Enirgi's repeated requests for information. Mr. Blankstein replies by deposing that Andover is not attempting to restructure; [i]t is simply attempting to gain some time and distance so as to be able to pay Enirgi."

All that can be said on this point is that there is no evidence that Andover is restructuring its assets. Mr. Scargill is concerned that is happening or it is going to happen but the evidence here does not support that conclusion.

(g) In argument Enirgi submits that Andover has been "unresponsive" to requests for information about the proposal process being followed by Andover. For example, Mr. Scargill deposes that Andover, in correspondence in August 2013, did not adequately address the concerns of Enirgi. Similarly, according to Enirgi, Andover has provided a deficient cash flow statement and has generally provided inadequate information. Enirgi also submits that Andover has given only "vague assertions" and inconsistent information about its assets and its potential plans.

For its part, Mr. Scargill deposes that Andover asked Enirgi by letter of September 6, 2013 (through counsel) to present "whatever proposal or suggestion" Enirgi might have and Andover would be "more than happy to consider same." No reply was received.

Mr. Blankstein also deposes that Andover provided information to Enirgi about all of Chief's information, files and data with the agreement by Enirgi that it would be returned. It was not returned. In reply Mr. Scargill deposes that "by oversight" the information was not returned and it was returned on or about September 18, 2013.

The evidence is that both parties have been tactical in their requests for information and their responses to those requests. There has been some unresponsiveness and some vagueness as the parties have positioned themselves for their competing applications. I can find no legal or other issue that is relevant to those applications.

(h) In its 2013 financial statements Andover stated that it had filed a notice "to seek creditor protection" and it was done "to ensure the fair and equitable settlement of the Company's liabilities in light of the legal challenges launched" by Enirgi. According to Enirgi the reference to "legal challenges" is incorrect and this statement by Andover demonstrates that the notice of proposal was a "purely defensive" act on the part of Andover.

I take it as beyond dispute that Andover has been operating in a defensive manner since the demand on the first note was made in May 2013. Further, I accept that its notice of intention to file a proposal is also defensive. As for what are "legal challenges" that is a phrase that is capable of many meanings.

(i) Andover alleges that Enirgi has obstructed its efforts to obtain financing to pay the first promissory note of $2.5 million. Mr. Blankstein deposes that, to this end, Enirgi has done the following (in part, this is a summary of some of the above issues): made an abrupt demand for payment (after it and Sentient had given verbal assurances that there would be no demand); made demands on the second and third promissory notes that are payable in 2014; interfered in attempts by Andover to enter into a joint venture with Ophir without any legal basis to do so; and disrupted a mortgage transaction between Andover and Chief in the summer of 2013.

Mr. Scargill, in reply, deposes that neither he nor anyone ("after due inquiry") has been in contact with Ophir.

The allegation by Andover about Ophir is a vague one and I accept Mr. Scargill's evidence on it. I have discussed the issues of Enirgi's abrupt demand on the first promissory note and the allegation that Enirgi disrupted a mortgage arrangement between Andover and Chief above. Enirgi interprets the language of the three promissory notes to mean that all are due on default of the first one. That is a legal issue that is not before me.

(j) Enirgi attempts to minimize the assets of Andover and maximize its debts. There may well be more detailed evidence that supports a different valuation of the assets than presented by Andover. However, on the evidence in this application, I accept that Andover is cash poor and asset rich.

[30] Despite vigorous argument to the contrary by both parties I am unable to find bad faith on the part of either party. There is the apparent communication by Enirgi to Chief about a possible mortgage arrangement for Andover which reflects the aggressive approach that Enirgi has taken to Andover. That represents the aggressiveness of Enirgi rather than any bad faith.

[31] Clearly there has been a falling out between the parties and it is also clear that Andover is vulnerable because of its lack of cash and Enirgi is being aggressive in seeking repayment of, at least, the first note.

The applications

[32] Andover now seeks an extension of its proposal pursuant to s. 50.4(9) of the *BIA* and Enirgi seeks termination of Andover's proposal pursuant to s. 50.4(11) of the *BIA*.

[33] I set out the two provisions of the *BIA* at issue as follows;

Extension of time for filing proposal

50.4(9) The insolvent person may, before the expiry of the 30-day period referred to in subsection (8) or of any extension granted under this subsection, apply to the court for an extension, or further extension, as the case may be, of that period, and the court, on notice to any interested persons that the court may direct, may grant the extensions, not exceeding 45 days for any individual extension and not exceeding in the aggregate five

> months after the expiry of the 30-day period referred to in subsection (8), if satisfied on each application that
>
> (a) the insolvent person has acted, and is acting, in good faith and with due diligence;
>
> (b) the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and
>
> (c) no creditor would be materially prejudiced if the extension being applied for were granted.
>
> . . .
>
> **Court may terminate period for making proposal**
>
> 50.4(11) The court may, on application by the trustee, the interim receiver, if any, appointed under section 47.1, or a creditor, declare terminated, before its actual expiration, the thirty day period mentioned in subsection (8) or any extension thereof granted under subsection (9) if the court is satisfied that
>
> > (a) the insolvent person has not acted, or is not acting, in good faith and with due diligence,
> >
> > (b) the insolvent person will not likely be able to make a viable proposal before the expiration of the period in question,
> >
> > (c) the insolvent person will not likely be able to make a proposal, before the expiration of the period in question, that will be accepted by the creditors, or
> >
> > (d) the creditors as a whole would be materially prejudiced were the application under this subsection rejected,
>
> and where the court declares the period in question terminated, paragraphs (8)(a) to (c) thereupon apply as if that period had expired.

[34] Each party says that its application should prevail over the other's application. I will review the case law presented by the parties on this issue as well as some interpretive issues under s. 50.4(9) and s. 50.4(11).

The approaches in *Cumberland* and in *Baldwin*

[35] In a decision relied on by Enirgi, Mr. Justice Farley of the Ontario Court of Justice denied the appeal of a registrar's decision that had dismissed an application for an extension of time by debtors under s. 50.4(9): *Baldwin Valley Investors Inc. (Re)*, [1994] O.J. No. 271, (C.J. (Gen. Div.)). The court noted that the test under s. 50.4(9)(b) was whether the debtors "would likely be able to make a viable proposal if the extension being applied for was granted." "Likely" did not mean a certainty and, using the Oxford Dictionary, it was defined as "such as might well

happen, or turn out to be the thing specified, probable … to be reasonably expected." Applied to the facts, the conclusion was that it was not likely the debtors would be able to make such a proposal since they had only submitted a cash flow statement. At para. 4, Mr. Justice Farley concluded "I do not see the conjecture of the debtor companies' rough submission as being 'likely'". Further, the court noted at para. 6 that the debtors did not even attempt to meet the condition of material prejudice under s. 50.4(9)(c) and the debtor was changing inventory into cash.

[36] The court also noted that the registrar (who made the decision being appealed) focused on the fact that the creditor had lost all confidence in the debtor. The creditor held a substantial part of the creditor's debt. Mr. Justice Farley pointed out, at para. 3, that that was not the test under s. 50.4(9)(b):

> This becomes clear when one examines s. 50.4(11)(b) and (c); it appears that Parliament wished to distinguish between a situation of a viable proposal (s. 50.4(9)(b) and 11(b)) versus a situation in which it is likely that the creditors will not vote for this proposal, no matter how viable that proposal (s. 50.4(11)(c) but with no corresponding clause in s. 50.4(9)).

[37] Enirgi relies on this statement for its submission that its application for termination under s. 50.4(11) should prevail over the application of Andover under s. 50.4(9).

[38] However, that statement was made as a comment on the previous registrar's reliance on the fact that the creditor (who held significant security) would not vote for any proposal. Mr. Justice Farley in *Baldwin* pointed out that was not the test under s. 50.4(9). He reasoned that this was clear because Parliament had distinguished between a situation of a viable proposal under s. 50.4(9)(b) and s. 50.4(11)(b) from a situation where it is likely that the creditors will not vote for a proposal no matter how viable, under s. 50.4(11)(c). In s. 50.4(9) there was no clause corresponding to s. 50.4(11)(c). The result is that this part of *Baldwin* does not support Enirgi's submission that an application under s. 50.4(11) supersedes one under s. 50.4(9).

[39] The result in *Baldwin* was that the debtor's application under s. 50.4(9) was denied. There does not appear to have been an application for termination under s. 50.4(11), unlike the subject case. At para. 8, the court did contrast the provisions

by saying that, if the debtor had been successful in its application to extend, it would have been a "Pyrrhic victory" because the creditor bank would have been able "to come right back in a motion based on s. 50.4(11)(c)."

[40] This is broad language but I acknowledge that it is capable of meaning that s. 50.4(11) is to supersede s. 50.4(9). However, such an interpretation would seem to be inconsistent with the other reference in *Baldwin* that the two provisions apply to different situations (discussed above). I also note that *Baldwin* only decided the merits of the s. 50.4(9) application, there was no application under s. 50.4(11) and there was no decision in favour of the creditor on the basis of that provision. The above statement was, therefore, *obiter*.

[41] Another decision relied on by Enirgi is *Cumberland Trading Inc. (Re)*, [1994] O.J. No. 132, (C.J. (Gen. Div.)) where a creditor sought to terminate a debtor's proposal after the notice of intention was filed. There does not appear to have been an application by the debtor to extend the proposal under s. 50.4(9), only an application under s. 50.4(11). Mr. Justice Farley found there was no indication what the proposal of the debtor was to be; "… there was not even a germ of a plan revealed" only a "bald assertion" and "[t]his is akin to trying to box with a ghost" (paragraph 8). The application for termination under s. 50.4(11) was allowed.

[42] The court noted, at para. 5, that the *BIA* was "debtor friendly legislation" because it provided for the possibility of reorganization by a debtor but it (and the *Companies Creditors Arrangement Act,* R.S.C. 1985 c. C–36) "do not allow debtors absolute immunity and impunity from their creditors". Concern was expressed about debtors too frequently waiting until the last moment, or beyond the last moment, before thinking about reorganization. The automatic stay available to a debtor by filing a notice of intention to file a proposal was noted. However:

> … [the] *BIA* does not guarantee the insolvent person a stay without review for any set period of time. To keep the playing field level and dry so that it remains in play, a creditor or creditors can apply to the court to cut short the otherwise automatic (or extended) stay; in this case [the creditor] is utilizing s. 50.4(11) to do so.

[43] Enirgi relies on this statement in its submission that its termination application should proceed over the extension application of Andover. This is broad language but I acknowledge Enirgi's submission that this statement provides support for its position that s. 50.4(11) permits it to "cut short" a stay or extension under s. 50.4(9).

[44] The court also described s. 50.4(11)(c) as permitting termination of a proposal if the debtor cannot make one before the expiration of the "period in question, that will be accepted by the creditors …" Mr. Justice Farley concluded that s. 50.4(11) deals specifically with the situation "where there has been no proposal tabled." It provides that there is "no absolute requirement" that the creditors have to wait to see what the proposal is "before they can indicate they will vote it down" (paragraph 9). Enirgi relies on this statement.

[45] In my view, this statement goes no further than saying what is self-evident: under s. 50.4(11)(c) any proposal must be accepted by the creditors. However, as explained in *Baldwin,* that is not a requirement under s. 50.4(9). *Cumberland* also says that the making of the proposal may be still to come but a creditor can exercise its rights under s. 50.4(11)(c). I do not agree with Enirgi that this statement in *Cumberland* supports its submission.

[46] From the above I conclude that there is some support for the submission of Enirgi that I should consider (and allow) its application under s. 50.4(11) over that of Andover under s. 50.4(9). There is the *obiter* in *Baldwin* that a successful application under s. 50.4(9) would be a Pyrrhic victory because a creditor could come right back with an application under s. 50.4(11). And there is the statement in *Cumberland* that an application under s. 50.4(11) can cut short an application under s. 50.4(9).

The approach in *Cantrail*

[47] A quite different view is set out in a more recent British Columbia case, *In the Matter of the Proposal of Cantrail Coach Lines Ltd.*, 2005 BCSC 351, [*Cantrail*] a decision relied on by Andover. Master Groves, as he then was, was presented with a submission by the creditor in that case that it intended to vote against any proposal from the debtor because it had lost faith in the debtor. The creditor was one of 91

creditors and its share of the total debt was not explained. This is essentially the position of Enirgi.

[48] In response to the creditor's submission that it could vote under s. 50.4(11) against any proposal of the debtor under s. 50.4(9) the court said:

> 14. If that was simply the test to be applied then one wonders why Parliament would have gone to the trouble, and creativity perhaps, of setting out proposals as an option in the *Bankruptcy and Insolvency Act*. Secured creditors or major creditors not uncommonly, in light of general security agreements and other type [sic] of security available, are in a position to claim to be over 50 percent of the indebtedness. Thus they will be the determining creditor or, I should say, are likely to be the determining creditor or, I should say, are likely to be the determining creditor in any vote on any proposal.
>
> 15. If a creditor with over 50 percent of the indebtedness could take the position that it would vote no, prior to seeing any proposal, and thus terminate all efforts under the proposal provisions, one wonders why Parliament would not simply set up the legislation that way. One wonders what the point would be of the proposal sections in the *Bankruptcy and Insolvency Act* if that were the case.
>
> 16. If the test to be applied was simply one of majority rules then in my view Parliament would not have set the test as it did in s. 50.4(9). They would simply set a test that if 50 percent of the creditors object at any point the proposal would be over. That is not the test that has been set.

[49] Since there was no evidence of bad faith on the part of the debtor in *Cantrail* and no determination of what the actual proposal would be, Master Groves allowed the application under s. 50.4(9) to extend the proposal and dismissed the application of the creditor under s. 50.4(11) to terminate the proposal (paragraphs 15-17). This is the result sought by Andover but opposed by Enirgi.

[50] Master Groves also adopted the view at para. 11 of *N.W.T. Management Group (Re),* [1993] O.J. No. 621 (C.J. (Gen. Div.)) that the intent of the *BIA* is that s. 50.4(9) and s. 50.4(11) should be judged on a rehabilitation basis rather than on a liquidation basis. And, in *Cantrail*, at para. 4, the court concluded that an objective standard must be applied to determine what a reasonable person or creditor would do, as was done in *Baldwin.*

[51] Enirgi distinguishes *Cantrail* on two grounds. First, it is submitted that at para. 9 *Cantrail* contains the inaccurate statement that "s. 50.4(11) is the mirror of s. 50.4(9)". As well, there was no discussion of *Cumberland* in *Cantrail*.

[52] I accept that, while there are a number of similarities between the two sections, there is one significant difference: under s. 50.4(11)(c) a creditor has a veto over any proposal. S. 50.4(9) does not contain such a veto and it is not a mirror to the extent of being exactly the same as s. 50.4(11). In my view this comment on a very small part of *Cantrail* does not affect the broader meaning of that judgement. And it is true that *Cumberland* was not discussed in *Cantrail* although the submission of the creditor in *Cantrail*, as recorded in the oral judgement, is in language very similar to that used in *Cumberland.*

[53] Another decision relied on by Andover as being similar to *Cantrail* is *Heritage Flooring Ltd. (Re)*, [2004] N.B.J. No. 286 (Q.B.) where a debtor filed an application under s. 50.4(9) for an extension and the creditor filed an application for termination under s. 50.4(11). The court allowed the application for an extension. The *Cumberland* and *Baldwin* decisions were noted but in *Heritage* the evidence was that the creditor would be paid out and, in any event, the creditor was not in a position to veto any proposal. *Cantrail* was also followed in *Entegrity Wind Systems Inc. (Re)*, 2009 PESC 25 although the facts in *Entegrity* did not include an application by the creditor under s. 50.4(11). The objective standard discussed in *Cantrail* was also adopted in *Convergix Inc. (Re)*, 2006 NBQB 288.

Cumberland* or *Cantrail?

[54] The result of the above is that there are different approaches to situations where there are competing applications under sections 50.4(9) and 50.4(11).

[55] The comments from *Cumberland* discussed above suggest that an application by a creditor under s. 50.4(11) can "cut short" an application under s. 50.4(9) and there is no absolute requirement that a creditor has to wait to see a proposal before voting it down. And in *Baldwin* there is a comment, in *obiter*, that

any successful application under s. 50.4(9) would be a Pyrrhic victory because the creditor could "come right back" with an application under s. 50.4(11).

[56] On the other hand, in *Cantrail* the court decided that there should be an extension for a viable proposal, not yet formulated, under s. 50.4(9) even though the creditor has lost faith in the debtor and has said it will vote against any proposal.

[57] As a matter of interpretation of the *BIA* I consider that s. 50.4(9) and s. 50.4(11) set out distinct rights and obligations. In the first case a debtor is entitled to an extension of time to make a proposal; in the second case a creditor can apply for the termination of the time for making a proposal. As I understand the submission of Enirgi the fact that it is the primary creditor (by some considerable margin), that it has lost confidence in Andover and that it will not accept any proposal from Andover supports consideration of its application for termination under s. 50.4(11).

[58] The problem with this submission is that it does not reflect the factors under s. 50.4(9) for granting an extension of time for a proposal. A creditor under this provision does not have the rights that Enirgi seeks over the debts of Andover. Those rights are in s. 50.4(11)(c) but that is a different inquiry. Indeed, one effect of the submission of Enirgi is to conflate s. 50.4(9) and s. 50.4(11). I recognize the comments from *Cumberland* and *Baldwin* that may support a contrary view. However, recognition must be given to the differences between the provisions in dispute and that contrary view does not do so. In my view the analysis and conclusions in *Cantrail* is to be preferred.

[59] I add that there are some situations where an application for an extension is overtaken by an application for termination. In *Cumberland* there was not even a germ of a proposal from the debtor for the analysis under s. 50.4(9). In that circumstance the court then proceeded to the other application before it from the creditor under s. 50.4(11).

[60] Other cases relied on by Enirgi are of a similar kind. In *Baldwin* the proposal was conjecture and rough (and the debtor had not even considered the issue of any

material prejudice to the creditor from the proposal). Similarly, in *St. Isidore Meats Inc. v. Paquette Fine Foods Inc.,* [1997] O.J. No. 1863 (Gen. Div.)) and *1252206 Alberta Ltd. v. Bank of Montreal*, [2009] A.J. No. 648 (Q.B.) the courts proceeded to a determination of the s. 50.4(11) application after finding there was no viable proposal. In *Triangle Drugs Inc. (Re)*, [1993] O.J. No. 40 (C.J. (Gen. Div.)) the creditors had a veto and they had actually seen the proposal. The court imported principles from the *Companies Creditors Arrangement Act,* R.S.C. 1985, c. C-36, concluded that it was fruitless to proceed with a plan that is doomed to failure and allowed the creditor's application under s. 50.4(11). In *Com/Mit Hitech Services Inc. (Re),* [1997] O.J. No. 3360 (C.J. (Gen. Div.)) there was no good faith or due diligence on the part of the debtor and the court proceeded to consider and allow the creditor's application under s. 50.4(11).

[61] In my view, these cases represent recognition of the procedural and business realities of the various situations rather than a legal conclusion that an application for termination will supersede an application for an extension.

[62] It follows that I find that Andover is entitled to have its application under s. 50.4(9) considered on its merits. If it is not meritorious then it is logical and consistent with the authorities to proceed with the application by Enirgi under s. 50.4(11).

The application by Andover under s. 50.4(9)

[63] With regards to the merits of Andover's application under s. 50.4(9) all of the following issues must be decided in its favour. Has it acted in good faith and with due diligence? Is it likely it would be able to make a viable proposal if an extension is granted? And, if an extension is granted, would a creditor be materially prejudiced?

[64] With regards to good faith and due diligence *N.T.W.* says that it is the conduct of Andover following the notice of intention in August 2013, rather than its conduct before then, that is to be considered. I have found above that the evidence does not support a finding of bad faith against either party.

[65] With regards to due diligence, since August 2013 Andover has obtained the September 24, 2013 letter from Ophir that says the latter "is in the process" of finalizing a loan of $3,000,000 to Andover. This is not a firm commitment of funds and nor does it need to be under s. 50.4(9); it does reflect some diligence on Andover's part. Mr. Blankstein also deposes that he has been having discussions with another party but he cannot reveal the name of that party because he is concerned that Enirgi will obstruct those discussions, as they did with Chief in June 2013. This latter information is not particularly helpful. Nonetheless I conclude that Andover has acted with sufficient due diligence.

[66] Turning to s. 50.4(9)(b), a viable proposal is one that would be reasonable on its face to a reasonable creditor; "this ignores the possible idiosyncrasies of any specific creditor": *Cumberland* at para. 4. It follows that Enirgi's views about any proposal are not necessarily determinative. The proposal need not be a certainty and "likely" means "such as might well happen."(*Baldwin*, paras. 3-4). And Enirgi's statement that it has lost faith in Andover is not determinative under s. 50.4(9): *Baldwin* at para. 3; *Cantrail* at paras. 13-18).

[67] I turn to a review of the assets of Andover in order to consider whether they provide some support for the viability of any proposal from Andover. The evidence for this review is from the affidavit of Mr. Blankstein.

[68] Alaska (wholly owned by Andover) is expecting, as a result of preliminary discussions, a N143101 Resource Calculation for a property to show approximately 1,200,000,000 pounds of copper with a gross value of about $3,600,000,000. An immediate net value of $60,000,000 and $120,000,000 is estimated, depending on the world price of copper. The State of Alaska is confident enough in the property that it has financed a road to it. In a separate property, Alaska has an estimated mineralization of 4,000,000 tons of 4.5 % copper and Andover has spent approximately $10,000,000 in developing this project. Alaska is solvent and up to date in its financial obligations.

[69] With respect to Chief (83% owned by Andover), it is also solvent and generally up to date on its obligations. Andover purchased 65% of the shares of Chief in 2008 for $8,700,000 with an environmental claim against it in the amount of $60,000,000. That claim has been negotiated down to a smaller number and the current amount due is $450,000, with half due in November 2013 and the other half due in November 2014. This has increased the value of Chief significantly, according to Andover.

[70] Financial statements in March 2013 showed Chief had $33,000,000 in equity, based on land and equipment (not mineral deposits). It owns more than 16,000 acres of land in Utah and leases an additional 2,000 acres. Plant and equipment have been independently appraised at $19,200,000. Andover estimates a cash flow in the next year of $7,000,000 to $11,000,000 to Chief.

[71] Andover and Chief are also presently involved in a joint venture with Ophir regarding deposits of silica, limestone and aggregate on property owned by Chief. Production will commence in November 2013 and sold to customers of Ophir. Ophir is spending $3,000,000 on exploration and development and production equipment has been ordered. Andover expects to receive from these two mines and a third (a joint venture with Rio Tinto) $7,200,000 to $10,900,000 in annual production net revenues commencing at the end of 2014.

[72] Chief has another property called Burgin Complex. At one time Enirgi was apparently interested in this specific property. A Technical Report, dated December 2, 2011, shows an expected cash flow of $483,000,000 in today's metal prices.

[73] By way of a summary, publicly available financial statements in March 2013 report that Andover had $42.5 million in assets and $9.1 of liabilities.

[74] Enirgi generally minimizes the asset value of Andover but it does not dispute the specific numbers above. In my view these are impressive numbers and they reflect a strong asset base for Andover. I accept that they do not demonstrate the cash at hand to pay the first promissory note and at this time Andover remains asset

rich and cash poor. But it is not "trying to box with a ghost" (as in *Cumberland*) to conclude that the assets of Andover support the view that it is likely that it can present a viable proposal. As above, there is also the prospect of a $3,000,000 cash loan from Ophir and that is some evidence of an imminent injection of cash into Andover. It has not materialized as yet but it is further evidence of the likelihood of a viable proposal. A certainty is not required and I conclude that a proposal is likely in the sense it might well happen.

[75] Enirgi points out that it holds the largest portion of unsecured debt of Andover (more than 80%) and it submits that this gives them a veto over any proposal. That may take place but thus far there is no proposal and Enirgi will have to make a business decision about its response in the event one is presented. Again, as an issue under s. 50.4(9), a proposal does not have to be acceptable to Enirgi. As well, I also note comments from the Court of Appeal, in the context of the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36, that questioned the legal basis of a creditor forestalling an application for a stay and whether the court's jurisdiction could be "neutralized" in that way: *Asset Engineering LP v. Forest & Marine Financial Limited Partnership*, 2009 BCCA 319 at para. 26, cited in *Pacific Shores Resort & Spa Ltd. (Re),* 2011 BCSC 1775, at paras. 40-41.

[76] The third requirement under s. 50.4(9) is that no creditor should be materially prejudiced if an extension is granted. As emphasized in *Cantrail* at para. 21 the test is not prejudice but material prejudice. It is also an objective test: *Cumberland* at para. 11. In the subject case there is no evidence that the security in the first promissory note would be less if an extension was granted. Enirgi asserts that Andover is restructuring its assets but there is no evidence of that and, in the event it occurs, remedies are available on short notice. Unlike in *Cumberland,* the debtor here is not converting inventory into cash. It is true that the note (or notes) is non-interest bearing but Enirgi knew that when it became an assignee in March 2013 and the note had not been unpaid since October 2012. I conclude that there is some prejudice to Enirgi but not material prejudice.

[77] Finally, I note in *Cantrail* and *N.W.T.* that the objective of the *BIA* is rehabilitation rather than liquidation. Andover has a nominal payroll but liquidation of Andover and its assets would obviously affect a number of other companies and be a complicated and protracted affair. It may come to that but on the basis of the evidence available at this time I conclude that an extension of Andover's proposal should be granted.

[78] Since Andover has met the requirements of s. 50.4(9) I find that its application under that provision must be allowed. It should be given the opportunity to make a proposal and an extension of time of 45 days is granted to do so.

Summary and conclusion

[79] In cases such as this where there are competing applications under s. 50.4(9) and s. 50.4(11) the debtor is entitled to present a proposal under the former provision if it is likely a viable proposal can be presented and the other requirements of s. 50.4(9) are met. In that event the debtor should have the opportunity to present a proposal. A creditor has the ability under s. 50.4(11) to decide whether a proposal is acceptable but does not have that right under s. 50.4(9).

[80] In this case Andover has significant assets and it is likely that it will be able to present a viable proposal. As well, there is no evidence of the part of Andover of bad faith, it has acted generally in good faith, it has acted with due diligence in attempting to construct a proposal and there is no material prejudice to Enirgi if an extension is granted. In the event that Andover presents a proposal Enirgi will have then have the opportunity to decide what its position will be on it. This will be a business decision rather than a matter under s. 50.4(11).

[81] The application by Andover under s. 50.4(9) is allowed. It is entitled to an Order extending the time for filing a proposal under Part III of the *BIA* for a period of 45 days to give it an opportunity to present a proposal.

[82] The application of Enirgi under s. 50.4(11) is dismissed with leave to reapply.

[83] I considered the alternate application of Enirgi to appoint a receiver under section 47.1 of the *BIA.* I note that there is a trustee appointed as part of the notice of intention. He apparently disagreed with Enirgi about what should be in a proof of claim document but for defensible reasons. There is otherwise no evidence that something more than a trustee is warranted at this time.

[84] I remain seized of this matter and any subsequent applications related to the insolvency of Andover. I am available on short notice if there is a need to move expeditiously. Costs will be in the cause.

"Steeves J."

TAB 13

2015 NBQB 107
New Brunswick Court of Queen's Bench

Gray Aqua Group of Companies, Re

2015 CarswellNB 222, 2015 NBQB 107, 1139 A.P.R. 197, 254 A.C.W.S. (3d) 25, 436 N.B.R. (2d) 197

In the Matter of the bankruptcy of Gray Aqua Group of Companies

Reg. Natalie H. LeBlanc

Heard: January 7, 2014
Judgment: May 25, 2015
Docket: NB 19425, Estate No. 51-1780540

Counsel: John D. Stringer, Q. C., Ben R. Durnford, for Ernst & Young Inc. - Trustee
Joshua J.B. McElman, for Business Development Bank of Canada
Ian Purvis, Q.C., for Gray Aqua Farms Ltd, Gray's Aqua Management Ltd, Gray Aqua Processing Ltd., Gray Aqua Group Ltd., Butter Cove Aqua Farms Ltd., Jervis Island Aqua Farms Ltd., Pass-My-Can Aqua Farms Ltd., and Goblin Bay Aqua Farms Ltd.
Celine Leicher, for Europharma Inc.

Subject: Insolvency

MOTION brought by proposal trustee for order to file consolidated proposal to respective and individual creditors.

***Reg. Natalie H. LeBlanc*:**

Background

1 On August 21, 2013 various Notices of Intention to Make a Proposal ("NOI") were filed by Gray Aqua Farms Ltd, Gray's Aqua Management Ltd, Gray Aqua Processing Ltd., Gray Aqua Group Ltd., Butter Cove Aqua Farms Ltd., Jervis Island Aqua Farms Ltd., Pass-My-Can Aqua Farms Ltd., and Goblin Bay Aqua Farms Ltd., (collectively the "Group").

2 As a result of the filing of the NOIs, Ernst & Young ("Proposal Trustee) was appointed as the Proposal Trustee ("Proposal Trustee"). On September 24, 2013 the Proposal Trustee presented a Motion for an Order Respecting Service and Accessibility Protocol which was granted. This Order allowed, *inter alia*, for service on all creditors and affected parties to the NOIs filed by the Group via telecommunications.

3 On or about January 7, 2014 solicitors for the Proposal Trustee applied to the Court for an Order allowing the filing of a Consolidated Proposal to the respective and individuals creditors of the Group, pursuant to sections 34, 66, 183 and 192 of the *Bankruptcy and Insolvency Act* (Canada).

4 Evidence contained in various reports from the Proposal Trustee, in particular the sixth report of the Proposal Trustee and the sixth affidavit of Tim Gray, which documents submit evidence supporting the Group's suitability for the filing of a Consolidated Motion.

5 In particular, the Group companies are vertically and financially integrated with a singular management and accounting structure. Moreover, solicitors for the Proposal Trustee submit uncontested evidence that Group companies operated at all times as an integrated enterprise with centralized management, sales and accounting based in Northampton, New Brunswick.

6 The Group also shares several common senior creditors, which include Callidus Capital Corporation ("Callidus") who acquired debt and security from HSBC Canada ("HSBC") on a number of the Group companies and Business Development Bank of Canada ("BDC").

7 It is submitted that the shared and respective creditors of the Group, if an Order allowing a Consolidated Proposal would not be deprived of any rights and would not suffer any measurable prejudice.

8 The largest individual respective group of creditors who require accommodation deriving from a Group company would be the unsecured creditors of Gray Aqua Processing Limited ("GAPL") who are proposed as a distinct class of creditors under a Consolidated Proposal.

Analysis

9 Historically, Courts have been reluctant to grant the right of consolidation to moving parties on the basis of consolidation being seen as an extraordinary remedy under the BIA, *supra.*

10 The BIA is void of any statutory test establishing benchmarks for the consolidation of corporate entities. Limited caselaw on point seems to rely on the equitable jurisdiction of the Court under Section 183.

11 Counsel for the Proposal Trustee submitted two cases for review by the Court. In *Ashley v. Marlow Group Private Portfolio Management Inc.* (2006), 22 C.B.R. (5th) 126 (Ont. S.C.J. [Commercial List]), the consolidation was opposed and ultimately denied by the Court. A thorough review of the issue was nonetheless undertaken by Justice Mesbur of the Ontario Superior Court, Commercial List.

12 Justice Mesbur said the following:

> [70] Essentially, a substantive consolidation would treat all of the corporate defendants as one entity. The assets of each would fall into one common pool, to be shared by all their creditors on a *pari passu* basis.
>
> [71] There is no specific authority in the *Bankruptcy and Insolvency Act* to grant an order for substantive consolidation. It is common ground, however, that the court has the authority to do so under its equitable jurisdiction under section 183 of the *Act.*
>
> [...]
>
> [74] The Receiver goes on to say that all four companies operated as an interrelated entity, with shared premises, telephone, fax, bank accounts and accounting records. The Receiver says that they were operated as a single, consolidated enterprise, and should be treated as such for bankruptcy purposes, because to do so would be most expedient and cost-effective.
>
> [...]
>
> [76] CIPF also points out that the Receiver wishes to use the only assets of Securities Inc., some cash, to fund the bankruptcy, and thus there is no practical advantage to any of Securities Inc.'s creditors to having a substantive consolidation of all the estates.
>
> [77] CIPF says that substantive consolidation profoundly affects the substantive rights of debtors and creditors, and thus should be considered an extreme remedy and carefully scrutinized. It involves more than procedural convenience, which of course can be accomplished by the procedural consolidation that everyone supports.

13 The Court ultimately upheld the objection of the creditor, CIPF, on the basis of a lack of evidence that the creditors would NOT be harmed by the consolidation.

14 The second case cited by the solicitors for the Proposal Trustee was the case of *Kitchener Frame Ltd., Re*, 2012 ONSC 234 (Ont. S.C.J. [Commercial List]) ("Kitchener Frame") whereby a Motion to consolidate was granted by Justice Morawetz.

15 Justice Morawetz made the following observations on substantial consolidations:

> [30].....Although not expressly contemplated under the *BIA*, the Applicants submit that the court may look to its incidental, ancillary and auxiliary jurisdiction under s. 183 of the *BIA* and its equitable jurisdiction to grant an order for substantive consolidation. See *Ashley v. Marlow Group Private Portfolio Management Inc*. (2006) 2006 CANLII 31307 (ON SC), 22 CBR (5th) 126 (Ont. S.C.J.) (Commercial List). In deciding whether to grant substantive consolidation, courts have held that it should not be done at the expense of, or possible prejudice of, any particular creditor. See *Ashley*, *supra*. However, counsel submits that this court should take into account practical business considerations in applying the *BIA*. See *A & F Baillargeon Express Inc. (Trustee of) (Re)* (1993), 27 CBR (3d) 36.
>
> [31] In this case, the Applicants submit that substantive consolidation inherent in the Consolidated Proposal is appropriate in the circumstances due to, among other things, the intertwined nature of the Applicants' assets and liabilities. Each Applicant had substantially the same creditor base and known liabilities (other than certain Excluded Claims). In addition, KFL had no cash or cash equivalents and the Applicants are each dependant on the Escrow Funds and borrowings under the Restated Senior Secured Loan Agreement to fund the same underlying pension and OPEB obligations and costs relating to the Proposal Proceedings.
>
> [32] The Applicants submit that creditors in neither estate will be materially prejudiced by substantive consolidation and based on the fact that no creditor objected to the substantial consolidation, counsel submits the Consolidated Proposal ought to be approved.

Disposition

16 On the whole, I am satisfied that the Group is a suitable candidate for an Order for a Consolidated Proposal. After a thorough protocol on service was established by the Court, all creditors of the Group were served and none contested the Motion.

17 I am further satisfied by the evidence submitted in the sixth report of the Proposal Trustee and the six affidavit of Tim Gray that the Group is sufficiently integrated both from a financial and practical perspective that it functions as a centralized company for all intents and purposes.

18 The purpose of the BIA is to facilitate financial rehabilitation in a fair and structured atmosphere while protecting the integrity of the process and all of its participants, including creditors.

19 The Proposal Trustee's evidence, including the accommodation of the GAPL creditors, strikes the right balance of efficiency and equity which will ultimately serve to streamline the proposal process, create savings for all parties and facilitating a faster restructuring of the Group.

20 For the above-noted reasons, I grant the Motion for a Consolidated Proposal in the case of the Group companies.

Motion granted.

TAB 14

1993 CarswellOnt 210
Ontario Court of Justice (General Division), In Bankruptcy

High Street Construction Ltd., Re

1993 CarswellOnt 210, [1993] O.J. No. 394, 19 C.B.R. (3d) 213, 38 A.C.W.S. (3d) 669

Re proposal of HIGH STREET CONSTRUCTION LIMITED

Leitch J.

Judgment: February 2, 1993
Docket: Doc. London 35-045487

Counsel: *A. Grace*, for High Street Construction Ltd.
B. Dawe, for Toronto Dominion Bank.

Subject: Corporate and Commercial; Insolvency

Application for extension of time to file proposal under s. 50.4(9) of *Bankruptcy and Insolvency Act*.

***Leitch J.*:**

1 High Street Construction Limited ("High Street") has applied to extend its time to file a proposal with the official receiver to March 1, 1993 pursuant to s. 50.4(9) of the *Bankruptcy and Insolvency Act* (the "Act"). To permit the extension I must be satisfied that High Street has and is acting in good faith and with due diligence, that no creditor is prejudiced by an extension and that the extension will permit High Street to make a viable proposal.

2 High Street directly and by guarantees of the indebtedness of two related companies Sweetie Developments Limited ("Sweetie") and 518463 Ontario Limited ("518463") owes approximately 5 million dollars to the Toronto Dominion Bank ("T.D."). Repayment of the debt was demanded by T.D. in December 1990. The debt was acknowledged and High Street agreed to satisfy its outstanding obligations by February, 1991. T.D. extended this repayment date to April 3, 1991. Further extensions were granted by T.D. from time to time apparently on an informal basis until November 1992. The High Street account then came under the jurisdiction of a new manager who, according to counsel for T.D., took the position that "enough was enough". Formal demand for repayment was made December 2, 1992. High Street responded with a notice of intent to file a proposal which brings us to this application. T.D. is the most significant unrelated creditor of High Street and is the only creditor to oppose this application.

3 Since April 1991, $300,000 has been paid to T.D., loans of $83,000 to one of the shareholders has been repaid and one parcel of property has been sold with a mortgage back from the purchaser assigned to T.D. However, interest on the outstanding indebtedness and the realty taxes have not been kept current. T.D. alleges that the fact that interest and realty tax arrears will accrue during an extension is evidence that it will be prejudiced by such extension. The assets of High Street available to satisfy the indebtedness to T.D. consist entirely of three parcels of vacant land in Kitchener, Ontario owned by High Street and two parcels of vacant land in Mississauga, Ontario owned by Sweetie and 518463. These assets are non-depreciating and cannot be dissipated. There is no suggestion by T.D. that the management of High Street will overlook or decline an opportunity to sell its assets. The fact that realty tax and interest arrears will continue to accrue during an extension period is not sufficient evidence of prejudice to T.D. to disentitle High Street to an extension. Further, the fact that at the request of T.D. and without opposition from High Street I ordered that s. 69 of the Act shall not operate to prevent T.D. from issuing its notice of sale with respect to its mortgages on the High Street property will alleviate the prejudice to T.D. which it has complained of.

4 The president of High Street, Larry Wolynetz, has worked without compensation during the last two years and has endeavoured to sell all of the vacant land owned by High Street and its affiliates. While it is apparent that he has not been successful, there is no evidence that the lack of success has resulted from anything other than the recessionary times. There is no evidence that detracts from his assertions that all of his efforts have been in good faith and that he has diligently pursued all opportunities for sale. There is no evidence that Mr. Wolynetz is "grossly exaggerating" the value of the assets, thereby discouraging a possible sale as was the case in *First Treasury Financial Inc. v. Cango Petroleums Inc.* (1991), 3 C.B.R. (3d) 232 (Ont. Gen. Div.). I find therefore that High Street has and is acting in good faith and with due diligence.

5 The requirement that the extension will permit High Street to make a viable proposal is the most difficult requirement for it to meet. The decisions relating to applications for extensions under the *Companies' Creditors Arrangement Act* suggest that in assessing whether a proposal will be viable you must consider whether such proposal has a probable chance of acceptance. (*Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 1 C.B.R. (3d) 101 (Ont. C.A.) and *Ultracare Management Inc. v. Zevenberger (Trustee of)* (1990), 3 C.B.R. (3d) 151 (Ont. Gen. Div.)). In this case, T.D. basically has taken the position that "enough is enough". It was acknowledged by counsel for T.D. that there is no question as to the honesty or integrity of Mr. Wolynetz but its concern is simply whether he can get the job done. Its contention is that given the failure to effect a sale of one or more of the parcels of land to this point in time, it is unlikely that a sale will be accomplished within the extension period. There is a distinction between that contention and a conclusion that High Street cannot put forward within the requested extension period a plan that has a probable chance of acceptance by a majority of the creditors. I find that High Street has a plan outline for its proposal — that is, the immediate sale of the parcels of land owned by Sweetie and 518463 which have been developed to the point that there is site plan approval, building permit availability and offers to lease for 60% of the proposed building. Mr. Wolynetz has determined that these parcels are the most saleable and has sworn in his affidavit that he expects an unconditional offer to purchase these parcels within the extension period. With this offer High Street can quantify the debt due to T.D. subsequent to the sale of this property and can provide a detailed and specific proposal to T.D. It cannot now be said that T.D. will not accept this proposal. I find therefore that the requested extension will permit High Street to make a viable proposal.

6 At the conclusion of this application counsel for T.D. noted that I must be cautious in granting this extension. I have made my decision based on the particular facts of this application and my findings that High Street has satisfied the three prerequisites for an extension under s. 50.4(9) of the Act.

Application allowed.

End of Document

TAB 15

Supreme Court of Canada
Hunt et al. v. The Queen, [1968] S.C.R. 323
Date: 1968-03-13

Roy A. Hunt, Alfred M. Hunt, Torrence M. Hunt, Roy A. Hunt, Jr., Richard McM. Hunt and Mellon National Bank and Trust Company *Appellants;*

and

Her Majesty The Queen *Respondent.*

1967: June 6, 7; 1968: March 13.

Present: Fauteux, Abbott, Martland, Ritchie and Hall JJ.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Estate tax—Situs of company shares—Unpaid tax on estate of deceased non resident—Seizure of shares by writ of fieri facias in Exchequer Court—Company incorporated in Canada—Situs of shares for purposes of judicial execution—Exchequer Court Act, R.S.C. 1952, c. 98, s. 74—Estate Tax Act, 1958 (Can.), c. 29, ss. 88(e), 47.

The estate of Mrs. H, who died in 1963 resident and domiciled in the United States, included a large number of shares of Aluminium Limited, a company incorporated under the *Companies Act* of Canada and having its head office and principal place of business in Montreal. The company maintained a register of transfers of shares in Montreal and also maintained branch registers in the United States, where the share certificates were physically situated. An assessment against the estate was not contested but the tax was not paid. A writ of *fieri facias* was issued out of the Exchequer Court, directed to the sheriff of the judicial district of Montreal. The seizure of the shares was then made. By a petition of right, the executors of the estate claimed that the seizure of the shares was invalid. The Exchequer Court dismissed the petition of right. The executors appealed to this Court where the sole question in issue was whether the shares were situated in Canada for the purposes of judicial execution.

Held: The appeal should be dismissed.

[Page 324]

The shares were validly seized. The true principles to be applied in this case were those set out in *Braun v. The Custodian,* [1944] S.C.R. 339. There was no valid reason why the same considerations should not apply to determine the situs of shares for the purpose of judicial execution as for the purpose of a dispute as to ownership. In both cases, the dominant consideration was the jurisdiction of the court to which the company was ultimately subject.

Revenu—Impôt successoral—Situs des parts d'une compagnie—Non paiement de l'impôt successoral d'un non résident—Saisie des parts par un bref de fieri facias émanant de la Cour de l'Échiquier—Compagnie constituée en corporation au Canada—Situs des parts pour

les fins de l'exécution en justice—Loi sur la Cour de l'Échiquier, S.R.C. 1952, c. 98, art. 74—Loi de l'impôt sur les biens transmis par décès, 1958 (Can.), c. 29, arts. 38(e), 47.

La succession d'une dame H, décédée en 1963 alors qu'elle avait son domicile aux États-Unis et y était une résidente, comprenait un grand nombre de parts de Aluminium Limited, une compagnie constituée en corporation en vertu de la *Loi sur les compagnies* du Canada et ayant son siège social et son principal établissement dans la cité de Montréal. La compagnie tenait un registre des transferts d'actions à Montréal et tenait aussi des registres annexes aux États-Unis, où les certificats des actions étaient physiquement situés. La cotisation du ministre n'a pas été contestée mais la taxe n'a pas été payée. Un bref de *fieri facias a* été délivré par la Cour de l'Échiquier, adressé au shérif du district judiciaire de Montréal. Les parts ont été alors saisies. Par une pétition de droit, les exécuteurs de la succession ont soutenu que la saisie des parts était invalide. La Cour de l'Échiquier a rejeté la pétition de droit. Les exécuteurs en appelèrent à cette Cour où la seule question à débattre était de savoir si les parts étaient situées au Canada pour les fins de l'exécution en justice.

Arrêt: L'appel doit être rejeté.

Les parts ont été validement saisies. Les principes que l'on doit appliquer dans cette cause sont ceux qui ont été énoncés dans *Braun v. The Custodian,* [1944] R.C.S. 339. Il n'y a aucune raison valable pour ne pas appliquer les mêmes considérations dans la détermination du situs des parts pour les fins d'une exécution en justice que pour les fins d'une dispute relativement à la propriété de ces parts. Dans les deux cas, la considération dominante est la juridiction de la cour à laquelle la compagnie est en fin de compte soumise.

APPEL d'un jugement du Président Jackett de la Cour de l'Échiquier du Canada[1] sur une pétition de droit. Appel rejeté.

APPEAL from a judgment of Jackett P. of the Exchequer Court of Canada[1], on a petition of right. Appeal dismissed.

[Page 325]

John de M. Marler, Q.C., and R.J. Cowling, for the appellants.

D.S. Maxwell, Q.C., and D.G.H. Bowman, for the defendant.

The judgment of the Court was delivered by

ABBOTT J.:—This is an appeal from a judgment of the President of the Exchequer Court[1], rendered August 18, 1966, whereby it was declared that certain shares of Aluminium Limited were validly seized under a writ of *fieri facias* issued out of the Exchequer Court of Canada.

The circumstances giving rise to the present dispute are set forth in a statement of facts, agreed to by the parties. The late Rachel McM. M. Hunt died in the City of Pittsburg,

[1] [1967] 1 Ex. C.R. 101, [1966] C.T.C. 474, 66 D.T.C. 5322.

Pennsylvania, on February 22, 1963. At her death she was domiciled in, and a citizen of, the United States of America. The appellants were named as Executors under her will, and probate of her will was granted to them on March 18, 1963.

At the date of her death, the late Mrs. Hunt owned 43,560 shares in the capital stock of Aluminium Limited. Aluminium Limited is a company incorporated under the *Companies Act* of Canada, and at all relevant times had its head office and principal place of business in the City of Montreal. Almost all of the meetings of directors, and all meetings of shareholders of Aluminium Limited, are held at the company's head office in the City of Montreal and the central management of the company is located there. At the date of death of the deceased, the company maintained a register of transfers of shares in its capital stock and all books required to be kept by it pursuant to s. 107 of the *Companies Act* in the City of Montreal. It also maintained branch registers of transfers in Pittsburg, New York, London (England), Toronto and Vancouver. The shares of Aluminium Limited were listed on the Montreal, Toronto, Vancouver, New York, Midwest, Pacific Coast, London, Paris, Basle, Geneva, Lausanne and Zurich Stock Exchanges. At the date of death, the share certificates relating to the shares owned by the deceased were physically situated in the City of Pittsburg.

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On May 14, 1963, estate tax, in the amount of $156,620.73, was assessed pursuant to Part II of the *Estate Tax Act,* Statutes of Canada 1958, c. 29. Under that Part, there is imposed an estate tax of 15 per cent of the aggregate value of property situated in Canada of a person domiciled outside Canada. For the purposes of Part II of the Act, the situs of shares in a corporation is deemed by s. 38 of the Act to be the place where the corporation is incorporated. Accordingly for the purposes of Part II of the *Estate Tax Act,* the shares of Aluminium Limited were deemed to be situated in Canada. No objection to the assessment has been filed pursuant to s. 22 of the *Estate Tax Act.*

On May 14, 1963, the Deputy Minister of National Revenue issued a certificate, alleging that estate tax in the sum of $156,620.73 was due, owing and unpaid by the Mellon National Bank and Trust Company, Executor of the Estate of Rachel McM. M. Hunt. This certificate was registered in the Exchequer Court. No objection is taken in this appeal to the issuance or

registration of the said certificate which, under s. 41 of the *Estate Tax Act,* has the same force and effect as a judgment obtained in the Exchequer Court.

On May 14, 1963, a writ of *fieri facias* was issued out of the Exchequer Court and directed to the Sheriff of the Judicial District of Montreal who is, by virtue of s. 74 of the *Exchequer Court Act, ex officio* an officer of the said Court. The Sheriff took the steps appropriate to the seizure of the Hunt shares in accordance with the requirements of the writ.

By petition of right filed on June 6, 1963, and amended on June 21, 1963, the appellants claimed, *inter alia,* that the seizure of the said shares was invalid, and it is from the judgment of the Exchequer Court of Canada, dismissing the appellants' action, that this appeal is brought.

Before the Exchequer Court, the sole issue was whether the shares of Aluminium Limited were situated in Canada for the purposes of judicial execution under the processes of the Exchequer Court.

Following the judgment of the Exchequer Court, counsel for appellants advised counsel for respondent of his intention to contend before this Court that, whatever might have

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been the situs of the shares, the writ of execution issued out of the Exchequer Court was not in the appropriate form and that it was therefore ineffective to seize the shares. At the argument before us, counsel for appellants was informed that, in the circumstances of this case, and applying the principles enunciated by Duff C.J. in *Dominion Royalty Corporation Ltd. v. Goffatt*[2] this point, as to procedure, cannot be entertained in this Court.

The sole question in issue before this Court is, therefore, whether the shares in question were property in Canada for the purposes of judicial execution. Three possible conclusions are open for consideration; either for purposes of execution (1) the shares were situate only in Canada or (2) they were situate in both Canada and Pennsylvania or (3) they were situate only in Pennsylvania.

[2] [1935] S.C.R. 565, 4 D.L.R. 736.

The appellants can succeed only if they establish that the learned trial judge ought to have rejected the first two alternatives and adopted the third.

Counsel for appellants put his case squarely on the familiar line of cases which established the rule that, for provincial succession duty purposes, shares have a situs where they can be effectively dealt with: *Brassard v. Smith*[3], *Rex v. Williams*[4] and *Treasurer of Ontario v. Aberdein*[5].

Appellants' contention was that the situs of Mrs. Hunt's shares, for present purposes, was in the United States and particularly in Pittsburg, either because of the rule of situs laid down in *Rex v. Williams* and *Ontario v. Aberdein* or simply by reason of the physical location there of her share certificates.

In *Brassard v. Smith,* the shares in question there could be effectively dealt with only in Quebec. In the *Williams* case, as in the present case, the Court was faced with a situation where the shares could be validly transferred in more than one place. In *Williams,* the shares were validly transferable on registries in Ontario and in Buffalo, New York, so the problem arose that, for the purposes of provincial succession duty, one, and only one, local situs had

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to be chosen. At page 558, Viscount Maugham, referring to the decision of this Court in *R. v. National Trust,*[6] said:

> In what their Lordships take leave to describe as a very luminous judgment of the Supreme Court Chief Justice Duff formulated as the result of the authorities certain propositions pertinent to the question of situs of property with which their Lordships agree. First, property, whether movable or immovable, can, for the purposes of determining situs as among the different provinces of Canada in relation to the incidence of a tax imposed by a provincial law upon property transmitted owing to death, have only one local situation. Secondly, situs in respect of intangible property must be determined by reference to some principle or coherent system of principles, and the courts appear to have acted on the assumption that the legislature in defining in part at all events by reference to the local situation of such property the authority of the province in relation to taxation, must be supposed to have had in view the principles deducible from the common law. Thirdly, a provincial legislature is not competent to prescribe the conditions fixing the situs of intangible property for the purpose of defining the subjects in respect

[3] [1925] A.C. 371, 38 Que. K.B. 208, 1 W.W.R. 311, 1 D.L.R. 528.
[4] [1942] A.C. 541, 2 All E.R. 95, 2 W.W.R. 321, 3 D.L.R. 1.
[5] [1947] A.C. 24, [1946] 3 W.W.R. 683, [1946] 4 D.L.R. 785.
[6] [1933] S.C.R. 670, 4 D.L.R. 465.

> of which its powers of taxation under s. 92, sub-s. 2, of the British North America Act may be put into effect.

and at page 559,

> One or other of the two possible places where the shares can be effectively transferred must therefore be selected on a rational ground.

The factor which impelled the Court to decide in favour of New York, rather than Ontario, was the existence in Buffalo, at the date of death, of certificates in the name of the testator endorsed in blank.

The passage which I have quoted makes it clear however that the rule followed to determine the situs of shares in issue in the *Williams* case does not necessarily apply to the situs of shares for the purposes of judicial execution. The Parliament of Canada can prescribe the situs of shares in federally incorporated companies. It has done so for estate tax purposes by the combined effect of s. 38(*e*), s. 47(1) and s. 47(4) of the *Estate Tax Act.*

In my opinion, the true principles to be applied in a case of the kind we are concerned with here are those set out in *Braun v. The Custodian*[7]. The question there was the situs of shares in the Canadian Pacific Railway Company, for the purpose of determining a dispute as to their ownership as between a purchaser from an alien enemy, and the Custodian of Enemy Property. The share certificates stood in the names of alien enemies, and were bought by Braun on the Berlin Exchange in October 1919. The shares were on the

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New York register of the company and transfers were registrable only in New York. The certificates had transfers on the back endorsed in blank by the registered owners. In April 1919, the shares had been made the subject of a vesting order under the Consolidated Orders Respecting Trading with the Enemy. In November 1919, Braun presented the certificates for registration in his name at the New York office. Registration was refused on the ground that the vesting order of April 1919 vested them in the Canadian Custodian. It was contended that the vesting order was a nullity on the ground that the situs of the shares was New York and that therefore no Canadian court could validly deal with them.

[7] [1944] Ex. C.R. 30, 3 D.L.R. 412; [1944] S.C.R. 339, 4 D.L.R. 209.

The Exchequer Court and this Court rejected this contention and held the shares to be situate in Canada.

In this Court, Kerwin J., as he then was, speaking for the Court said at p. 345:

> While ordinarily (in the present instance) the law of Germany would determine the effect of the contract to transfer the certificates, "the distinction", as Professor Beale points out in volume 1 of his Conflict of Laws, page 446, "between the certificate of stock and the stock itself is an important one. The latter has its situs at the domicile of the corporation and there only".
>
> * * *
>
> Here the situs of the shares, as distinguished from that of the certificates, was in Canada and the New York Uniform Stock Transfer Law, relied upon by the appellant, has no bearing upon the question. The fact that the Railway Company was authorized to, and did in fact, establish a transfer office in the State of New York where, only, transfers of the shares in question were registrable, cannot make any difference. This was a mere matter of convenience and did not detract from the power of Canada to deal with the title to the shares of the Canadian company.
>
> The appellant also relied on the decision of the Privy Council in *Rex v. Williams* (2). There the Province of Ontario attempted to collect succession duty upon shares of a mining company incorporated by letters patent under the Ontario *Companies Act* and which had two transfer offices, one in Toronto and the other in Buffalo, New York, at either of which shareholders might have their shares registered and transferred in the books of the company. The shares in question were those of a testator who died domiciled in New York and the share certificates themselves were physically located there. Viscount Maugham pointed out that "One or other of the two possible places where the shares can be effectively transferred must therefore be selected on a rational ground" (p. 559); and further: "In a business sense the shares at the date of the death could effectively be dealt with in Buffalo and not in Ontario" (p. 560). The considerations which apply to a discussion as to the situs of shares for provincial succession duty purposes where a provincial legislature is restricted to direct taxation within the province cannot affect the matter at present under review.

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I can see no valid reason why the same considerations should not apply, to determine the situs of shares for the purpose of judicial execution, as for the purpose of a dispute as to ownership. In both cases, the dominant consideration is the jurisdiction of the court to which the company is ultimately subject.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: Cate, Ogilvy, Bishop, Cope, Porteous & Hansard, Montreal.

Solicitor for the respondent: D.S. Maxwell, Ottawa.

TAB 16

COURT FILE NO.	2201-11627
COURT	COURT OF KING'S BENCH OF ALBERTA (IN BANKRUPTCY & INSOLVENCY)
JUDICIAL CENTRE	CALGARY
APPLICANTS	IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*, RSC 1985, C C-8, AS AMENDED AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF BR CAPITAL LP, BR CAPITAL INC., ICE HEALTH SYSTEMS LP, ICE HEALTH SYSTEMS GP LP, ICE HEALTH SYSTEMS INC., HEALTH EDUCATION LP, HEALTH EDUCATION GP LP, HELP INC., FIRST RESPONSE INTERNATIONAL LP, FIRST RESPONSE INTERNATIONAL GP LP, FIRST RESPONSE INTERNATIONAL INC., ICE HEALTH SYSTEMS LTD AND SESCI HEALTH SERVICES INC. AND IN THE MATTER OF A PLAN OF ARRANGEMENT OF HEALTH SYSTEMS INC., HELP INC., FIRST RESPONSE INTERNATIONAL INC., ICE HEALTH SYSTEMS LTD AND SESCI HEALTH SERVICES INC. UNDER THE *BUSINESS CORPORATIONS* ACT, RSA 2000, CH B-9, AS AMENDED
DOCUMENT	**ORDER (Procedural Consolidation, Administration Charge, Interim Financing, Interim Financing Charge, D&O Charge and Stay Extension)**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**Gowling WLG (Canada) LLP** 1600, 421 – 7th Avenue SW Calgary, AB T2P 4K9 Attn: **Tom Cumming / Stephen Kroeger** Phone: 403.298.1938 / 403.298.1018 Fax: 403.263.9193 Email: tom.cumming@gowlingwlg.com / stephen.kroeger@gowlingwlg.com File No.: A167833

DATE ON WHICH ORDER WAS PRONOUNCED: October 14, 2022

LOCATION WHERE ORDER WAS PRONOUNCED: Calgary, Alberta

JUSTICE WHO MADE THIS ORDER: The Honourable Justice C. Dario in Commercial Chambers

UPON THE APPLICATION of BR Capital LP ("**BR LP**"), BR Capital Inc. ("**BR GP**"), Ice Health Systems LP ("**ICE LP**"), Ice Health Systems GP LP ("**ICE GP LP**"), Ice Health Systems Inc. ("**ICE AB Inc.**"), Health Education LP ("**HE LP**"), Health Education GP LP ("**HE GP LP**"), Help Inc. ("**HE Inc.**"), First Response International LP ("**FRI LP**"), First Response International GP LP ("**FRI GP LP**"), First Response International Inc. ("**FRI Inc.**"), Ice Health Systems Ltd. ("**ICE Ltd.**") and SESCI Health Services Inc. ("**SECSI**") (collectively, the "**Applicants**"), filed October 5, 2022; **AND UPON** reading Affidavit of Mark Genuis, sworn October 5, 2022 (the "**Genuis Affidavit**"), the supplemental Affidavit of Mark Genuis, sworn October 6, 2022, and the Affidavit of Kristy DeIure, sworn October 14, 2022; **AND UPON** reading the Report of KPMG Inc. in its capacity as proposal trustee of the Applicants (in such capacity, the "**Proposal Trustee**"); **AND UPON** hearing submissions by counsel for the Applicants, counsel for the Proposal Trustee and any other counsel or other interested parties present,

IT IS HEREBY ORDERED THAT:

SERVICE

1. The time for service of the notice of application for this order (the "**Order**") is hereby abridged and deemed good and sufficient and this application is properly returnable today, and no other than those persons served is entitled to service of the notice of application.

PROCEDURAL CONSOLIDATION

2. The bankruptcy estates of the Applicants BR LP (Estate No. 25-095315), BR GP (Estate No. 25-2865866), ICE LP (Estate No. 25-095322), ICE GP LP (Estate No. 25-095321), ICE AB Inc. (Estate No. 25-2865872), HE LP (Estate No. 25-095320), HE GP LP (Estate No. 25-095318), HE Inc. (Estate No. 25-2865870), FRI LP (Estate No. 25-095317), FRI GP LP (Estate No. 25-095316), FRI Inc. (Estate No. 25-2865869), ICE Ltd. (Estate No.25-2866171) and SESCI (Estate No. 25-2865873) (each individually an "**Estate**") shall, subject to further order of the Court, be procedurally consolidated into one estate (the "**Consolidated Estate**") and shall continue under Estate No. 25-095315 (with the proceeding in respect thereof being the "**Consolidated Proposal Proceeding**").

3. Without limiting the generality of the foregoing, the Proposal Trustee is hereby authorized and directed to administer the Consolidated Estates on a consolidated basis for all purposes in carrying out its administrative duties and other responsibilities as proposal trustee under

the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3 (the "***BIA***") as if the Consolidated Estate were a single estate and the Consolidated Proposal Proceeding were a single proceeding under the *BIA*, including without limitation:

(a) the meeting of creditors of the Applicants may be convened and conducted jointly, and the votes of creditors at such meeting shall be calculated on a consolidated basis;

(b) the Proposal Trustee is authorized to issue consolidated reports in respect of the Applicants; and

(c) the Proposal Trustee is authorized to deal with all filings and notices relating to the proposal proceedings of the Applicants, each as required under the *BIA*, on a consolidated basis.

4. Any pleadings or other documents served or filed in the Consolidated Proposal Proceeding by any party shall be deemed to have been served or filed in each of the proceedings comprising the Consolidated Proposal Proceeding.

5. A copy of this Order shall be filed by the Applicants in the Court file for each of the Estates but any subsequent document required to be filed will be hereafter only be required to be filed in the Consolidated Estate (Estate No. 25-095315).

6. The procedural consolidation of the Estates pursuant to this Order shall not:

(a) affect the legal status or corporate structure of the Applicants; or

(b) cause any Applicant to be liable for any claim for which it is otherwise not liable, or cause any Applicant to have an interest in an asset to which it otherwise would not have.

7. The Estates are not substantively consolidated, and nothing in this Order shall be construed to that effect.

8. The Proposal Trustee may apply to this Court for advice and directions with respect to the implementation of this Order or with respect to any other matter relating to the procedural consolidation of the Consolidated Estate.

ADMINISTRATION CHARGE

9. Legal counsel to the Applicants, the Proposal Trustee and Osler, Hoskin & Harcourt LLP, legal counsel to the Proposal Trustee, as security for their respective professional fees and disbursements incurred at up to their normal rates and charges in preparing for and during these Consolidated Proposal Proceedings, and both before and after the granting of this Order, shall be entitled to the benefit of, and are hereby granted, a security and charge (the "**Administration Charge**") on all of the Applicants' present and after-acquired assets, property and undertakings (the "**Property**"), which charge shall not exceed $350,000.

INTERIM FINANCING

10. The Applicants are hereby authorized and empowered to obtain and borrow under an interim financing facility (the "**Interim Financing Facility**") pursuant to the interim financing facility commitment letter dated July 26, 2022 (the "**Interim Financing Commitment Letter**"), among the Applicants as borrowers and 2443970 Alberta Inc. ("**244**") as administrative agent for and on behalf of a group of lenders (244, in such capacity, the "**Interim Agent**", and such lenders, together with the Interim Agent, the "**Interim Lenders**"), provided that borrowings under the Interim Financing Facility shall not exceed the principal amount of $430,010 unless permitted by further order of this Court and agreed to by the Interim Lenders.

11. The Interim Financing Facility shall be on the terms and subject to the conditions set forth in the Interim Financing Commitment Letter attached as Exhibit "Y" to the Genuis Affidavit, as such Interim Financing Commitment Letter may be amended in accordance with its terms.

12. The Interim Lenders shall be entitled to the benefit of and are hereby granted a security and charge on the Property (the "**Interim Lenders' Charge**") as security for the payment and performance of the indebtedness, liabilities and obligations of the Applicants to the Interim Lenders under the Interim Financing Commitment Letter and the Interim Financing Facility created thereby in the principal amount of $430,010 together with any interest accrued thereon or costs and expenses incurred thereunder.

D&O INDEMNIFICATION AND CHARGE

13. The Applicants shall indemnify their directors and officers against obligations and liabilities that they may incur as directors or officers after the filing of the Applicants' notices of intention to file a proposal, except to the extent that, with respect to any director or officer, the obligation or liability was incurred as a result of the director or officer's gross negligence, willful misconduct or fraud.

14. Each of the directors and officers of the Applicants shall be entitled to the benefit of and are hereby granted a charge (the "**D&O Charge**") on all of the Property, which shall not exceed an aggregate amount of $300,000, as security for the indemnity provided in this Order.

PRIORITY OF CHARGES

15. The filing, registration or perfection of the Administration Charge, the Interim Lenders' Charge and the D&O Charge (collectively, the "**Charges**") shall not be required, and the Charges shall be enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, notwithstanding any such failure to file, register, record or perfect.

16. Subject to paragraph 16.1, below, the Charges shall constitute a security and charge on the Property and such Charges shall rank in priority to all other security interests, trusts, liens, charges, deemed trusts, encumbrances and claims of secured creditors, statutory or otherwise in favour of any person, including liens and trusts created by federal and provincial legislation (collectively, the "**Encumbrances**"). The ranking as between the Charges shall be as follows:

(a) first, the Administration Charge;

(b) second, the Interim Lenders' Charge; and

(c) third, the D&O Charge.

16.1 With respect only to the property of SESCI HEALTH SERVICES INC. and not the property of any of the other Applicants, the Charges are subject to the claims (if any) of

His Majesty the King in right of Canada, as represented by the Minister of National Revenue pursuant to subsection 227(4.1) of the *Income Tax Act* (RSC 1985 c. 1 (5th Supplement), subsection 23(4) of the *Canada Pension Plan* (RSC 1985 c. C-8), subsection 86(2.1) of the *Employment Insurance Act* (S.C. 1996, c. 23), and section 76 of the *Alberta Personal Income Tax Act* (RSA 2000 c. A-30) against only SESCI HEALTH SERVICES INC.

17. Except as otherwise provided herein, or as may be approved by this Honourable Court, the Applicants shall not grant any Encumbrances over the Property that rank in priority to, or *pari passu* with, any of the Charges, unless the Applicants obtain the prior written consent of the beneficiaries of the Charges (the "**Chargees**") or further order of this Court.

18. The Charges shall not be rendered invalid or unenforceable and the rights and remedies of the Chargees thereunder shall not otherwise be limited or impaired in any way by:

(a) the pendency of these proceedings and the declarations of insolvency made in this Order;

(b) any application(s) for bankruptcy order(s) issued pursuant to the *BIA*, or any bankruptcy order made pursuant to such applications;

(c) the filing of any assignments for the general benefit of creditors made pursuant to the *BIA*;

(d) the provisions of any federal or provincial statutes; or

(e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, sublease, offer to lease or other agreement (collectively, an "**Agreement**") that binds the Applicants, and notwithstanding any provision to the contrary in any Agreement:

(i) neither the creation of the Charges nor the execution, delivery, perfection, registration or performance of any documents in respect thereof, shall create or be deemed to constitute a new breach by the Applicants of any Agreement to which they, or any one of them, is a party;

(ii) none of the Chargees shall have any liability to any person whatsoever as a result of any breach of any Agreement caused by or resulting from

the creation of the Charges, or the execution, delivery or performance of the Interim Financing Facility; and

(iii) the payments made by the Applicants pursuant to this Order and the granting of the Charges, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct or other challengeable or voidable transactions under any applicable law.

EXTENSION OF TIME TO FILE A PROPOSAL

20. The time within which the Applicants are required to file a proposal to their creditors with the Official Receiver, under section 50.4 of the *BIA* is hereby extended to November 29, 2022.

21. Any interested party (including the Proposal Trustee and the Applicants) may apply to this Court to vary or amend this Order on not less than seven (7) days' notice to any other party or parties likely to be affected by the order sought, or upon such other notice, if any, as this Court may order.

22. Service of this Order may be effected by facsimile, electronic mail, personal delivery or courier. Service is deemed to be effected the next business day following transmission or delivery of this Order.

J.C.K.B.A.

Approved as to Form and Content
this ____ day of October, 2022 by Legal Counsel for KPMG Inc., in its capacity as Proposal Trustee for the Applicants

Randal Van de Mosselaer
Osler, Hoskin & Harcourt LLP

Approved as to Form and Content
this 19th day of October, 2022 by Counsel for the Canada Revenue Agency

George F. Body
Department of Justice Canada

TAB 17

COURT FILE NUMBER	25-2581252 25-2582159	Clerk's Stamp
COURT	COURT OF QUEEN'S BENCH OF ALBERTA	
JUDICIAL CENTRE	CALGARY	
	IN THE MATTER OF THE BANKRUPTCY AND INSOLVENCY ACT, R.S.C. 1985, c. B-3, AS AMENDED IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF TRAKOPOLIS IoT CORP. IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF TRAKOPOLIS SaaS CORP.	
APPLICANTS:	TRAKOPOLIS IoT CORP. and TRAKOPOLIS SaaS CORP.	
DOCUMENT	**ORDER** **(Extension of the Stay, Administration Charge, FA Charge, D&O Charge)**	
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Osler, Hoskin & Harcourt LLP Suite 2500, TransCanada Tower 450 – 1st Street SW Calgary, Alberta T2P 5H1	
	Solicitors: Randal Van de Mosselaer / Emily Paplawski Phone: 403.260.7060 / 7071 Fax: 403.260.7024 Email: RVandemosselaer@osler.com / Epaplawski@osler.com Matter: 1205888	

DATE ON WHICH ORDER WAS PRONOUNCED: December 16, 2019

LOCATION WHERE ORDER WAS PRONOUNCED: Calgary, Alberta

NAME OF JUSTICE WHO MADE THIS ORDER: Mr. Justice A. D. Macleod

UPON THE APPLICATION of Trakopolis IoT Corp. and Trakopolis SaaS Corp. (together, "**Trakopolis**" and each a "**Debtor**") among other things, approving and extending the time for Trakopolis to file a proposal to January 24, 2020, pursuant to section 50.4(9) of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, as amended ("**BIA**"); AND UPON having reviewed the Affidavit of Chris Burchell, sworn November 25, 2019 (the "**Burchell Affidavit**"), the Confidential Affidavit of Chris Burchell, sworn November 25, 2019 (the "**Confidential Burchell Affidavit**"), the Supplemental Affidavit of Chris Burchell, sworn December 13, 2019 (the "**Supplemental Burchell Affidavit**"), the Supplemental Confidential Affidavit of Chris Burchell, sworn December 13, 2019 (the "**Supplemental Confidential Burchell Affidavit**"), the First Report of Alvarez & Marsal Canada Inc., in its capacity as Trustee (the "**Proposal Trustee**") under the Notices of Intention to Make a Proposal of Trakopolis ("**NOIs**"), filed November 7 and 9, 2019, and the Supplemental First Report of the Propsoal Trustee; **AND UPON** hearing the submissions of counsel for Trakopolis, the Proposal Trustee and ESW Holdings, Inc. ("**ESW**"), and no one appearing for any other person on the service list;

IT IS HEREBY ORDERED AND DECLARED THAT:

1. Service of notice of this Application and supporting materials is hereby declared to be good and sufficient, and no other person is required to have been served with notice of this Application, and time for service of this Application is abridged to that actually given.

EXTENSION OF THE STAY

2. Trakopolis is hereby granted, pursuant to s. 50.4(9) of the BIA, an extension of the time for Trakopolis to file a proposal, such extension being to January 24, 2020.

ADMINISTRATION CHARGE

3. The Proposal Trustee, Proposal Trustee`s counsel, and Trakopolis's counsel as security for the professional fees and disbursements incurred both before and after the NOIs, shall be entitled to the benefit of and are hereby granted a charge (the "**Administration Charge**") on Trakopolis`s current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (the "**Property**"), which charge shall not exceed an aggregate amount of $250,000, as security for their professional fees and disbursements incurred at the normal rates and charges of the

Proposal Trustee, Proposal Trustee's Counsel and Trakopolis's counsel. The Administration Charge shall have the priority set out in paragraphs 5 to 7 hereof.

THE FINANCIAL ADVISOR ENGAGEMENT LETTER AND CHARGE

4. The engagement letter (the "**EL**") between Canaccord Genuity Corp. (the "**FA**") and the Companies dated December 10, 2019, including the fees payable as set out therein, are hereby approved.

5. The FA shall be entitled to the benefit of and is hereby granted a charge (the "**FA Charge**") on the Property, which charge shall not exceed an aggregate amount of $200,000, as security for their professional fees and disbursements incurred pursuant to the EL. The Administration Charge shall have the priority set out in paragraphs 5 to 7 hereof.

DIRECTORS' AND OFFICERS' CHARGE

6. The charge granted to the directors and officers of Trakopolis by paragraph 2 of the December 6, 2019 Order of this Court in the within Action (the "**D&O Charge**") shall have the priority set out in paragraphs 7 to 9 hereof.

VALIDITY AND PRIORITY OF CHARGES

7. The Priorities of the Charges (as defined below), as between them, shall be as follows:

   First – Administration Charge (to the maximum of $250,000) and the FA Charge (to the maximum of $200,000), on a *pari passu* basis;

   Second – D&O Charge (to the maximum of $150,000)

   (collectively, the "**Charges**").

8. The filing, registration or perfection of the Charges shall not be required, and the Charges shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, notwithstanding that any such failure to file, register, record or perfect.

9. Notwithstanding anything else in this Order, there shall be no amounts owing under the FA Charge unless or until Trakopolis has closed a restructuring transaction (a "**Restructuring Transaction**") within the meaning of the EL, namely, any restructuring, reorganization, rescheduling, repayment, refinancing or recapitalization of all or any material portion of the liabilities of the Trakopolis, however such result is achieved, including, without limitation, through a plan of arrangement, reorganization or liquidation or proposal in the within proceedings, or under the *Companies' Creditors Arrangement Act*, or under the laws of the province of Alberta, an exchange offer or consent solicitation, covenant relief, a rescheduling of debt maturities, a change in interest rates, a settlement or forgiveness of debt, a conversion of debt into equity, or other amendments to the Trakopolis debt instruments. For further clarification, any transaction following the appointment of a Receiver on application by ESW shall not constitute a Restructuring Transaction.

10. The Charges shall constitute a charge on the Property and such Charges shall rank in priority to all other security interests, trusts, liens, charges, and encumbrances, statutory or otherwise (collectively, "**Encumbrances**") in favour of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "**Persons**" and each being a "**Person**").

CONSOLIDATION

11. The Proposal Trustee is entitled to administer procedural matters relating to the bankruptcy proceedings of Trakopolis on a consolidated basis (the "**Consolidated NOI Proceedings**"). All materials filed with the court clerk in respect of Court of Queen's Bench of Alberta in Bankruptcy and Insolvency Estate Nos. 25-2581252 and 25-2582159 may be filed exclusively in Estate No. 25-2581252. A copy of this order will be filed in the Court file for each of the Debtor's respective estates, but any other document required to be filed in the Consolidated NOI Proceedings shall be filed in Estate No. 25-2581252.

12. The Consolidated NOI Proceedings will be in relation to procedural matters only and do not:

    (a) affect the separate legal status and corporate structure of the Debtors; or

(b) cause either Debtor to be liable for any claim for which it is otherwise not liable, or cause either Debtor to have an interest in an asset to which it otherwise would not have.

13. Without limiting the generality of the foregoing, the Proposal Trustee is authorised to carry out its administrative duties and responsibilities as trustee-in-bankruptcy and as proposal trustee under the BIA as if the Consolidated NOI Proceedings were a single proceeding under the BIA, including without limitation:

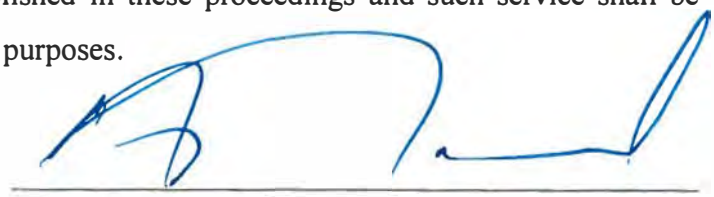
(a) the meetings of creditors of the Debtors may be convened and conducted jointly;

(b) the Proposal Trustee is authorised to issue consolidated reports in respect of the Debtors; and

(c) the Proposal Trustee is authorized to deal with all filings and notices relating of the proposal proceedings of the Debtors, each as required under the BIA on a consolidated basis.

MISCELLANEOUS

14. Trakopolis shall serve by courier, fax transmission, email transmission or ordinary post, a copy of this Order on all parties present at this Application and on all parties who are presently on the service list established in these proceedings and such service shall be deemed good and sufficient for all purposes.



Justice of the Court of Queen's Bench of Alberta

TAB 18

Lockhart Saw Limited (Re), 2007 NBQB 093
Court Number: 12795
Estate Number: 51-919744

IN THE COURT OF QUEEN'S BENCH OF NEW BRUNSWICK

TRIAL DIVISION

JUDICIAL DISTRICT OF SAINT JOHN

BETWEEN:

IN THE MATTER OF the Proposal of Lockhart Saw Limited

BEFORE: **Justice Peter S. Glennie**

AT: **Saint John, N.B.**

DATE OF HEARING: **February 2, 2007**

DATE OF REASONS: **February 9, 2007**

COUNSEL:

R. Gary Faloon, Q.C., on behalf of Lockhart Saw Limited

D E C I S I O N

GLENNIE, J. (Orally)

[1] Lockhart Saw Limited, ("Lockhart"), seeks an order pursuant to section 50.4(9) of the *Bankruptcy and Insolvency Act*, R.C.S. 1985, c.B-3 ("BIA") extending the time for filing a Proposal.

Overview

[2] Lockhart filed a Notice of Intention to Make a Proposal under s. 50.4(1) of the BIA on January 3, 2007, (the "Notice of intention"). The Notice of Intention provided that A.C. Poirier & Associates Inc., ("ACP"), had consented to act as Trustee under a Proposal.

[3] Since the filing of the proposal, Lockhart says it has been canvassing the market in an effort to find a purchaser of its real property situate in the City of Saint John. At present, based on continued customer support and discussions with certain stakeholders, it appears that there is a reasonable opportunity to complete the successful reorganization and sale of Lockhart's real property.

[4] ACP is of the opinion that the creditors of Lockhart will not be materially prejudiced by the requested extension. No creditor has demonstrated material prejudice or attempted to quantify its supposed losses if an extension is granted.

Analysis

[5] The Proposal sections of the BIA are designed to give an insolvent company an opportunity to put forward a proposal as long as a court is satisfied that the requirements of section 50.4(9) are met: *Re Doaktown Lumber Ltd.* (1996), 39

C.B.R. (3d) 41 (N.B.C.A.) at paragraph 12.

[6] In considering applications under section 50.4(9) of the BIA, an objective standard must be applied and matters considered under this provision should be judged on a rehabilitation basis rather than on a liquidation basis: See *Re Cantrail Coach Lines Ltd.* (2005), 10 C.B.R. (5th) 164 and *Re Convergix Inc.* [2006] N.B.J. No. 354 (Q.B.)

Acting in Good Faith and with Due Diligence

[7] Lockhart has been diligently working on a restructuring for over a year. It has retained the professional services of ACP to assist it in restructuring, has successfully reduced its overall indebtedness and is actively attempting to either sell or lease its real property. I am accordingly satisfied that Lockhart has acted, and is acting, in good faith and with due diligence.

Ability to Make a Viable Proposal

[8] The test for whether Lockhart would likely be able to make a viable proposal if granted the extension is whether Lockhart would likely (as opposed to certainly) be able to present a proposal that seems on its face to be reasonable to a reasonable creditor. The test is not whether or not a specific creditor would be prepared to support the proposal. In *Re Baldwin Valley Investors Inc. (1994),* 23 C.B.R. (3d) 219 (Ont. G.D.) Justice Farley was of the opinion that "viable" meant reasonable on its face to a reasonable creditor and that "likely" did not require certainty but meant "might well happen" "probable" "to be reasonably expected". See also *Scotia Rainbow Inc. v. Bank of Montreal* (2000), 18 C.B.R. (4th) 114 (N.S.S.C).

[9] On the evidence before me I find that there appears to be a core business to

form the base of a business enterprise; that management is key to the ongoing viability of the business and that management appears committed to such ongoing viability; and that debts owed to creditors after sale of the real property can likely be serviced by the restructured entity.

[10] Accordingly, I am satisfied that Lockhart would likely be able to make a viable proposal.

Absence of Material Prejudice to Creditors

[11] On the evidence I conclude that Lockhart has honoured all of its post-filing obligations and is in a position to honour these obligations during the extension period. As well, it appears that the position of secured creditors has not and will not be adversely affected for several reasons including, mortgage payments continue to be paid and the building on Lockhart's real property continues to be insured and properly maintained; the book value of the assets forming the security of Royal Bank of Canada, ("RBC"), exceeds the amount owed to RBC by a significant amount; Lockhart continues in operation and made a profit from its operation for the month of January, 2007; Lockhart reduced the amount outstanding on its RBC operating line of credit in January, 2007; Lockhart is actively trying to lease or sell its real property; over the past year Lockhart has reduced its indebtedness to RBC from nearly $800,000 to under $200,000; and Lockhart's real property has an assessed value for real property taxes of $419,700.

[12] The material prejudice referenced in section 69.4(1) of the BIA is an objective prejudice as opposed to a subjective prejudice. In other words, it refers to the degree of the prejudice suffered vis-à-vis the indebtedness and the attendant security and not to the extent that such prejudice may affect the creditor *qua* person, organization or entity. See *Re Cumberland Trading Inc.*

(1994), 23 C.B.R. (3d) 225 (Ont. Gen. Div.).

[13] In *Re Acepharm Inc.* (1998), 4 C.B.R. (4th) 19 (Ont. Gen. Div.) the court refused to lift a stay under section 69.4 of the BIA as the moving party pleaded subjective prejudice, which did not constitute material prejudice. At paragraph 10 the court cited with approval the following passage from *Honsberger, Debt Restructuring* at section 8-44:

> "what amounts to material prejudice must be decided on a case-by-case basis. It is a broad concept…the Bankruptcy Court being a court of equity must consider the impact of a stay on the parties. This will involve a weighing of the interest of the debtor against the hardship incurred on the creditor. This has been referred to as the "balance of hurt" test."

[14] On the evidence, I conclude that the proposed extension would not materially prejudice Lockhart's creditors.

Disposition

[16] In the result an order will issue pursuant to section 50.4(9) of the BIA extending the time for filing a proposal to March 19, 2007.

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Peter S. Glennie
A Judge of the Court of Queen's Bench
of New Brunswick

TAB 19

England and Wales Court of Appeal (Civil Division) Decisions

BAILII Citation Number: [1995] EWCA Civ 55

Case No. CH 1991 M No.12739

IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL
(CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
CHANCERY DIVISION)
MR. JUSTICE MILLETT))

Royal Courts of Justice
Strand
London WC2

2 November 1995

B e f o r e :

LORD JUSTICE STAUGHTON
LORD JUSTICE AULD
LORD JUSTICE ALDOUS

MACMILLAN INC — **Appellants**

- v -

BISHOPGATE INVESTMENT TRUST plc & ors — **Respondents**

(Handed Down Transcript of the Judgment: John Larking Verbatim Reporters, Chancery House, Chancery Lane
London WC2 Tel: 0171 404 7464 Official Shorthand Writers to the Court)

MR. D. OLIVER Q.C and MR. M. ROSEN Q.C. (Instructed by Messrs Herbert Smith) appeared on behalf of the (Plaintiff) Appellant, Macmillan Inc.)

MR. C. ALDOUS Q.C. and MR. R. HILDYARD Q.C. (instructed by Messrs. Freshfields) appeared on behalf of the Second Defendant (Respondent) Shearson Lehman Brothers Holdings plc.
MR. W. BLAIR Q.C. (instructed by Messrs. Watson, Farley & Williams) appeared on behalf of the Third Defendant (Respondent) Swiss-Volksbank.
MR. S. MORTIMORE Q.C. and MR. W. TROWER (instructed by Messrs. Clifford Chance) appeared on behalf of the Fifth Defendant (Respondent), Credit Suisse).

HTML VERSION OF JUDGMENT

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1. **LORD JUSTICE STAUGHTON**: In any case which involves a foreign element it may prove necessary to decide what system of law is to be applied, either to the case as a whole or to a particular issue or issues. Mr Oliver, for Macmillan Inc., has referred to that as the proper law; but I would reserve that expression for other purposes, such as the proper law of a contract, or of an obligation. Conflict lawyers speak of the lex causae when referring to the system of law to be applied. For those who spurn Latin in favour of English, one could call it the law applicable to the suit (or issue) or, simply the applicable law.

2. In finding the lex causae there are three stages. First, it is necessary to characterize the issue that is before the court. Is it for example about the formal validity of a marriage? Or intestate succession to movable property? Or interpretation of a contract?

3. The second stage is to select the rule of Conflict of Laws which lays down a connecting factor for the issue in question. Thus the formal validity of a marriage is to be determined, for the most part, by the law of the place where it is celebrated; intestate succession to movables, by the law of the place where the deceased was domiciled when he died; and the interpretation of a contract, by what is described as its proper law.

4. Thirdly, it is necessary to identify the system of law which is tied by the connecting factor found in stage 2 to the issue characterised in stage 1. Sometimes this will present little difficulty, though I suppose that even a marriage may now be celebrated on an international video link. The choice of the proper law of a contract, on the other hand, may be controversial.

5. In an ideal world the answers obtained in these three stages would be the same, in whatever country they were determined. But unfortunately the Conflict rules are by no means the same in all systems of law. In those circumstances a choice of Conflict rule may have to be made. It is clear that, in general, the second and third stages are to be determined by the law of the place where the trial takes place (lex fori) . That law must tell one what the connecting factor is for the issue before the court, and what system of law it points to. But the first stage, characterisation of the issue, presents more of a problem.

6. In Dicey and Morris on The Conflict of Laws (12th edn) p.35 there is this passage:

> "The problem of characterisation has given rise to a voluminous literature, much of it highly theoretical. The consequence is that there are almost as many theories as writers and the theories are for the most part so abstract that, when applied to a given case, they can produce almost any result."

Fortunately the next sentence reads:

> "They appear to have had almost no influence on the practice of the courts in England."

The authors conclude (p.44):

> "The way the court should proceed is to consider the rationale of the English conflict rule and the purpose of the rule of substantive law to be characterised. On this basis, it can decide whether the conflict rule should be regarded as covering the rule of substantive law. In some cases the court might conclude that the rule of substantive law should not be regarded as falling within either of the two potentially applicable conflict rules. In this situation a new conflict rule should be created."

Later (p.47):

> "... the way lies open for the courts to seek commonsense solutions based on practical considerations."

7. Before leaving these preliminary matters, I would add that if at all possible the rules of Conflict should be simple and easy to apply. One might say that all rules of law should be of that character; but we have less control over rules of domestic law. The litigant who is told by his advisers that his case may or may not involve the application of a foreign system of law, and that he must be armed with expensive expert evidence which may, in the event, prove unnecessary, deserves our sympathy. For many years even cases of tort/delict involved uncertainty and the analysis of five different speeches in the House of Lords. Academic writers of distinction concern themselves with Conflict, not surprisingly since it is a subject of great intellectual interest. We must do our best to arrive at a sensible and practical result.

These proceedings

8. Macmillan Inc., a Delaware corporation, started an action against eight defendants claiming the return of 10.6 million shares in Berlitz International Inc., a New York Corporation of renown in the language teaching field, or compensation for the loss of the shares. The action continued against the second defendants (Shearson Lehman Brothers Holding Ltd) , the third defendants (Swiss Volksbank) and the fifth defendants (Credit Suisse). The trial lasted for the best part of a year, from October 1992 to July 1993, before Millett J. He gave judgment in favour of the defendants, dismissing the claims of Macmillan. One of the problems which he had to resolve on the route to that conclusion - one might say the first - was whether the dispute should be resolved by English law or the law of and prevailing in the state of New York. In other words, which was the lex causae? The judge held that it was New York law.

9. Macmillan have appealed. All parties agreed that we should first determine that same question as a preliminary issue in the appeal; and an order has been made to that effect. The order reads as follows:

> " (2) that the said hearing of these appeals commence with and be limited in the first instance to the following issues ('the Proper Law Appeal Issues') on which argument is estimated to occupy the court for 10 days namely:-
>
> a. paragraph 2 of the Notice of Appeal as against the Second Defendant and paragraph 1 of the Second Defendant's Respondent's Notice;
>
> b. paragraph 2 of the Notice of Appeal as against the Third Defendant;
>
> c. paragraph 2 of the Notice of Appeal as against the Fifth Defendant, and paragraph 1 of the Fifth Defendant's Respondent's Notice."

10. The paragraphs in the three notices of appeal are all the same in substance. One of them read as follows:

> "2.1 The Learned Judge was wrong to hold that the Plaintiff's claim against Shearson was governed by New York law rather than English law. That claim is to be governed by the law which has the closest and most real connection with Shearson's alleged obligation to make restitution of the relevant Berlitz shares to the Plaintiff and not by the lex loci actus."

11. The Respondents' notices of the second and fifth defendants introduce alternative reasons for choosing New York law.

12. I am not entirely happy with the way that the preliminary issue is drafted, although I have to confess that I certainly approved it, and may have had a hand in its drafting. However, the right course would seem to be first to arrive at an answer to the problem, and then to see if the question needs re-drafting.

13. There are in essence three issues before us, corresponding to the three stages in a Conflict case which I have mentioned. They are:

> (A) How does one characterize the question in this action?
>
> (B) What connecting factor does our Conflict rule provide for questions of that character?
>
> (C) What system of law does that connecting factor require to be applied? The facts

14. There are differences in the material facts relating to each of the second, third and fifth defendants. But some are common to all. Macmillan were a wholly owned subsidiary of Maxwell Communications Corporation plc, a company owned partly by the public and partly by Mr Robert Maxwell and his family. Macmillan in turn had a majority holding of 10.6 million shares in Berlitz, registered in Macmillan's name in New York. (In point of fact it would seem that the transfer sheets of the company's transfer agent, Manufacturers Hanover Trust Company, constituted the register.)

15. On 5th November 1990 the shares were transferred out of Macmillan's name to a company called Bishopsgate Investment Trust plc, which was in a part of the Maxwell group that was owned and controlled by Mr Robert Maxwell and his family. This was done on the instructions of Mr Maxwell, and (as the judge found) with the authority of a resolution of the executive committee of the board. Macmillan's share certificates were cancelled, and replaced by 21 certificates in the name of Bishopsgate. They were brought to London from the United States by Miss Ghislaine Maxwell on the following day. But not long afterwards Mr Maxwell signed a nominee agreement in which Bishopsgate acknowledged that it held the shares as nominee for the account and benefit of Macmillan, and had "no power or right to take any action with respect thereto without the express consent of Macmillan." That agreement provided that it should be governed by the law of New York.

16. To say that this pious declaration was disregarded before the ink on it was dry may be something of an exaggeration. But a practice began whereby numbers of the shares were used as security for debts owed to creditors by companies in the private ownership of Mr Maxwell and his family. Thus the property of Macmillan, a company which was in part publicly owned through its parent and no doubt had creditors of its own, was used to secure loans to the private side of the Maxwell empire.

17. In order to facilitate that process, in March 1991 7.6 million of the shares were deposited with the Depository Trust Company in New York. That is said to be a paperless transfer system, and is much used in the United states. Shares are transferred to Depository Trust Co. and registered in the name of their agents, a partnership called CEDE. In order to deal with DTC, as I shall call them, it was necessary to go through a DTC agent. In the case of the Maxwell Group the agent was Morgan Stanley Trust Company, a company incorporated in New Jersey. So after the shares entered the DTC system, they were registered in the Berlitz register in the name of CEDE, in the records of CEDE as held for Morgan Stanley, and in the

records of Morgan Stanley as held for an associated company of Bishopsgate. But not for long. Various transactions followed in which the shares were used as security, until we come to those which give rise to the present dispute.

(1) Shearson Lehman

18. A total of 1.9 million Berlitz shares were deposited with Lehman Bros. International Ltd by a Bishopsgate company in three parcels in November and December 19 90 and September 1991. The deposit was as security for the obligations of the borrowers under a stock lending agreement. I need not enter upon the detail of that agreement; it had the effect of making money available on loan to one or more companies in the private ownership of Mr Maxwell.

19. The security was created by the deposit of the share certificates in London accompanied by duly executed share transfer forms. In July and October 1991 the security was, as the judge found, perfected in New York by deposit in the DTC system. This was done by Lehman Brothers sending the certificates to Bankers Trust, their agent in the DTC system. So CEDE became the registered owners, and held the shares for Bankers Trust who in turn held them for Lehman Brothers.

20. On 6th November 1991, the day after the death of Mr Robert Maxwell, Lehman Brothers sold the 1.9 million shares to Shearson Lehman, in the exercise of their power of sale. It is said that Shearson Lehman thereby obtained as good a title as Lehman Brothers previously had, even if they now had notice of a breach of trust by Bishopsgate. That sale was completed on 4th December 1991, when the shares were registered in the name of Shearson Lehman in place of CEDE; and Shearson Lehman obtained a stock certificate.

(2) Swiss Volksbank

21. On 12th November 1991 2.4 million Berlitz shares which were already in the DTC system were transferred to Swiss Volksbank. This was achieved by CEDE holding the shares for Citibank NA, who were Swiss Volksbank' s agents in the DTC system. The purpose of the transaction became clear on the following day, when security documents were executed in London. This was to cover a loan of some $35 million by Swiss Volksbank to a company privately owned within the Maxwell empire. The pledge agreement was expressed to be governed by New York law, and other documents by English law.

22. On 3rd December 1991 Macmillan's solicitors wrote to Swiss Volksbank demanding return of the Berlitz shares. Swiss Volksbank thereupon realized their security, and on 6th December were registered as owners with the company's transfer agents in place of CEDE, and obtained a share certificate.

(3) Credit Suisse

23. In this instance there were two parcels of shares that were treated differently, although both were pledged as security for a loan of £50 million to a privately owned company in the Maxwell empire. There were memoranda of deposit and a facility letter, expressed to be governed by English law.

24. First, 500,000 shares in Berlitz were deposited with Credit Suisse on 27th September 1991, together (as it happened) with shares in other companies incorporated in other countries. The deposit was of a single share certificate in the name of the Bishopsgate company, with a stock power executed in blank by the Maxwell brothers, who were directors of that company.

25. Secondly, on 12th November 1991, one million Berlitz shares already in the DTC system were transferred to Credit Suisse. This was achieved by debiting Morgan Stanley's account with CEDE (Morgan Stanley being, as I have mentioned, the DTC agents of the Bishopsgate companies), and crediting Swiss American Securities Inc., who were Credit Suisse's agents.

26. An interim injunction was in force between 2 0th January and 13th April 1992, restraining Credit Suisse from dealing with the 1.5 million Berlitz shares. On the later date an extension was refused by Hoffman J., on the ground that Macmillan's undertaking in damages was not sufficiently secured. In the view of Millett J. this was a critical event for part of the shares. For in May 1992 Credit Suisse withdrew the one million shares from the DTC system and secured their registration in the name of their own nominee company; and in June they achieved the same result for the 500,000 shares which had never been in the DTC system. All that happened while the action was in progress.

27. There were thus two different routes by which the shares were pledged in the first instance - by deposit of share certificates in London, and by a transaction in the DTC system in New York. Shearson Lehman (or rather Lehman Brothers) were an example of the first, and Swiss Volksbank of the second. Credit Suisse received one parcel by each of the two methods. In all cases the pledgees eventually became registered as owners of the shares. And in all cases the pledge of shares was, as the judge found, a breach of trust by Bishopsgate.

The Issues

28. The relief sought in the amended Statement of Claim comprised, so far as is material for present purposes,

> (1) a declaration that Macmillan is still beneficially entitled to the 10.6 million shares transferred to Bishopsgate on 5th November 1990;
>
> (2) a declaration that the shares subsequently transferred to Shearson Lehman, Swiss Volksbank and Credit Suisse are held on constructive trust for Macmillan;
>
> (3) such orders as are required for restoring the shares to Macmillan; and
>
> (4) inquiries as to compensation and /or damages for breach of constructive trust and/or conversion.

Paragraph 5.2 reads as follows:

> "Macmillan has expressly notified each defendant . . . that they hold the said various shares respectively on constructive trust on its behalf. It will (so far as may be necessary) deny any claim by Shearson Lehman, Swiss Volksbank and/or Credit Swiss ... to have acquired legal ownership thereof and to have done so bona fide for value and without any notice of Macmillan's rights."

29. During the trial and with the cooperation of all parties the 5.8 million shares with which this action is concerned were sold to a Japanese company for $137 million in cash and other consideration. The proceeds of sale have now replaced the shares to the extent that they were the object of the claim.

30. All three defendants pleaded that the Statement of Claim did not disclose any cause of action. Had that been the main issue, or indeed a significant issue, it may well be that it would affect the law applicable to the suit, for reasons which will appear. But so far as I can detect that plea was not persisted in. What has been sustained is the plea of all three defendants that they acquired title to the shares in good faith and for value, without notice of any beneficial interest in Macmillan. That is said to be the case both by English and by New York Law.

31. Millett J. made findings as to the effect of New York law. They may be in issue at a later stage in this appeal; but I quote his summary now so as to show briefly why there is a contest as to the applicable law.

32. The Berlitz shares were "certificated securities" within Article 8 of the New York Uniform Commercial Code. That was the case whether or not the shares were entered in the DTC system. They were negotiable instruments by New York law. Since property in a negotiable instrument passes both at law and in equity

by delivery, no distinction is made in Article 8 between legal estates and equitable interests. The priority rules are consequently much simpler than in English law. The main differences are:

> (1) As between the parties to a transfer and persons claiming under the transferor, the transfer of a certificated security (including a security interest in it) takes place when the purchaser or a person designated by him acquires possession of the certificate, not when he obtains registration.
>
> (2) Special provision is made for delivery of shares through the DTC system.
>
> (3) A bona fide purchaser for value who takes delivery of a certificated security, including delivery through the DTC system, takes free from any adverse claim of which he had no notice at the date of delivery, whether he subsequently obtains registration or not.
>
> (4) Notice is defined more narrowly than in English law, and does not include constructive notice.

33. The judge held that the applicable rule of Conflict of Laws required him to apply the law of the place of the transaction (lex loci actus) , which in turn he held to be New York law. Both those conclusions are challenged. Macmillan argue for the law of the restitution obligation, which in turn they claim to be the law of the place where the benefit was received, or the law with which the transaction has its closest and most real connection. Alternatively they say that the place of the transaction, even applying the judge's rule, was England and not New York.

34. The defendants are content with the judge's conclusions as they stand. But the preferred view of Shearson Lehman and Credit Suisse is that the applicable law is the lex situs of the shares, or (if there is any difference) the law of the place of incorporation or where the register is kept. All these tests point to New York in this case. Swiss Volksbank on the other hand adopt the judge's solution as their primary case, but are content with the lex situs or the law of the place of incorporation as alternatives.

Stage 1: Characterisation

35. Macmillan contend, as they did before the judge, that their claim is restitutionary in nature; and that in consequence the appropriate Conflict rule is rule 201 in Dicey & Morris:

> "201 (1) The obligation to restore the benefit of an enrichment obtained at another person's expense is governed by the proper law of the obligation.
>
> (2) The proper law of the obligation is (semble) determined as follows:
>
> > (a) If the obligation arises in connection with a contract, its proper law is the law applicable to the contract;
> >
> > (b) If it arises in connection with a transaction concerning immovable (land), its proper law is the law of the country where the immovable is situated (lex situs);
> >
> > (c) If it arises in any other circumstances, its proper law is the law of the country where the enrichment occurs."

36. The rule appears in the section of Dicey & Morris which deals with the law of obligations. It is sub-paragraph (c) which is said to be relevant here.

37. The case of Chase Manhattan Bank NA v. Israel-British Bank (London) Ltd (1981) Ch. 105 was cited in support of the rule. That was a case of money paid under a mistake of fact; but, the defendants being in

liquidation, there was a proprietary claim to trace the money asserted as well as a common law claim for money had and received. It was, as Goulding J. said (at p.115):

> "common ground that the legal effects of the mistaken payment must in the first instance be determined in accordance with New York law as the lex causae."

38. Counsel (Mr Chadwick) had cited the predecessor of rule 201(2)(c) from the 9th edition of Dicey & Morris. El Ajou v. Dollar Land Holdings plc (1993) 3 All ER 717 was about a claim to trace the proceeds of fraud. Millett J., at first instance, held that (p.736)

> "the law governing such claims is the law of the country where the defendant received the money,"

and referred to Dicey & Morris (11th edn) and the Chase Manhattan case. In the Court of Appeal (1994) 2 All ER 685 the decision was reversed, but not upon any consideration of the applicable law - perhaps because there had been no evidence of foreign law.

In re Jogia (1988) 1 WLR 484 concerned claims for money paid under a mistake and/or for money had and received. Sir Nicolas Browne-Wilkinson V-C said this (at p.495):

> "As at present advised, I am of the view that quasi-contactual obligations of this kind arise from the receipt of the money. I find it difficult to see how such obligation can be said to be 'made' or 'arise' in any place other than that of receipt. As to the proper law, Dicey & Morris, the Conflict of Laws, 10th edn. (1980), p.921 expresses the view that, save in cases where the obligation to repay arises in connection with a contract or an immoveable, the proper law of the quasi-contact is the law of the country where the enrichment occurs. This accords with the American Restatement and seems to me to be sound in principle."

This passage was not essential to the decision, but rather obiter. Rule 201 was followed by Hwang JC in the High Court of Singapore in Hongkong & Shanghai Banking Corporation v. Overseas Bank Ltd (1992) 2 SLR 495 in relation to money purloined from a bank account.

39. Millett J. in the present case accepted (as he had done in El Ajou) that Dicey's rule applied to some restitutionary claims; but he held that it did not apply to all. He drew a distinction between the claim of an equitable owner to recover his property, or compensation for the failure to restore it, from the person into whose hands it had come, and a claim by a plaintiff in resect of a breach of a fiduciary obligation owed to him. Whilst the latter class of a case would be within Rule 201(2) (c) , the former would not. The issue in the former case was one of priority, to be governed by the law selected by a Conflict rule as appropriate to that issue.

40. It is clear that Macmillan's claims in the present case are to some extent proprietary. Mr Oliver asserts that they are receipt based. But he needs to do more than show that the defendants received the shares; he must also plead, in effect, that they are Macmillan's shares; and the Statement of Claim does indeed say that. Millet J. described this requirement as "an undestroyed proprietary base." Against that it is said that, whilst Macmillan do have an equitable title to the shares, equity acts in personam and gives effect to that title only by orders directed at those who would disturb it. Hence the fact that, while the English courts do not have jurisdiction to decide questions of title to foreign land (Dicey & Morris rule 116) , there are many instances where they will grant a remedy against defendants who are here and who are sued here: Mercantile Investment & General Trust Co v.River Plate Trust, Loan & Agency Co, (1892) 2 Ch.303, Webb v.Webb (1994) 3 WLR 801. Mr Oliver points out that Macmillan claim not only a declaration as to their proprietary rights, but also an order that the defendants restore the shares to Macmillan and compensation or damages.

41. In my judgment the considerable learning directed at those issues does not need to be considered in the present case. This part of this appeal is not in my opinion the place to confront the law of restitution "in a logical, consistent and coherent fashion". (Bird (1995) LMCLQ 313). I am prepared to accept that Macmillan's claim is restitutionary in nature; and I would accept without deciding that rule 2 01 of Dicey & Morris determines what system of law governs such a claim. But the issue is not, or not any longer, whether Macmillan have a cause of action for restitution; it is whether the defendants have a defence on the ground that they were purchasers for value in good faith without notice of Macmillan's claim. As the judge said, and Mr Oliver asserts, "Shearson Lehman cannot resist Macmillan's claim unless it can establish the defence of bona fide purchaser for value without notice." The same applies to Credit Suisse and Swiss Volksbank. Mr Oliver went so far as to submit that, once one has determined the law which governs the cause of action, that same system governs all issues which arise in the suit. That cannot be right. Procedure, for instance, which sometimes includes limitation, is governed by the law of the place of trial; or, to take a rare example, a contract to exchange one currency for another may be invalid by its proper law, or by the law of the place of performance, or by the law of the forum, or by the law of the country whose currency is involved! I would regard it as plain that the rules of Conflict of Laws must be directed at the particular issue of law which is in dispute, rather than at the cause of action which the plaintiff relies on. We should translate lex causae as the law applicable to the issue, rather than the suit. In this case the issue is whether in law the defendants were purchasers for value in good faith without notice, so as to obtain a good title to the shares.

42. Macmillan still assert, against Credit Suisse only, a claim in conversion, although the judge thought that it had been abandoned during the trial. That claim, it is said, must be governed by English law. But again it is the defence which identifies the issue. If Credit Suisse have by New York law a good title as purchasers for value in good faith and without notice, they are not liable in damages; or if for some reason they became liable at one stage, there are now no damages. That, I suppose, is an issue to be determined at a later stage of this appeal; so we must not be taken to have made a definite ruling upon it. But Mr Oliver mentioned the point in his reply, and I feel that we should make it plain that it has not been overlooked.

Stage 2: the appropriate Conflict rule

(i) For property issues in general

43. The general rule, which is subject to exceptions, appears to me to be that issues as to rights of property are determined by the law of the place where the property is. That is shown in relation to land (including priorities) by the case of Norton v. Florence Land & Public Works Co (1877) 7 Ch.D 332.

44. The same applies to chattels: see Cammell v. Sewell (1860) 5 H & N 728 at p. 744, where Crompton J. quoted Pollock CB in the court below:

> "If personal property is disposed of in a manner binding according to the law of the country where it is, that disposition is binding everywhere."

45. This was treated as the general rule, although subject to exceptions, in Winkworth v. Christie Manson & Woods Ltd (1990) Ch.496. It was applied by the House of Lords to a dispute about priority in Inglis v. Robertson (1898) AC 616, although the purist might say that the decision was as to the Scots as opposed to English rules of Conflict. As was pointed out by Mr Blair, for Swiss Volksbank, the law of the place of the transaction (lex loci actus) , in the case of the sale of a chattel, will almost invariably be the same as the law of the place where the chattel is (lex situs) . But the courts have chosen situs as the test rather than locus actus.

46. There is in my opinion good reason for the rule as to chattels. A purchaser ought to satisfy himself that he obtains a good title by the law prevailing where the chattel is, for example in Petticoat Lane, but should not be required to do more than that. And an owner, if he does not wish to be deprived of his property by some eccentric rule of foreign law, can at least do his best to ensure that it does not leave the safety of his own country.

47. Thirdly, there are negotiable instruments. These are assimilated to chattels, so that the lex situs applies; see Alcock v. Smith (1892) 1 Ch.238 (although arguably this supports the law of the place of the transaction), Embericos (sic) v. Anglo-Austrian Bank (1904) 2 KB 870. See also Dicey & Morris p.1420:

> "In the conflict of laws, negotiable instruments are therefore treated as chattels, ie. as tangible movables."

48. In Brown v. Beleggings-Societeit NV (1961) 29 DLR (2nd) 673, a Canadian Court held that title to bearer shares in a company should be determined by the law of the place of incorporation, not the law where the certificates are. This decision might appear to be out of line, unless (as Mr Mortimore for Credit Suisse suggests) the certificates had ceased to be negotiable.

49. Then a question arises as to which system of law is to determine whether an instrument is negotiable. One might have thought that in principle this should be the lex fori, since one is still at the stage of choosing a lex causae. Dicey & Morris p. 1420 appear to suggest otherwise, and to prefer the law of the place where negotiation is said to have occurred. I find this a difficult question, and we do not need to decide it. By English law, whether as the law of the forum or the law of the place of alleged negotiation, the share certificates are not negotiable; so English law is not applicable. By New York law they may be negotiable; but New York is not the forum nor the place of alleged negotiation. So one must look elsewhere for a choice of law rule in this case, and not apply the rule for negotiable instruments.

50. I turn now to other movable but intangible property, that is to say choses in action. The general rule for this kind of property is stated by Dicey & Morris as follows:

> "Rule 120 (1) The mutual obligations of assignor and assignee under a voluntary assignment of a right against another person ("the debtor") are governed by the law which applies to the contract between the assignor and assignee.
>
> (2) The law governing the right to which the assignment relates determines its assignability, the relationship between the assignee and the debtor, the conditions under which the assignment can be invoked against the debtor and the question whether the debtor's obligations have been discharged."

51. Paragraph (1) of the Rule raises a topic to which I shall have to return later in relation to the case of Cady. It also leaves a question as to what happens if there is no contract between the assignor and the assignee; but that does not arise in the present case. The Rule is based on Article 12 of the Rome Convention on the Law Applicable to Contractual Conventions, and the Contracts (Applicable Law) Act 1990. It is said by Dicey & Morris p. 979 to represent the common law.

52. The law governing the right to which the assignment relates, in paragraph (2) of the Rule, in the case of a debt points to the proper law of the contract or other obligation by which the debt was created. The corresponding rule in the 11th edition of Dicey & Morris was as follows:

> "Rule 123 The priority of competing assignments of a debt or other intangible thing is governed by the proper law of the debt or the law governing the creation of the thing."

The commentary has this passage (p.965):

> "It is obvious that questions of priorities cannot be governed by the lex loci actus of the assignment or by its proper law, because the assignments may have been made in different countries or may be governed by different proper laws and there is no reason why one law should govern rather the other."

The commentary in the 12th edition reads:

> "Since the law governing the creation of the right assigned determines the rights and obligations of the debtor that result from the assignment, it must also decide questions of priorities between competing assignments."

Cheshire & North's Private International Law (12th edn) p. 812 makes the same point:

> "Where there have been assignments in different countries, no confusion can arise from a conflict of laws since all questions are referred to a single legal system. The same merit is not shared by the law of the situs, since this follows the residence of the debtor and is not therefore a constant. ... It is suggested, then, that the most appropriate law to govern the question at any rate of priorities is the law governing the transaction by which the subject-matter of the various assignments was created."

53. In the case of a simple contract debt the lex situs is thus rejected, because it is uncertain. That was not always Dicey's view. In re Maudslay Sons & Field (1900) 1 Ch 602 was a case concerning competing claims to a debt from a French firm. Cozens-Hardy J. said (at p.610):

> "It seems to me that I am bound to hold that that assignment which alone is recognised by the law of France ought to prevail . . . This is the view taken by Mr Dicey in his work on the Conflict of Laws, rule 141: "An assignment ... of a debt, giving a good title thereto according to the lex situs of the debt (in so far as by analogy a situs can be attributed to a debt) is valid."

54. Situs is now replaced by the proper law of the contract by which the debt was created. But with other monetary obligations the choice of "the law governing the creation of the thing" approximates closely, in my opinion, to the lex situs. Thus in Kelly v. Selwyn (1905) 2 Ch 117 there was a contest between competing assignees of an interest in reversion under a will. Warrington J said (at p.122):

> "The ground upon which I decide it is that, the fund here being an English Trust and this being the Court which the testator may have contemplated as the Court which would have administered that trust fund, the order in which the parties are to be held entitled to the trust fund must be regulated by the law of the Court which is administering the fund."

The obligees in such a case are not likely to be mobile, and there is less risk that the lex situs will turn out to be transient.

55. Another example is to be found in the case of In re Queensland Mercantile & Agency Company (1891) ICh 536, which was concerned with competing claims to moneys due to the company in respect of unpaid calls on its shares. North J said (at p.545):

> "There is another equally well-known rule of law, viz., that a transfer of moveable property, duly carried out according to the law of the place where the property is situated, is not rendered ineffectual by showing that such transfer as carried out is not in accordance with what would be required by law in the country where its owner is domiciled."

His decision was upheld on appeal, (1892) ICh.219. But it seems that there had been a stay of proceedings in Scotland on terms that the dispute should be decided in England in exactly the same way as it would have been decided in Scotland. As Lindley LJ observed (p.22 6) that involved the application of Scots rules of the Conflict of Laws, even if they led to a different view from that which an English court would take. But at all events, for choses in action in general the lex loci actus has been rejected. So has the proper law of the assignment except for the limited purposes of rule 120(1).

56. There have been cases where other solutions have been reached: see for example Canada Deposit Insurance Corporation v. Canadian Commercial Bank (1993) 3 WLR 302, where it was held that priorities were governed by the law of the forum - an invitation to forum shopping if ever there was one; and United States Surgical Corporation v. Hospital Products International Pty Ltd (1982) 2 NSWLR 766, where it appears to have been held that the availability of equity and equitable remedies was governed by the law of the forum, provided the defendant was in New South Wales (but we were told that the case had gone to a higher court) . I would not follow either of those decisions,

    (ii) Shares in particular

57. I now turn to the specific case of an issue as to the ownership of shares in a company. It is not argued that shares are within Article 12 of the Rome convention, and therefore within Rule 12 0 of Dicey & Morris. Indeed it may be that shares have a rule of their own. I must consider the authorities as to shares separately, but against the background of the law relating to land, chattels, negotiable instruments and other debts which has already been discussed. We have the authority of the House of Lords for the proposition that to some extent, as between transferor and transferee, the effect of an assignment of shares is determined by the law of the place where the assignment takes place. As with Rule 120(1) in Dicey & Morris, it is important to determine the limits of that proposition. The case is Williams v. Colonial Bank (1888) 38 Ch.D 388 in the Court of Appeal, and The Colonial Bank v. Cady (18 90) 15 App Cas. 267 in the House of Lords. The plaintiffs were the executors of the deceased holder of shares in New York Central and Hudson River Railroad Company. In order that the shares might be registered in their names, the executors signed blank transfers together with powers of attorney, which were endorsed on the certificates. Those would entitle the rightful holder of the certificates to be registered by the company as owner of the shares, provided that the company was satisfied as to the genuiness of the signatures. The executors handed the certificates to their brokers, who fraudulently deposited them with the defendant banks as a security for money due from the brokers. At the time when the action was commenced the shares were still registered in the name of the deceased, and the transfers were still blank as to the transferee.

58. The evidence of American law was that the certificates were not negotiable instruments; but that the banks obtained a good title in law and equity because the owners had "so dealt with the certificates as to lead a purchaser for value to believe honestly that he was taking a good title to it. In other words the foundation rests in the principle of estoppel" (p.399).

59. In those circumstances it is scarcely surprising that the law of England was held to be applicable. Cotton LJ (at p 3 99) said that the question whether the bank obtained a good title "depends on transactions in England" and so must be governed by English law, although the law of America would be

> "properly referred to for the purpose of deciding what would be the effect of a valid effective transfer of the certificates on the title to shares in an American company."

    Lindley LJ (at p 403) said:

> "We must look to the American law for the purpose of understanding the constitution of the railway company and the proper mode of becoming a shareholder in it. Moreover, it may be that the consequences of having acquired a title to the certificate may depend on American law, but the question how a title is to be acquired to a certificate by a transaction in this country does not depend on American law at all."

60. The judgement of Bowen LJ (at p 408) is to the same effect.

    He said:

> "The key to this case is whether the Defendants have a right to hold these pieces of paper, these certificates. What the effect upon their ulterior rights in America would be, if we were to declare that they were entitled to these pieces of paper, is another system."

61. So the Court of Appeal hold that the issue was to be determined by the law of England, which was the locus of the transaction (and also the situs of the certificates). Other problems would have to be decided by American law, sc. as the law of the place of incorporation, if they arose. In the House of Lords Lord Halsbury LC (at p. 272) recorded the transaction of loan took place in London. He added:

> "If it were necessary to consider what law must govern, as between these parties, the right to these certificates on the one hand, and the right to detain them as pledged for the money advanced on them on the other, though the certificates themselves were the certificates of shares in a foreign corporation, I should not doubt that it is to the law of England you must look, and nor to the law of the United States."

Lord Watson said (at p. 276) :

> "That the interest in the railway company's stock, which possession of these certificates confers upon a holder who has lawfully acquired them, must depend upon the law of the Company's domicile, seems clear enough, and has not been disputed by the respondents. But the parties to the various transactions, by means of which the certificates passed from the possession of the respondents into the hands of the appellants, are all domiciled in England; and it is in my opinion equally clear that the validity of the contracts of pledge between Blakeway and the appellants, and the right of the latter to retain and use the documents as their own, must be governed by the rules of English law."

Lord Bramwell (at p. 281) :

> "The shares being of an American company domiciled in one of the United States of America, an act effectual by the law of that state to transfer the property, and no other, would transfer it."

Lord Herschell (p. 283) :

> "I agree that the question, what is necessary or effectual to transfer the shares in such a company, or to perfect the title to them, where there is or must be held to have been an intention to transfer them, must be answered by reference to the law of the State of New York. But I think that the rights arising out of a transaction entered into by parties in this country, whether, for example, it operated to effect a binding sale or pledge as against the owner of the shares, must be determined by the law prevailing here."

62. Four points are clear from that decision. First, there is a dual conflict rule, which allocates some issues to one country and others to another. Secondly, the issue in the Cady case was as to who was entitled to the certificates, not as negotiable instruments but as pieces of paper. Thirdly, that issue was to be decided by English law, since the transaction took place here or (per Lord Watson) the parties to it were domiciled here. Fourthly, any issue as to the effect of possession of the certificates, or as to how shares could be transferred, should be decided by the law of the company's domicile or (it would seem) its place of incorporation.

63. I do not find it easy to determine the precise borderline between points three and four in that case, or for that matter between paragraphs (1) and (2) in Rule 12 0 of Dicey & Morris. But what is in my judgment

clear is that the issue in the present case comes in the second class, and must be decided by the law of New York. It is not an issue as to the validity of a contract between MacMillan and one or other of the defendants; so far as the facts go they had never met each other and there was no contract between them. Nor is there any issue as to the validity of the contract of loan between one of the Maxwell companies and one or other of the defendants, or as to the validity of the pledge as between those parties. The issue is whether, in the words of Lord Bramwell and Lord Herschell, there has been an act effectual by New York law to transfer the property in the shares.

64. We were referred to a number of transatlantic cases. In some of them the question was decided by the law of the place where the certificates were, apparently on the ground that by the law of the place of incorporation the company was given power to issue certificates having that effect. Subject to that, the preponderance of authority is that the ownership of shares is to be determined by the law of the situs, which for this purpose is the place of incorporation.

65. See Jellinek v Huron Copper Mining Co (1900) 177 US 1,13 (United States Supreme Court, Justice Harlan), Direction Disconto-Gesellschaft v United States Steel Corporation (1925) 267 US 22, 28 (United States Supreme Court, Justice Holmes), United Cigarette Machinery Co v Canadian Pacific Railways Co. (1926) 12 FR (2nd) 634, 636, Pennsylvania Co. v United Railways of Havana & Regla Warehouses (1939) 26 F.Supp. 3 7 9,390 Morson v. Second National Bank of Boston (1940) 29 N.E. 2d 19, 20 Brawn v The Custodian (1944) 3 DLR 412, 428, (1944) 4 DLR 209, 214, Hunt v The Queen (1968) 67 DLR (2nd) 373, 378, Oliner v Canadian Pacific Railway Co. (1970) 34 AD 2d 310, 313.

66. I conclude that an issue as to who has title to shares in a company should be decided by the law of the place where the shares are situated (lex situs) . In the ordinary way, unless they are negotiable instruments by English law, and in this case, that is the law of the place where the company is incorporated. There may be cases where it is arguably the law of the place where the share register is kept, but that problem does not arise to-day. The reference is to the domestic law of the place in question; at one time there was an argument for renvoi, but mercifully (or sadly, as the case may be) that has been abandoned.

Stage 3 - The System of Law

67. Whether it be situs, place of incorporation or place of share register, the answer is the law of and prevailing in the state of New York. I therefore agree with the conclusion reached by Millett J, although I have reached it by a somewhat different route. It is unnecessary to pursue the issue as to where the relevant events took place, as I have not adopted the lex loci actus. It seems to me that situs and incorporation have the advantage of pointing to one system of law which is very unlikely to be transient, and cannot be manipulated by a purchaser of shares in order to gain priority. If a lender of money chooses to take as security shares in companies incorporated in a number of different jurisdictions, he may have to make different enquiries so as to satisfy himself as to his title. He does not deserve much sympathy on that account - particularly as I do not know whether lenders are particularly diligent in making any enquiries at all.

68. Subject to what counsel may say, I would answer the preliminary question in these appeals by saying that the issue as to whether the defendants have title to the shares as purchasers in good faith for value without notice of adverse claims should be decided by the law of New York, not including its conflict rules. That in effect involves that the appeals thus far have failed.

69. **LORD JUSTICE AULD**: The question between the parties to this appeal is "Who has the better right to ownership of shares in a corporation?". The question in this part of the appeal is "How, in the English Conflict of Laws, is the applicable law for such an issue to be determined?" Is it a matter of property to be governed by the location of the shares or the incorporation of the company? Or is it to be determined by one or other of the rules governing obligations? If the latter, does it come within the existing rules governing choses in action, or does it form, as Millett J. held, at [1995] 1 WLR 992G-H, "a special sub-species of chose in action with its own rules"?

70. Macmillan was a Delaware company controlled by the late Robert Maxwell through Maxwell Communications Corporation plc. It owned about 55.6% of Berlitz International Inc., a company incorporated in New York. Mr Maxwell, contrary to Macmillan's interests, through a series of transfers and other corporate vehicles, agreed in London with Lehman, Credit Suisse and Swiss Volksbank to pledge Berlitz shares as security for loans made by them to his private interests. The shares were immediately or ultimately transferred to Shearson Lehman as assignee of Lehman, Swiss Volksbank and Credit Suisse in New York in accordance with its law. New York law treats the shares in the manner in which they were transferred there as negotiable instruments.

71. The loan and security transactions were negotiated and concluded in London. Such notice as the banks, as I shall call them, received of Macmillan's interest in the shares, they received in London. Some of the share transfers, namely that to Lehman and part of that to Credit Suisse, were by way of delivery of share certificates and an executed transfer form in London followed by transfer in New York. Some, that to Swiss Volksbank and part of that to Credit Suisse, were made directly in New York.

72. Mr Maxwell's private interests defaulted on the loans, and there is a dispute between Macmillan and the three banks as to who has the better claim to the Berlitz shares. Macmillan claims that it is the equitable owner. Each of the banks says that at the time of each relevant transfer in New York it was a transferee for value in good faith without notice of Macmillan's interest. Each says that it had no notice, or in Shearson Lehman's case no effective notice under New York law, which affects its entitlement.

73. As to the applicable law, Macmillan maintains that it is English law because the transactions giving rise to the issue had their closest and most real connection to England. Shearson Lehman and Credit Suisse contend that New York law applies because it is the law of the country of incorporation of Berlitz. Alternatively, they contend for New York as the lex situs, the place where the shares were. Swiss Volksbank maintains, as the Judge held, that the applicable law is the lex loci actus, namely that of New York where the transfer of the shares took place, coinciding in the circumstances with the law of incorporation and the lex situs.

74. The parties are at odds as to whether it is the claim or the issue that has to be characterized in order to determine the connecting factor for identification of the applicable law. Macmillan says it is the claim; the banks say it is the issue. To add to the problems the parties are also not agreed as to the nature of the transaction giving rise to the claim or the issue.

75. As to the claim, Macmillan says it is based on obligation not property. It describes it as a restitutionary claim, albeit based on its equitable property in the shares. The banks say that it is a proprietary claim, not one arising out of an obligation since there was no contract or equity between the parties. Millett J, while accepting Macmillan's description of the claim as restitutionary, held that it was the issue that mattered and that it was one of priority of property rights. He held, at 994B-D and 1011B, that that issue is governed by the lex loci actus, which he described as -

> "... the law of the place where the transaction took place on which the later assignee relies for priority over the claim of the original owner"

namely New York where the transfers took place. He also said that he saw no reason in the circumstances to distinguish the lex loci actus from the lex situs or the law of incorporation, because the shares were also in New York, Berlitz' place of incorporation.

76. I agree that the issue provides the starting point. It is whether each bank can resist Macmillan's equitable claim to return of the shares by showing that it was a bona fide transferee for value without notice and thus acquired an interest in them superior to that of Macmillan. More specifically, the issue is whether the banks can show that they acquired the shares without notice of Macmillan's interest.

77. As to the transaction, on Macmillan's approach it was the lending and security arrangements made in London, and the alleged notice there to the banks of Macmillan's prior interest, leading to the transfer of

the shares in New York. For the banks, the transaction was solely the transfer of the shares in New York.

78. Subject to what I shall say in a moment, characterization or classification is governed by the lex fori. But characterization or classification of what? It follows from what I have said that the proper approach is to look beyond the formulation of the claim and to identify according to the lex fori the true issue or issues thrown up by the claim and defence. This requires a parallel exercise in classification of the relevant rule of law. However, classification of an issue and rule of law for this purpose, the underlying principle of which is to strive for comity between competing legal systems, should not be constrained by particular notions or distinctions of the domestic law of the lex fori, or that of the competing system of law, which may have no counterpart in the other's system. Nor should the issue be defined too narrowly so that it attracts a particular domestic rule under the lex fori which may not be applicable under the other system. See Cheshire & North, 12th ed., 45-46, and Dicey & Morris, 12th ed., 38-43 and 45-48.

79. The dispute about the nature of the issue in this case, whether it is about restitution, stemming from the developing notion of a "receipt-based restitutionary claim", or about property, is a good example of the danger of looking at the problem through domestic eyes. There is a long and growing line of cases, recently comprehensively reviewed by Hobhouse J in the Westdeutsche case [19 94] 4 All ER 8 90, indicating a right to restitution flowing from the circumstances of receipt regardless of the knowledge of or notice to the recipient. See also Lipkin Gorman v. Karpmale Ltd [1991] 2 AC 548, HL, per Lord Goff at 570-572 and 577-581; and Royal Brunei Airlines v. Tan [1995] 3 WLR 64, PC, per Lord Nicholls at 70 ("Recipient liability is restitution-based; ..."). Charles Harpum, a Law Commissioner, writing in 1995 LQR 545, at 546, suggested that the Royal Brunei case vindicates the school of thought that treats receipt-based claims as restitutionary as against that which bases them on equitable wrongdoing.

80. The "receipt-based restitutionary claim" is a notion of English domestic law that may not have a counterpart in many other legal systems, and is one that it may not be appropriate to translate into the English law of conflict. In my view, it would wrong to attempt to graft this equitable newcomer onto the class of cases where English courts will intervene to enforce an equity in respect of property abroad. Adrian Briggs made the point, albeit a little more diffidently, in an article prompted by Millett J's judgment in this case, entitled "Restitution Meets The Conflict Of Laws" in [1994] Restitution Law Review, 94, at 97:

> "It is a commonplace that conceptual divisions in domestic law do not necessarily translate into the conflict of laws. ... To take a distinction which is struggling to define itself within the domestic law of restitution and project this into the realm of choice of law may be unwise."

81. As to land, the normal rule in England is that the lex situs applies to competing claims. See Rule 116(3), Dicey and Morris, 12th ed. , pp. 946 and 952-5; and British South Africa Co. v. Companhia de Mocambique [1893] AC 602, HL; and Hesperides Hotels Ltd. v. Aegean Turkish Holidays Ltd. [1979] AC 508, HL. Cf. the position in Canada where the lex fori is said to determine such questions of priority, Canada Deposit Insurance Corp. v. Canadian Commercial Bank [1993] 3 WWR 3 02.

82. One of the exceptions to Rule 116(3), expressed in subparagraph (a) , is "where the action is based on a contract or equity between the parties". See Dicey and Morris, pp. 952-5; and Deschamps v. Miller [1908] 1 Ch 856, per Parker J. at 863; and e.g. Penn v. Lord Baltimore (1750) 1 Ves Sen 444; Lord Cranstown v. Johnston (1800) 3 Ves 170; Ex p. Holthausen (1874) LR 9 Ch. App 722; Paget v. Ede (1874) LR 18 Eq 118; and Mercantile Investment Co. v. River Plate Co. {1892] 2 Ch 303, at 311, in which an English court ruled that it had jurisdiction to enforce a foreign charge on foreign land against its English owners. Cf. Norris v. Chambres (1861) 29 Beav. 246, 3 De G.F. & J. 583, CA, where the court declined jurisdiction to enforce a claimed equitable lien on foreign land sold to a third party with notice. See also United States Surgical Corporation v. Hospital Products International PTY Ltd 1982] 2 NSWLR 766, reversed without consideration of the question of choice of law (1984) 156 CLR 41; and cf. Webb v. Webb [1994] 3 WLR 801 [ECJ] at 819.

83. Moving from land to other forms of property, my view is that the concept of a "receipt-based restitutionary claim" would not, in any event, provide a firm basis in the circumstances of this case for identifying the appropriate connecting factor. I say that for the following reasons.

84. First, the importance to Macmillan's case that the claim or issue should be regarded as restitutionary rather than proprietary is its reliance on the tentative Dicey and Morris Rule 201(2)(c), op. cit., p 1471, that the proper law of a non-contractual obligation relating to movables arising from unjust enrichment is that of the country where the enrichment occurs. I say "tentative" Rule because, as the commentary in Dicey and Morris, at pp 1476-8, makes plain, the authority on which it is said to be based, Chase Manhattan Bank NA v. Israel-British Bank (London) Ltd. [1981] Ch 105, does not expressly decide it; and the other authorities applying it appear to rest on that insecure foundation. It is true that in In re Jogia (A Bankrupt) [1988] 1 WLR 484, Sir Nicholas Browne-Wilkinson, at 495, expressed the view that the Rule accorded with the American Restatement and seemed to be sound in principle, but that was a case concerning service out of the jurisdiction under the then RSC 0 11(1) (f) , and his view was obiter. In El Ajou v. Dollar Land Holdings plc [1993] 3 All E.R. 717, at 736, Millett J relied, without discussion, on the Rule and the Chase Manhattan case as authorities for the proposition that the law governing "receipt-based restitutionary claims" is the law of the country where the defendant received the money. So also did Hwang JC in Honkkong & Shanghai Banking Corp Ltd v. United Overseas Bank Ltd [1992] Sing. LR 495, at 500. At the highest, as Mr David Oliver, QC, on behalf of Macmillan, put it, there is "a tendency in the cases to endorse Dicey's proposition". None of them binds this Court, and, as will appear, I do not consider it necessary to express a view on it. In any event, acceptance and application of the proposition would not assist Macmillan on the facts. Such enrichment or benefit as the banks received, they received in New York on the transfer to them there of the shares. I shall return to that aspect in another context in a moment.

85. Second, even if Dicey's Rule is valid, it is difficult to see what unjust enrichment the banks have had, since they gave full value.

86. Third, even if the facts could support a claim for unjust enrichment, it is the issue that determines the matter. As I have said, it is essentially a proprietary one, whether the banks could defeat Macmillan's interest by establishing that they were bona fide transferees for value without notice. In my view, Rule 201(2) (c) has no application to such an issue. It, the issue, is more within the sphere of the rules governing priority of ownership.

87. Before I turn to those rules, I should consider the alternative argument of Macmillan that the lex loci actus should govern the matter, namely the law of England, because that is where the transaction took place. As I have said, on Macmillan's approach, the transaction was the lending and security arrangements made in London, part of which involved the transfer of the shares in New York, the banks deriving the benefit through the documentation in London to secure their title to the shares elsewhere. London also was where the banks received such notice as they did of Macmillan's interest. For the banks, the transaction was solely the transfer of shares immediately or ultimately in New York.

88. Mr Oliver cited a number of authorities in support of his submission that the court should consider the underlying transaction, including: Rodick v. Gandel (1852) 1 De GM & G 763; Holroyd v. Marshall (1862) 10 HLC 191; In re Queensland Land and Coal Company - Davis v. Martin [1894] 3 Ch 181; Simultaneous Colour Printing Syndicate v. Foweraker [1901] 1 QB 7 71; and Swiss Bank Corporation v. Lloyds Bank Ltd. [1982] AC 584, HL.

89. Millett J was driven to reject that submission by his identification of the issue as one or priority of property rights rather than one arising out of an obligation. At 991D-E, he accepted as a general proposition that the governing law should be that which has "the closest and most real connection with the transaction", but stated that

> " [i] t is in order to identify the relevant transaction and ascertain the law which has the closest and most real connection with it that it is necessary to undertake

> the process of identifying and characterising the issue in question between the parties."

He identified the transaction, at 994B-C:

> "issues of priority in a case such as present fall to be determined by the law of the place where the transaction took place on which the later assignee relies for priority over the claim of the original owner. This does not lead to the adoption of English law in respect of every transaction in the present case, as Macmillan contends. The relevant transaction is not the contract to grant security, which affects only the parties to the contract, but the actual delivery of possession or transfer of title which created the security interest on which the particular defendant relies."

90. In my view, the Judge correctly identified the transaction for this purpose via his identification of the issue. The authorities relied on by Mr Oliver were all cases where there was privity of contract or some fiduciary relationship between the parties stemming from more than mere receipt of property with notice of another's claim to an interest in it. That is not so here. The negotiations and agreements in England preceding the transfer were not with Macmillan; there was no privity of contract between the parties, and, apart from the claimed equity which Macmillan relies upon to support its "receipt-based restitutionary claim", no equitable or other fiduciary relationship between them.

91. The question remains whether Millett J was correct to take the lex loci actus of the transaction, the transfer, as the means of identifying the applicable law. In general, disputes about the ownership of land and of tangible and intangible movables, including negotiable instruments, are governed by the lex situs. See: in relation to land, Norton v. Florence Land and Public Works Co. (1877) 7 Ch D 332; in relation to tangible movables, Rule 118, Dicey and Morris, pp 965 and 967, Cammell v. Sewell (1860) 5 H & N 728, at 742-7, and Winkworth v. Christie [1980] Ch 496, at 501B and 512G-514B; in relation to intangible movables, including negotiable instruments, see e.g Alcock v. Smith [1892] 1 Ch 238; In re Maudslay, Sons & Field [1900] 1 Ch 602 in which Cozens- Hardy J., at 609-610, expressed the view that the principle of Norton v. Florence Land applies to a debt, even though it is a chose in action, because a debt has a "quasi-locality", and Embericos v. Anglo-Austrian Bank [1904] 2 KB 870, [1905] 1 KB 677, CA.

92. Swiss Volksbank, albeit contending for the lex loci actus, maintains that the same principle applies to shares in a company when by the law of the place where they are situate at the time of transfer they are treated as negotiable.

93. Shearson Lehman and Credit Suisse contend for the law of incorporation, relying in large part on the commentary in the current edition of Dicey and Morris to Rule 120(2) that the priority of competing assignments of an intangible thing is governed by the law governing the creation of the thing. Rule 120(2) which reproduces article 12.2 of the Rome Convention on the Law Applicable to Contractual Obligations, states:

> "The law governing the right to which an assignment relates determines its assignability, the relationship between the assignee and the debtor, the conditions under which the assignment can be invoked against the debtor and any questions whether the debtor's obligations have been discharged."

The commentary, at 981, reproducing the former Dicey and Morris Rule 123, is that:

> "Since the law governing the creation of the right assigned determines the rights and obligations of the debtor that result from the assignment, it must also decide questions of priorities between competing assignments. Thus, if the same right is assigned twice to different assignees, the law under which the right was created decides which assignment prevails."

See also Cheshire and North, 12th ed. 811-2 and 816.

94. Millett J's view was that such a principle or rule does not apply to the priority of competing claims to interests in the shares of a corporation. He said, at 9 92H, that he regarded it as limited to successive assignments by the same assignor of the same debt or fund or other chose in actions governed in English domestic law by the rule in Dearie v. Hall (1828) 3 Russ. 1. That also appears to be the context in which the editors of Cheshire & North, 12th ed., at 811-2 and 816 argue, in support of the same proposition.

95. As Millett J. observed, at 993A-D, none of the authorities cited in support of the old Rule 123 concerned the shares in a corporation. Le Feuvre v. Sullivan, (1855) 10 Moo PC 1, was a dispute about the deposit of a life insurance policy as security for a loan. It contains no statement of principle and is explicable on one of several bases, lex loci actus of the deposit and grant of the security, the law of domicile of the lender or the lex loci actus of the making of the contract of insurance. Kelly v. Selwyn [1905] 2 Ch 117, concerned an English trust fund created by an English testator with trustees in England, in which the expressed ratio was that the English law applied because it must have been contemplated by the testator that an English court would administer the fund. Two other authorities relied upon by Mr Charles Aldous, QC, for Shearson Lehman in this context, In re Queensland Land and Coal Company, Davis v. Martin [1891] 1 Ch 536, [1892] 1 Ch 219, CA; and In re Maudslay Sons & Field [1900] 1 Ch 682, do not appear to me to throw any light on the subject where, as here, the competing claims do not result from successive assignments or dispositions by the same person. And, as Millett J. also noted, the Rule in Dearie v. Hall does not apply to dealings by the owner of shares in an English company.

96. Accordingly, I agree with Millett J. that former Dicey and Morris Rule 123 is not a suitable route for selecting the applicable law in this case.

97. In my view, there is authority and much to be said for treating issues of priority of ownership of shares in a corporation according to the lex situs of those shares. That will normally be the country where the register is kept, usually but not always the country of incorporation. If the shares are negotiable the lex situs will be where the pieces of paper constituting the negotiable instruments are at the time of transfer. As to the law determining negotiability, the views of Dicey and Morris, op cit., p. 1420, and Cheshire and North, op. cit., pp. 523 and 823, are that it is determined by the law of the country where the alleged transfer by way of "negotiation" takes place, namely where the instrument is at the time. The logical result is that beneficial ownership is extinguished by an act of transfer recognised in the jurisdiction in which it occurs.

98. See Goodwin v. Robarts [1875] LR 10 Ex Ch 337, affirmed (1875) 1 App Cas 476; Picker v. The London and County Banking Co. Ltd. (1887) 18 QBD 515, CA; and London Joint Stock Bank v. Simmons [1892] AC 201, HL. As negotiability is just a step on the way to determining situs for this purpose, the reasoning may appear, in the abstract, to be circular. However, it should be an obvious enough exercise when applied to the facts of most cases. And, in my view, there is judicial support and good common-sense for it and for treating the lex situs of shares at the time of the last relevant transfer as the applicable law in disputes about priority.

99. The judicial support is to be found in Alcock v. Smith [1892] 1 Ch 238, per Romer J. at 255, affirmed in the Court of Appeal - see, in particular Lopes LJ at 2 66; Embiricos v. Anlgo-Austrian Bank [1904] 2 KB 870, affirmed [1905] 1 KB 677, CA; and Koechlin v. Kestenbaum [1927] 1 K.B. 889.

100. See also Picker, supra. The common-sense of determining negotiability according to the lex situs and of treating the lex situs of the last relevant transfer as the applicable law in priority disputes is, first, that it treats shares as other property, situate at and subject to the law of the place where they are at the time of the transaction in issue. Second, it provides certainty in cases of successive or competing assignments in different countries, also a characteristic of the law of incorporation. That is so even where, according to the lex situs, some other law, say that of the country of incorporation, applies. It may be burdensome in a single transaction involving transfers of parcels of shares in a number of countries to have to check the

law of the place where each is at the time of transfer. However, that requirement, which is a matter of common commercial prudence, applies to all the tests of applicability contended for in this appeal.

101. I, therefore, conclude that the shares are in the same position as chattels and that the dispute as to priority of ownership of them should be determined by the law of New York as the lex situs.

102. That, in my view, is enough to dispose of the matter. However, I should not leave the matter without referring to the decision of the House of Lords in Colonial Bank v. & Cady & Williams (18 90) 15 App Cas 20, and to some North American authorities.

Cady was a case in which the London brokers of owners of shares in a New York company dishonestly deposited the [non-negotiable] share certificates with banks in London to secure a loan. In a dispute between the share owners and the banks, the latter claiming to have no notice of the dishonesty, the House of Lords held that if it had to decide whether the matter was governed by New York or English law it would have held that English law applied, but that as the law of New York and England on the issue appeared to be the same, there was no need to determine the matter.

103. The dispute was as to the validity of the transfer of the share certificates, not in the event as to priority of ownership of the shares. Lords Halsbury LC and Lord Watson, in common with Cotton, Lindley and Bowen LJJ in the court below, (1888) 38 Ch D 388) , appear to have preferred English law because the property in issue was the share certificates in London not the shares in New York. Lords Bramwell and Morris did not consider it necessary to express a view. Both Lords Watson and Lord Herschell, however, distinguished between the formal requirements of, and contractual rights connected with, the transfer of shares, the former being governed by the law of incorporation, the latter by the place of the transaction. Lord Watson distinguished between ownership of the shares and rights deriving from ownership of the share certificates representing them. He said as to the latter, at 277-8:

> "... delivery passes, not the property of the shares, but a title, legal and equitable, which will enable the holder to vest himself with the shares without risk of his right being defeated by any other person deriving title from the registered owner."

Lord Herschell said, at 283:

> "I agree that the question, what is necessary or effectual to transfer the shares ..., or to perfect the title to them, where there is or must be held to have been an intention to transfer them, must be answered by a reference to the law of the State of New York. But I think that the rights arising out of a transaction entered into by parties in this country, whether, for example, it operated to effect a binding sale or pledge as against the owner of the shares, must be determined by the law prevailing here."

104. The case supports the proposition that where there is delivery of possession of property, in that case certificates, the law of the country where the property was at the time of delivery, governs the question whether the transferee is entitled to retain them as against the true owner. As to the shares themselves, the remarks of Lords Watson and Herschell were not, and had no need to be, directed at the law of incorporation as distinct from the law of situs; there, as in this appeal, they were the same. To the extent, if at all, that those remarks point to the former rather than the latter, they were obiter.

105. As to the North American jurisprudence, it provides support for the law of incorporation, and also, by derivation for the lex situs where the law of incorporation makes or permits transfer of shares elsewhere. It also distinguishes, as did the House of Lords in Cady, between shares and non-negotiable share certificates evidencing them. As to the latter, see e.g Direction Disconto- Gessellschaft v. United States Steel Corporation (1924) 300 F 741, (1925) 267 US 22 - an expropriation case in which Mr Justice Holmes in the United States Supreme Court said, in a dispute as to title to share certificates:

> "... the question who is the owner of the paper depends upon the law of the place where the paper is."

106. As to the combined operation of the law of incorporation and lex situs where the former makes the shares assignable in other countries; see Pennsylvania Co. for Insurance v. United Railways of Havana (1939) 26 F Supp 379, a decision of the Maine District Court; and Morson v. Second National Bank of Boston (1940) 29 NER (2d) 19, a decision of the Supreme Court of Massachusetts. As to the primacy of the law of incorporation where it does not permit the shares to be assigned elsewhere, see, as a starting point, Jellenik v. Huron Copper Mining Co. (1889) 177 US 1. That was a decision of the Supreme Court of the United States in which the shares were situate in the state where the company was incorporated. The other cases cited to us were in the main expropriation cases, namely: United Cigarette Machine Co, Inc. v. Canadian Pacific Railway Co. (1926) 12 FR (2d) 634; Braun v. The Custodian [1944] 3 DLR 412, [1944] 4 DLR 209, note per Thorson J. at 421, distinguishing between title to the property in the share and that in the share certificate; Brown, Gow Wilson v. Beleggings-Societeit NV (1961) 29 DLR (2d) 673; Olner v. Canadian Pacific Railway Co. (197) 34 AD (2d) 310; see also Hunt v. The Queen (1968) 67 DLR (2d) 373, a succession duty case.

107. For my part, I do not derive much direct assistance from the North American jurisprudence. However, it confirms the distinction between shares and share certificates where the latter are non-negotiable and, overall, it is as consistent with selection of the lex situs as of the law of incorporation as the applicable law to disputes about the ownership of shares.

108. In the preliminary question for decision before us, we are concerned with the transfer of shares in New York, not the transfer of share certificates in England, the distinction made in Cady and many of the North American cases. For the reasons I have given, my view is that the applicable law for determination of the issue of priority of ownership of those shares is the domestic law of New York because it was the lex situs of the shares at the time of transfer. It so happens, on the facts, that it was also the law of incorporation and of the lex loci actus. Accordingly, I would reject Macmillan's submission on the preliminary issue, but for different reasons than those given by Millett J.

109. **LORD JUSTICE ALDOUS**: Macmillan appeal from an Order of Millett J in an action in which it was the Plaintiff and the relevant Defendants were Shearson Lehman Bros Holdings plc, Swiss Volksbank and Credit Suisse. The action was concerned with shares in a New York company called Berlitz International Inc. The shares in question had been owned by Macmillan, but were transferred into the name of Bishopsgate Investment Trust plc [BIT] which held those shares on trust for Macmillan under an agreement governed by New York law. In breach of that trust agreement, BIT pledged the shares to the Defendant Banks in consideration of loans. After default, and after the collapse of the Maxwell organisation, the action was started to recover the shares. Macmillan claimed restoration of the shares, but that was resisted by the Defendants who contended that they were the owners of the shares and their title had priority over any claim of Macmillan because they were bona fide purchasers for value without notice of the legal estate in the shares. They also contended that the question of whether they had notice should be determined according to New York law. The reason being that under New York law the test is actual knowledge or suspicion and deliberate abstention from inquiry less the truth be discovered; whereas under English law it is sufficient if the purchaser had reason to know or cause to suspect.

110. The Judge concluded that the question as to whether the Defendants were bona fide purchasers for value of the legal estate without notice should be decided pursuant to New York law and applying that law he held that the Defendants' right to the shares in Berlitz ranked in priority to the equitable title of Macmillan. Macmillan believe the conclusion of the Judge to be wrong and appealed, but we were only concerned with the issue as to what was the appropriate law to apply to decide whether the Defendants were bona fide purchasers for value of the legal estate without notice. In particular whether the appropriate law was English or New York law.

The facts

111. Before the court the parties accepted, for the purposes of the hearing only, the facts as found by the Judge, not all of which are relevant to the matters before this court. I will therefore only provide a summary of the facts to set the background against which the decision of law can be decided.

112. Mr Robert Maxwell and his family controlled a large and complex web of private companies and trusts which were referred to as "the private side". One of those companies was BIT. Maxwell Communications Corporation [MCC] was not part of the private side, but was controlled by the Maxwell family. It acquired the shares of Macmillan in 1988. Berlitz is a company incorporated under the law of New York. It was a wholly owned subsidiary of Macmillan at the time that Macmillan was taken over by MCC. Subsequently, 44.4% of Berlitz common stock was offered for sale to the public and thereafter the shares were listed and traded on the New York Stock Exchange. The rest of the shares were held by Macmillan and were represented by a single share certificate in its name. In October 1990, the single stock certificate representing 10.6m Berlitz shares was cancelled and was replaced by nine certificates, subsequently 21, in the name of BIT. BIT held those shares upon trust for Macmillan, but there is no doubt that the purpose of obtaining the transfer of the shares to BIT was to enable money to be raised for the private side which was contrary to the interests of Macmillan. At the beginning of 1991, 7.6m of the 10.6m of the Berlitz shares were placed in the transfer system in operation in New York called the DTC system. The letters DTC refer to the Depository Trust Company which is a company organised as a depository for shares. It accepts securities for deposit which are then credited to the account of the depositing participant in the scheme. When shares are deposited the certificates are returned to the company's transfer agents and cancelled. The shares are then registered in the name of CEDE & Co which is a nominee of DTC and a fresh certificate is issued in CEDE's name. Thus in March 1991 the certificate representing 7.6m shares in Berlitz in the name of BIT was cancelled and CEDE & Co was recorded as the owner of those shares which it held as nominee for DTC who in turn held them on behalf of the depositing company. The remaining shares were retained and the certificates were held in London.

Shearson Lehman - Lehman Bros International Ltd is an associate company of the Second Defendant Shearson Lehman. It entered into an agreement dated 3 November 198 9 pursuant to which it lent Treasury Bills to Bishopsgate Investment Management Ltd [BIM] in return for the deposit of collateral. The Berlitz shares in question formed part of that collateral. They were deposited in three tranches on the 3 0 November 19 90, 31 December 1990, and 2 7 September 1991 respectively. The first tranche consisted of a certificate relating to 500,000 Berlitz shares endorsed as to 370,000 to Lehman Bros. That share certificate was delivered to, and held by, Lehman Bros in London. The second tranche consisted of two endorsed certificates for 500,000 shares respectively which were also delivered and held in London. After a review of security, Lehman Bros deposited the three share certificates in the DTC system. Pursuant to that deposit 1.37m shares in Berlitz were registered in the name of CEDE in July 19 91 and held to the order of Bankers' Trust, the agents acting for Lehman Bros. The third tranche consisted of two endorsed certificates for 500,000 and 130,000 Berlitz shares. They were delivered in London to Lehman Bros which forwarded them to New York for incorporation into the DTC system. That took place on 16 October 1991.

113. On 2 9 October 19 91, Lehman Bros sought return of the Treasury Bills lent to the Maxwell organisation. On 5 November 1991 Mr Robert Maxwell was reported missing at sea and on 6 November 1991 Lehman Bros served formal notice of default and on the same day sold to Shearson Lehmanthe Berlitz shares that they held. That sale was completed on 4 December 19 91 and Shearson Lehman was registered as owner of the shares on the Berlitz register in place of CEDE.

Swiss Volksbank - Swiss Volksbank, the second Defendant, is a Swiss company which has offices in London and New York. In 1991 it held one million shares in an Israeli company as security for a loan to one of the private side Maxwell companies. On 11 October 1991, Mr Kevin Maxwell requested release of those shares so that a sale could be completed. Swiss Volksbank agreed to that upon substitution of 2.4m Berlitz shares as security. Those shares were part of the DTC holding and the relevant transfer within the DTC was completed by 13 November 1991. After demand for payment, Swiss Volksbank enforced its security by buying the shares from itself. The shares were withdrawn from the DTC system on 4

December 1991 and Swiss Volksbank was registered as the owner of the shares on 6 December 1991 and a new certificate to that effect was issued.

Credit Suisse - Credit Suisse is a company incorporated in Switzerland. In 1990 it approved the grant to one of the Maxwell private side companies of a £50m facility secured against a portfolio of shares. To secure that facility a single endorsed certificate in respect of 500,000 Berlitz shares was deposited with Credit Suisse in London on 27 September 1991. On 8 November 1991 a further one million shares in the DTC system were offered as security and the appropriate transfer was completed on 13 November. Credit Suisse made a formal demand for repayment on 5 December 1991. Thereafter solicitors acting for Macmillan demanded return of the shares and Credit Suisse was joined in this action on 13 December. On 16 December 1991 Credit Suisse undertook not to transfer, sell, charge or otherwise dispose of or deal with the Berlitz shares that it held. As Credit Suisse was not prepared to continue that undertaking until trial, ex-parte relief was sought and granted on 25 January 1992. On 13 April 1992 Hoffmann J refused to continue the injunction. Thereafter Credit Suisse arranged for the one million shares held to its benefit, to be withdrawn from the DTC and registered in a nominee company owned by it. It also arranged for the nominee company to become the registered owners of the other 500,000 shares that were covered by the certificate held in London.

114. Since the action started all the shares in Berlitz have been sold to a Japanese company with the agreement of the parties. That is irrelevant to the issue before us as the parties accept that the dispute is to be decided upon the pleadings.

The issue

115. In the Amended Statement of Claim, Macmillan pleads that since the end of 1989 it has been entitled to 10.6m shares of Berlitz stock; that it remains the beneficial owner of the shares and is entitled to the share certificates and the dividends and that the Defendants hold their Berlitz shares on constructive trust for them. Macmillan claims a declaration that it remains and still is beneficially entitled to the shares; a declaration that the Defendants hold their Berlitz shares on constructive trust for the Plaintiff and inquiries as to compensation, damages for breach of trust and conversion and ancillary relief. The defences vary, but as now amended each Defendant pleads how it came into possession of its shares and claims that it is entitled to the shares as a bona fide purchaser for value of the legal estate without notice of any right of Macmillan. The defendants also allege that the relevant law to decide that issue is the law of New York.

116. Before us and before the Judge, Macmillan submitted that the appropriate law to decide whether the Defendants were bona fide purchasers of the legal estate without notice was English law. Macmillan submitted that its claim was based upon a restitutory obligation and that the law to be applied was English law as that was the law of the place where the benefit was received. It submitted that the benefit was the security which was the subject of negotiation in London and was supplied in London. Thus it was submitted that Rule 201[2](c) of Dicey applied.

> "Rule 201[1] : The obligation to restore the benefit of an enrichment obtained at another person's expense is governed by the proper law of the obligation.
>
> [2] The proper law of the obligation is determined as follows:
>
> > (a) if the obligation arises in connection with a contract, its proper law is the law applicable to the contract;
> >
> > (b) if it arises in connection with a transaction concerning an immovable [land], its proper law is the law of the country where the immoveable is situated *[lex situs];*
> >
> > (c) if it arises in any other circumstances, its proper law is the law of the country where the enrichment occurs."

117. The Defendants submitted that the dispute between the parties concerned the title to the shares and in particular it was a dispute as to whether the Plaintiffs or the Defendants had the better title. That being so, New York law applied. However, the Defendants did not agree as to the reason why New York law applied. Counsel for Shearson Lehman and Credit Suisse submitted that New York law applied because the appropriate law was the law of incorporation of Berlitz, the *lex situs.* Swiss Volksbank on the other hand submitted that the appropriate law was that of *lex loci actus* being the law of the place where the transaction on which the assignee relied for priority over the claim of the original owner took place. That submission was accepted by the Judge who held that the place where the transaction took place was the place where actual delivery, possession or transfer of title, which created the security interest on which the particular Defendant relied. Thus as the shares claimed by Shearson Lehman and Swiss Volksbank were transferred in New York, New York law applied.

118. It must be remembered that Credit Suisse was in a slightly different position to the other defendants in that at the date of the Writ it still held a certificate in London and thus at that time the *lex loci actus* was English law. After the injunction was lifted, the shares were registered in New York in the name of a Credit Suisse nominee with the result that New York law became the *lex loci actus.*

Characterization

119. As appears from the second chapter of Dicey the problem of characterizing which judicial concept or category is appropriate, is not easy, but it is a task which is essential for the court to complete before it can go on to decide which system of law is to be used to decide the question in issue. In this case, the court's task is made easier as the parties are agreed that the characterization of the issue is to be determined according to English law.

120. Macmillan submitted that its claim was in essence a claim for the performance of an obligation by the Defendants to restore its property or the proceeds or the value of the property. That, it was said, was a claim in equity for restitution. That is true, but to succeed it involves establishing a number of facts, including that it owned the shares and that they were transferred to the Defendants in breach of trust. The reply of the Defendants is that the shares are registered in their names and they were bona fide purchases for value without notice.

121. The issue between the parties concerns the title to the shares and, in particular, whether Macmillan or the Defendants have the better title. The issue is one of priority. I agree with the Judge when he said,

> "In order to ascertain the applicable law under English conflict of laws, it is not sufficient to characterize the nature of the claim, it is necessary to identify the question in issue."

122. Any claim, whether it be a claim that can be characterized as restitutionary or otherwise, may involve a number of issues which may have to be decided according to different systems of law. Thus it is necessary for the court to look at each issue and to decide the appropriate law to apply to the resolution of that dispute. The Judge concluded:

> "In my judgment the Defendants have correctly characterised the issue of one of priority."

I agree, but believe it right to add what is implicit in that statement, namely that the issue is one of priority of title to shares in Berlitz. Those shares are in the nature of choses in action. They give to the registered holder the rights and liabilities provided by the company's documents of incorporation as governed by New York law. The issue between the parties concerns the right to be registered as the holder of the shares and therefore entitled to the rights and liabilities stemming from registration or the right to registration.

123. Mr Oliver QC who appeared for Macmillan referred us to a number of cases concerning to restitutionary claims, mainly in respect of money paid under a mistake or obtained by fraud. None of them seemed to me

to be relevant, once it is appreciated that the issue in the present case concerns priority to the title of the shares and in particular the property represented by the shares. As Sir Nicholas Browne-Wilkinson VC pointed out *In re Joga* (1988 1 WLR 455 at 495H) different considerations apply to quasi-contractual obligations relating to money to those where the obligation relates to an immoveable:

> "As at present advised, I am of the view that quasi-contractual obligations of this kind arise from the receipt of the money. I find it difficult to see how such obligation can be said to be "made" or "arise" in any place other than that of the receipt. As to the proper law, *Dicey & Morris, The Conflict of Laws,* 10th ed (1980), p.921 expresses the view that, save in cases where the obligation to repay arises in connection with a contract or an immoveable, the proper law of the quasi-contract is the law of the country where the enrichment occurs. This accords with the American Restatement and seems to me to be sound in principle."

The Applicable Law

124. I cannot agree with the Plaintiff's submission that Rule 201 of Dicey applies. That Rule is concerned with what has been called unjust enrichment, not a case like the present where the Defendants gave value for the shares and the dispute is whether the legal titles they obtained have priority over that of the Plaintiff. Further, insofar as the Defendants have obtained any benefit or enrichment, it was the legal titles to the shares which were obtained in New York. It follows, if Rule 201[2] (c) were to be applied, there is a strong case for concluding that New York law was the applicable law.

125. Macmillan went on to submit that whether or not the issue between the parties should be characterized as restitutionary, the appropriate system of law to resolve the issue was that which had the closest and most real connection with the issue. That, Macmillan submitted, was English law because in every case the agreement under which the shares were provided as security were negotiated in London, the loans were repayable in London and the benefit, the shares, were received in London. The transaction must be considered as a whole and, if so, the bulk of the transaction took place in London. Thus, it was said, English law is the *lex loci actus* and should be applied to the transaction as a whole.

126. The Judge dealt with that submission *[1995] 1 WLR at 991D]* .

He said:

> "It is impossible to quarrel with the contention that the governing law should be the law which has ' the closest and most real connection with the transaction.' In the present case, however, the incantation of the formula is not particularly helpful. It is merely to state the question, not to solve it. It is in order to identify the relevant transaction and ascertain the law which has the closest and most real connection with it that it is necessary to undertake the process of identifying and characterising the issue in question between the parties."

He went on to conclude that the issue which he had characterized as one of priority should be determined by the *lex loci actus.* He said at page 994C:

> "This does not lead to the adoption of English law in respect of every transaction in the present case, as Macmillan contends. A relevant transaction is not the contract to grant security, which affects only the parties to the contract, but the actual delivery of possession or transfer of title which created the security interest on which the particular Defendant relies."

I agree with the view expressed by the Judge in the extracts I have just quoted. In any case, it is important to remember that none of the Defendants had any dealings with Macmillan. Thus there was no transaction

between Macmillan and the Defendants. The issue being one of priority, the law having the closest and most real connection must be New York law. That is the law which governs the right in dispute, namely the right to be placed on the register.

127. As I have said Shearson Lehman and Credit Suisse submitted that the issue should be decided by the law of incorporation, namely New York law. They submitted that Rule 120[2] of Dicey was determinative. It is in this form:

> " [2] The law governing the right to which the assignment relates determines its assignability, the relationship between the assignee and the debtor, the conditions under which the assignment can be invoked against the debtor and any question whether the debtor's obligations have been discharged."

128. That Rule does not equate to the facts of this case as the Rule is directed to determination of issues between assignors and assignees and, by implication where shares are involved, the company whose shares have been assigned. In the present case the issue is one of priority in circumstances where there is no legal relationship between the parties claiming the shares. In any case I have no doubt that the transferability of shares in a corporation, the formalities necessary to transfer them and the right of the transferee to be registered on the books of the corporation as the owner of the shares are all governed by the law of incorporation. That was the conclusion of the Judge at page 992D. It is also a conclusion supported by the judgments of the Court of Appeal and the speeches of the House of Lords in *The Colonial Bank v John Cady* (CA 1888 38 Ch Div 388; 1890 HL 15 App Cas 267) . In that case English executors of a holder of shares of an American company signed blank transfers to enable them to be registered as holders of the shares. Their brokers fraudulently deposited the share certificates with the Defendant bank as security for advances. The brokers subsequently became bankrupt and the executors sought the return of the share certificates. It was concluded both by the Court of Appeal and by the House of Lords that in the absence of attestation by a Consul, the transfers were not in order and therefore they did not give the bank title to the shares. The pertinent conclusions to this case can be derived from two extracts from the speeches of the House of Lords. At page 272 Lord Halsbury LC said:

> "My Lords, if it were necessary to consider what law must govern, as between these parties, the right to the certificates on the one hand, and the right to detain them as pledged for the money advanced on the other, though the certificates themselves were the certificates of shares in a foreign corporation, I should no doubt not doubt that it is to the law of England you must look and not the law of the United States."

At page 2 76 Lord Watson said:

> "That interest in the railway company's stock, which possession of these certificates confers upon a holder who has lawfully acquired them, must depend upon the law of the company's domicil, seems clear enough, and has not been disputed by the respondents. But the parties to the various transactions, by means of which the certificates passed from the possession of the respondents into the hands of the appellants, are all domiciled in England; and it is in my opinion equally clear that the validity of the contracts at pledge between *Blakeway* and the appellants, and the right of the latter to retain and use the documents as their own, must be governed by the rules of English law. In the application of these rules the appellants are, of course, entitled to the benefit of any privilege which the law of America attaches to possession of these documents as conferring right or title to the property of the shares."

129. The Judge rightly concluded,

> "In my judgment that case is the authority for the following propositions

> [i] formal validity of the transfer of shares in a foreign corporation must be determined by the law of incorporation;
>
> [ii] the rights, if any, in the shares of a foreign corporation, conferred by the lawful possession of the share certificates, must be determined by the same laws; but
>
> [iii] where the certificates are delivered into the possession of the holder in England, the prior question whether he is entitled to retain possession of them against the claim of the true owner must be determined by English law."

However, he went on to say:

> "In my judgment the case is clear authority in favour of the *lex loci actus* and against the application of the law of incorporation for the purpose of deciding questions of priority while the transfer remains unregistered."

He also concluded that the application of the law of incorporation to the issue of priority of title in the shares was contrary to principle and authority, in particular *Cady.* I believe that that latter statement was not correct. The question of priority was not before the court in *Cady* nor was the question as to what law determined the rights to the shares as opposed to the right to the share certificates.

130. The Judge also considered that there was persuasive authority in foreign cases to suggest that the appropriate law to apply when deciding the issue of priority was that of *lex loci actus.* For myself, I am of the view that the authorities indicate, rather than decide, that the appropriate law to apply when deciding whether one party has a better title to shares is the *lex situs,* that being the law of incorporation.

131. In *Braun v The Custodian* (1944 3DLR 412), Thorson J, sitting in the Exchequer Court of Canada gave judgment in a case where an American citizen had purchased in Germany from an enemy alien shares in the Canadian Pacific Railway Company. Those shares were registered and transferred into his name in New York. The Canadian Custodian of enemy property claimed the shares. It was contended on behalf of the American citizen that the order vesting the shares in The Custodian was a nullity on the grounds that the *situs* of the shares was in New York because the transfers were registered there and therefore the shares were not property in Canada and consequently not subject to the jurisdiction of the Canadian legislation. After citing *Cady,* Thorson J concluded that there was a difference between the property in the share certificates and the property in the shares themselves. At page 42 8 he said:

> "It is, I think, a sound rule of law that the *situs* of shares of a company for the purpose of determining a dispute as to their ownership is in a territory of incorporation of the company, for that is where the court has jurisdiction over the company in accordance with the law of its domicile and power to order rectification of its register, where such rectification may be necessary, and to enforce such order by personal decree against it. It is at such place that the shares can be effectively dealt with by the court.

132. The Canadian Pacific Railway was incorporated in Canada under the law of Canada and is governed by it and, under such law, is subject to the jurisdiction of the Canadian courts. The *situs* of the shares in dispute for the purposes of the present case is, therefore, in Canada and they constitute property in Canada."

133. It is true that Thorson J was not dealing with a question of priority of rival claims to shares, but he was concerned with rival claims and concluded the appropriate law was the law of incorporation. If that be right, as I believe it to be, then it would be odd to apply a different system of law to resolving claims to title in which the issue was concerned with priority to title to that applicable where the issue was whether a particular person had any title at all.

Braun was followed in *Hunt v The Queen* [1968 67 DLR 373] where the Supreme Court of Canada held that for the purpose of execution, the property in shares was situated at the place of incorporation.

134. In *Braun,* Thorson J referred to *Jellinik v Huron Copper Mining Co* [1899 177 US 1], a case decided in the US Supreme Court. The decision is mainly concerned with whether the suit of the Plaintiffs could proceed in the absence of the Defendants. The suit was brought in the Circuit Court of the United States for the Western District of Michigan by parties who were citizens of other states against the *Michigan Mining Corporation* and certain individuals holding shares in that corporation being citizens who resided in Massachusets. The Plaintiffs claimed that they were the real owners of certain shares of the company which were held by the Massachusets Defendants and sought a decree to that effect. Harland J, who gave the judgment of the court, said at page 13:

> "But we are of the opinion that it is within Michigan for the purpose of a suit brought there against the company - such shareholders being made parties to the suit - to determine whether the stock is rightfully held by them. The certificates are only evidence of the ownership of the shares, and the interest represented by the shares is held by the company for the benefit of the true owners. As the habitation or domicile of the company is and must be in the State that created it, the property represented by its certificates and stock may be deemed to be held by the company within the State whose creature it is, whenever it is sought by suit to determine who is the real owner. This principle is not affected by the fact that the Defendant is authorised by the laws of Michigan and have an office in another State, at which a book showing the transfers of stock may be kept."

135. That judgment also indicates that shares are property which is situated in the country of incorporation and it is the law of that country which should be applied when determining questions of ownership.

136. A similar conclusion was reached by Manton J giving the judgment of the Circuit Court of Appeal, Second Circuit, in *United Cigarette Company Inc v Canadian Pacific Railway Company* [12 Fed Reporter, 2nd series, 634.] In so doing he cited this passage from the judgment of Holmes J in *Direction der Disconto-Gesellschaft v US Steel Corporation* [267 US 22].

> "Therefore New Jersey have authorised this Corporation like others to issue certificates that so far represent the stock that ordinarily at least no one can get the benefits of ownership except through and by means of the paper, it recognises as owner anyone to whom the person declared by the paper to be the owner has transferred it by the endorsement provided for wherever it takes place. It allows an endorsement in blank, and by its laws and well as by the law of England an indorsement in blank authorises anyone who is the lawful owner of the paper to write in a name, and thereby entitle the person so named to demand registration as owner in his term upon the Corporation's books. But the question of who is the owner of the paper depends upon the law of the place where the paper is."

137. That quotation was cited by the Judge. However, Manton J in his judgement drew a distinction between owning the paper and owning the rights attaching to the shares. The latter as he made clear was to be governed by the law of Canada being the law of incorporation. Thus his judgment like the others to which I have referred suggests that the appropriate law to apply when deciding the ownership of the shares as opposed to the ownership of the certificates is the law of incorporation.

138. Judgments to a similar effect were given by District Judge Peterson in *Pensylvania Company v United Railways of Havana* (1939 26 Federal Supplement 379) and the Supreme Judicial Court of Massachusets in *Morson v Second National Bank of Boston* [1940 29 N.E.Reporter, 2nd series 19] . In that case the court had to decide whether a testator had prior to his death made a valid gift in circumstances where the share certificates were handed over in Italy and were subsequently endorsed. It was argued that the validity of the gift had to be judged by the law of Italy and that as certain formalities required by Italian law had not

been observed there had been no transfer of ownership of the shares. The court held that there had been a valid gift according to the law of incorporation and therefore property passed. At page 2 0 in the judgment of the court the following was said:

> "Doubtless it is true that whether or not there is a completed gift of an ordinary tangible chattel is to be determined by the law of the *situs* of the chattel. ... Shares of stock, however are not ordinary tangible chattels. A distinction has to be taken between the shares and the certificate, regarded as a piece of paper which can be seen and felt, the former being said to be subject to the jurisdiction of the State of incorporation and the latter to the jurisdiction of the State in which it is located. ... The shares are part of the structure of the corporation, all of which was erected and stands by virtue of the law of the State of incorporation. The law of that State determines the nature and attributes of the shares. If by the law of that State the shares devolve upon one who obtains ownership of the certificate it may be that the law of the State of a purported transfer of a certificate will indirectly determine ownership. ... But at least when the State of incorporation has seen fit in creating the shares to insert in them the intrinsic attribute or quality of being assignable in a particular manner it would seem that that State, and other States as well, should recognise assignments made in the specified manner wherever they are made, even though that money involves dealing in some way with the certificate. Or the shares may be regarded for this purpose as remaining at home with the Corporation, wherever the certificate may be - much as real estate remains at home when the deeds are taken abroad."

139. The English authorities to which we were referred did not involve questions of priority to shares. However they do in my view tend to support the proposition that the appropriate law to apply in this case is the law where the property is situated namely the law of incorporation or *lex situs.* In *Norton v Florence Land & Public Works Co* [1877 7 Ch Div 332] , a company with an office in London and property in Florence raised money by the issue of "obligations" purporting to bind the property. Subsequently by a mortgage in Italian form, the company mortgaged the property to an Italian bank with a London office which had notice of the "obligations". The bank took proceedings in Florence to enforce the mortgage and the holders of the "obligations" sought to restrain the sale of the property claiming priority over the bank. The court refused to interfere. Jessel MR said at page 336:

> "The answer is very simple. It depends on the law of the country where the immovable property is situated. If the contract according to the law of that country binds the immovable property, as it does in this country, when for value, that may be so, but if it does not bind the immovable property, then it is not so. You cannot by reason of notice to a third person of a contract which does not bind the property thereby bind the property if the law of the country in which the immoveable property is situated does not so bind it. That would answer to the claim so far as regards the notion that mere notice would do."

140. Clearly the facts of that case are very different to the present; but shares are property in the nature of a chose in action which is immoveable in the sense that it remains at the place of the company's incorporation. Thus the reasoning of Jessel MR would suggest that the title to the shares in this case, the title to the chose in action, should depend upon whether the Defendants were bona fide purchasers for value without notice according to the law of incorporation: that being the law where the property is situated.

141. In *Maudslay v Maudslay Sons & Field* [1900 1 Ch 602] it was held that the existence of a valid charge according to English law did not entitle a debenture holder to prevent a company who was an unsecured creditor from enforcing rights given to it by French law . The reason given by Cousins-Hardy J was that the question of whether there was an equity in favour of the debenture holders had to be answered according to the law of the debt which was where the debt was situated. Thus as French law allowed

recovery, the debenture holders had no prior equity. Again the facts are very different, but the decision is consistent with the view that the appropriate law to apply in deciding questions of title is the law of the place where the property in dispute is situated. In the present case that is the law of incorporation namely New York law.

142. In *Kelly v Selwyn* [1905 2 Ch 117] Mr Selwyn, who was domiciled in New York, assigned to his wife his reversionary interest under his late father's will. To be a completed assignment, a notice to the trustees was not required under New York law. Three years later he assigned the same interest by way of mortgage to the Plaintiff who gave notice to the trustees. Thereafter, Mrs Selwyn gave notice to the trustees and the question arose as to whether her claim had priority. Warrington J held that as the trust fund was an English trust fund, the question of priority was governed by English law and therefore the Plaintiff's claim had priority. Thus the Judge looked at the *lex situs* of the property in the same way as in the United States cases to which I have referred looked to the law of incorporation to decide questions of title in respect of shares.

143. As a matter of principle I believe the appropriate law to decide questions of title to property, such as shares, is the *lex situs* which is the same as the law of incorporation. No doubt contractual rights and obligations relating to such property fall to be determined by the proper law of the contract. However it is not possible to decide whether a person is entitled to be included upon the register of the company as a shareholder without recourse to the company's documents of incorporation as interpreted according to the law of the place of incorporation. If that be right, then it is appropriate for the same law to govern issues to title including issues as to priority; thus avoiding recourse to different systems of law to essentially a single question. Further, it is to the courts of that place which a person is likely to have to turn to enforce his rights.

144. The conclusion that the appropriate law is the law of incorporation is, I believe, also consistent with the general rule relating to moveables and land. In both cases the courts look to the law of the place where the moveable or land is situated. Further, the conclusion that it is the law of incorporation which should be used to decide questions of title, including questions as to priority of title does, I believe, lead to certainty as opposed to applying the *lex loci actus* which can raise doubt as to what is the relevant transaction to be considered and where it takes place. That is particularly so in modern times with the explosion of communication technology. The conclusion is, I also believe, consistent with the trend of authority both in this country and abroad.

145. Although Swiss Volksbank submitted that New York law applied, it sought to support the conclusion of the Judge that the appropriate law was the *lex loci actus,* being the law of the place where the transfers took place. Swiss Volksbank accepted that the dispute should be characterized as one relating to priority of title to the shares. It submitted that this issue should be decided by the principle that the applicable law was that of the place where the property was situated as the time of the transfer. If so, following cases to which I have referred, you would expect them to have submitted that the appropriate law was the law of incorporation. Not so. Counsel submitted that under New York law the shares were negotiable instruments and therefore the place where the property was situated was the place of transfer. That, they submitted, was in New York where the shares passed through the DTC system.

146. In the present case the submissions of Swiss Volksbank arrive at the same conclusion, namely that New York law applies, but that will not necessarily be the result in every case. That is demonstrated by the facts of the *Braun* case. For myself, I would reject the submission that the *situs* of the rights and liabilities which are the subject of the shares is the place where they are transferred. I believe that the property, the subject of shares, is situated at the place of incorporation, even though that property can be validly transferred and traded in other places. That being so, I conclude the submissions of Swiss Volksbank are based on a misconception, namely that the property, the subject of the shares can be situated in a number of countries and the appropriate law to determine title to that property is the law of the country where the transfer takes place.

147. Although I have concluded that the law applicable to the resolution of the dispute is the law of incorporation and not that of the *lex loci actus,* the result is the same as New York law is the law of both places. That is the law for which the Defendants contend and is the law applied by the judge. It follows that the submissions of the Plaintiff should in my view be rejected and I would dismiss the Plaintiff's appeal on the question before this court.

(Order: Appeal dismissed; declaration in terms stated; costs to be paid by the appellants in any event, including costs before Master of the Rolls and Staughton L.J. in relation to directions; application for leave to appeal to the House of Lords refused)

TAB 20

1994 CarswellOnt 257
Ontario Court of Justice (General Division, Commercial List)

Mernick, Re

1994 CarswellOnt 257, [1994] O.J. No. 26, 24 C.B.R. (3d) 8

Re proposal of STEPHEN RANDALL MERNICK, insolvent person

Farley J.

Judgment: January 4, 1994
Docket: Doc. 31-269152

Counsel: *Malcolm M. Mercer*, for Xerox Canada Finance Inc., creditor.
Stephen R. Mernick, in person.

Subject: Corporate and Commercial; Insolvency

Application for approval of proposal.

Farley J. **(Endorsement):**

1 At the beginning of the hearing Stephen R. Mernick ("Mernick") requested an adjournment until January 5, 1994 (or later) to allow his new counsel to attend. Mernick's previous counsel was successful in removing himself from the record on December 22, 1993. Well prior to that time, he had arranged with Mr. Mercer for this matter to be heard today. His new counsel was apparently under the misapprehension that the January 4, 1994 hearing date was only a tentative date; however on his enquiring about shifting the date, Mr. Mercer advised forthwith on December 23, 1993 that the January 4, 1994 date was a fixed one. Mernick's new counsel responded by voice mail that there had been a misunderstanding on new counsel's part. No effort was made, with or without reasons, to change the current date. Counsel should be well aware of the Practice Direction (1993), 13 O.R. (3d) 453 in this regard. The adjournment request was refused.

2 No responding material was filed by Mernick or any of his counsel in response to the request of Xerox Canada Finance Inc. ("Xerox") that the Court refuse to approve Mernick's proposal.

3 On June 9, 1993 Xerox obtained an Order from Registrar Ferron requiring that Mernick answer the undertakings given on his examination held April 26, 1993 and questions reasonably arising therefrom. Up to the date of this hearing no answers, even in piecemeal, were given.

4 Mernick advises that he has fought the bankruptcy petitions over a long period of time in a very vigorous manner as he wishes to avoid what he feels is the automatic stigma of being a bankrupt. While his effort in this respect may be applauded from one point of view, it should be recognized that bankruptcy legislation is intended to be rehabilitative in nature. It has been often remarked that there is nothing untoward in an honest but unfortunate businessman resorting to this legislation so as to enable him to attempt to make a clean start.

5 I note as well that it would appear that the proposal section of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 as amended ("BIA") is aimed at the reorganization of business entities (including individuals) which are insolvent but which generally are expected to be viable in an operational sense once the restructuring of the proposal takes place. Such of course would not be the case in Mernick's situation. He has declared that he has no assets of any value and in particular no business operational assets. Furthermore, he has no income; he apparently depends on his general family to support him, his wife and his children. Aside from this family financial assistance (which apparently would be the source of the $50,000 payment in the proposal), Mernick is also able to obtain loans or credit for emergency and necessary matters. Part of the emergency

matters would seem to include his assisting others with charitable donations. I am given to understand by him that he has been instrumental in assisting some thousands of others who have been in need; in this case the nature of his generosity is quite commendable although one would have to question his means of borrowing from others to in turn lend with no apparent means to ensure repayment.

6 Mernick's proposal disclosed no assets but liabilities totalling $43,125,465. Of this, $40 million was said to be owing to 974846 Ontario Inc., a company owned by Meyer Botnick, which purchased the "Firestone indebtedness" for $100,000. The $100,000 did not come from Botnick's company but rather from Mernick's mother who received a non-interest bearing note due 2017 for $500,000 from Botnick's company. However, this transaction which took place July 23, 1992 was reduced by Registrar Ferron to $7,485,000 in light of a prior settlement; it is this amount plus accruing interest which Botnick's company is able to claim against Mernick. The remaining $3,125,465 was made up of various small claims. These were supplemented by further claims of $13,898,887. Claims amounting to $24,509,382 were made and voted in the proposal.

7 The proposal was for $50,000 payable over time (12 months) without any actual security or designation as to the source of such payments. This would amount to a payout of 1/5 of one cent on the dollar. However, Botnick's company waived payment which would increase the payout to about 1/3 of one cent on the dollar — a payout which no one would suggest was handsome.

8 It is however a rather strange waiver by Botnick's company. The proposal states:

> The trustee will distribute the above-mentioned funds [$50,000] in accordance with the priority set forth above. To the extent that unsecured creditors receive dividends through this proposal, such dividend shall be deemed as full payment, and full settlement of those creditors' outstanding claims.
>
> 974846 Ontario Inc. has agreed that upon the acceptance of this proposal by my creditors and approval by the Court, it will waive its rights to its pro rata share of the dividend contemplated under this proposal, thereby allowing such funds to be distributed among other unsecured creditors.

9 On that basis it would appear that Botnick's company's claim would not be compromised since it would not receive a dividend. On the other hand, the legitimacy of the deal which Mernick advised was to get an independent party in control of the Firestone indebtedness — questionable at best takes on a very rank odour if Botnick's company forgives its claim against Mernick but remains saddled with its debt to his mother. The transaction does not have the air of reality. In any event, Mernick was unfortunately at somewhat of a loss to explain which interpretation should be given to the Botnick company waiver.

10 53 votes were cast in the vote on the proposal — 47 (88%) in favour and 6 against. In dollar terms, of the $24,509,382 of claims, $16,992,529 (69.3%) were in favour and $7,516,852 against. Two thirds value would be $16,339,586 so that the votes exceeded this value requirement by $652,944.

11 The PTL deal was to have been completed by 792929 Ontario Inc. ("79 Company"). Mernick held the shares of this company in trust but he has been vague about the nature of the trust and its beneficiary. He asserts that the beneficiary was never himself although there are a number of agreements in which he recites and warrants that he is sole beneficial owner of the shares. As well, his legal counsel caused to be signed court papers to this effect. Mernick asserts that errors were made and that he did not check the papers before signing. The point in issue in this hearing is the return of the PTL deposit to the 79 Company in late 1990. In 1992, Mernick admitted that a portion of the PTL deposit of about $2.4 million was used to settle claims of Firestone, Bank Leumi and other creditors as well as for legal fees, living expenses and business expenses. Details were not given. One of the April 26, 1993 undertakings to be answered was to give details of the disposition of these funds.

12 Until he settled with MICC, Mernick always claimed that his interest in the Innisfil Site was worth $30 million based on a conditional offer to purchase the site obtained from 901557 Ontario Inc., a company controlled by a Mr. Spier. However, it appears that the $400,000 deposit paid came not from Spier's company but from the 79 Company. One must question the *bona fides* of such a structure which would so give the impression of financial strength.

13 Bank Leumi received $500,000 in early 1991 out of the PTL deposit. Registrar Ferron was of the view that this was a preference. Bank Leumi claimed $5,455,834 and voted in favour of the proposal.

14 Firestone received $428,353 U.S. in the winter of 1991 out of the PTL deposit. It would appear that such has the earmarks of a preference. The Botnick company, as assignee of the Firestone debt, voted $7,484,030 in favour of the proposal.

15 With respect to many of the claims, it is interesting to note that they date back to 1991 or before, yet they were not previously disclosed in any statement of assets and liabilities affirmed by Mernick. Mernick was quite candid that a fair number of these were owed to persons who were not pressing but expected to be paid if Mernick ever got into position to pay. It was expressed by Mernick that he felt he had a moral (and more) obligation to pay these in full — and it appears that there is a corresponding view in this regard from these creditors. One may well question under these circumstances if the proposal has any meaning vis-à-vis these debts. If the proposal fails, these people expect Mernick to pay 100 cents on the dollar at some time; if the proposal succeeds, they still expect Mernick to pay 100 cents on the dollar. While the morality of such may be very high, one must question whether votes in respect to these claims should be taken into account in binding other creditors; if not, then consideration should be given to the nature of this when considering whether the proposal should be approved.

16 Mernick has admitted that his "mess" began in the fall of 1989 during which time the Napanee mortgages fell due and were not paid. Spider Maple was put into receivership and Bank Leumi called its loans. Since then, at least $2.4 million has been expended which could have been made available to Mernick's creditors generally.

17 Clearly the assets involved are less than 50 cents on the dollar (s. 173(1)(*a*)). Mernick has either failed to keep proper records (s. 173(1)(*b*), s. 200(1)(*a*)) or he has refused to or is unable to answer his undertakings using such records (s. 173(*m*). Mernick has continued to obtain credit after knowing himself to be insolvent and engaged in business deals (s. 173(1)(*c*)). The PTL deposit disposition has not been answered (s. 173(1)(*d*)). In light of the scanty information available (despite great efforts over a long time by Mr. Mercer), it is not possible to determine if Mr. Mernick has infringed s. 173(1)(*e*). Clearly in his dismissal for want of prosecution of appeal of the Xerox claim, Mernick has put Xerox to unnecessary expense (s. 173(1)(*f*)). It appears that there have been preferences within the period in question (s. 173(1)(*h*)). He has also committed a bankruptcy offence in failing to answer questions (s. 198(*c*), s. 173(1)(*l*)).

18 Three interests must be considered on an application to approve a proposal (see *Re Stone* (1976), 22 C.B.R. (N.S.) 152 (Ont. S.C.)):

(a) the interests of the debtor;

(b) the interests of the creditors generally by ensuring that the proposal is reasonable; and

(c) the interests of the public in the integrity of bankruptcy legislation.

19 The Court must weigh the effect of approving the proposal and not approving the proposal. In order for the proposal to be approved, the creditors must obtain an advantage over bankruptcy: see *Re Allen Theatres Limited* (1922), 3 C.B.R. 147 (Ont. S.C.); *Re Tridont Health Care Inc.* (1991), 4 C.B.R. (3d) 290 (Ont. Bktcy.) and *Re First Toronto Mining Corp.* (1991), 3 C.B.R. (3d) 246 (Ont. Bktcy.). The conduct of the debtor is a factor to be considered and if there is any suggestion of collusion or secret advantage, the matter will be particularly scrutinized: see *Re Gardner* (1921), 1 C.B.R. 424 (Ont. S.C.) and *Re Man With Axe Ltd.* (1961), 2 C.B.R. (N.S.) 8 (Man. Q.B.).

20 Where the facts mentioned in s. 173 BIA are proven, the Court shall refuse to approve the proposal unless the proposal provides reasonable security for the payment of not less than 50 cents on the dollar of unsecured claims or such percentage of these as the Court may direct: see *Re Dolson* (1984), 49 C.B.R. (N.S.) 255 (Ont. S.C.); *McNamara v. McNamara* (1984), 53 C.B.R. (N.S.) 240 (Ont. S.C.); *Re Tridont, supra*. The Court may refuse to approve a proposal where offences mentioned in s. 198 and s. 200 have been committed (s. 59(2) BIA).

21 As indicated previously, I am of the view that this type of proposal is an ill fit with the thrust and intention of BIA. It is not a reorganization or restructuring. As such, it should at least receive the strongest scrutiny. There are numerous offences and inappropriate facts which raise problems under s. 173, s. 198 and s. 200. The Botnick company deal smacks of illegitimacy on whatever view is taken of it. It would seem that the creditors may be giving up $50,000 (although it is necessary to note that the source was not disclosed in the proposal and it had to be over time) but that this would be their ticket of admission to determine what happened to at least the PTL deposit and to see if some of this money might be recovered under a preference action. I note that it would be very much in the interests of Bank Leumi and Firestone/Botnick company to vote in favour of the proposal to eliminate the risk of investigation into the preference question. It seems to me that an investigation would have the double barrelled advantage of satisfying the justifiable curiosity of the "outside" claimants and vindication of Mernick if he has in fact made appropriate (even if quite disjointed) disclosure. I note also that even according the in favour votes full dollar credence, the two-thirds' value majority was narrowly obtained; in other words, there was not an overwhelming vote in favour. I am therefore of the view that it would be in the interests of the creditors generally not to approve this proposal since it does not appear reasonable on its face (especially since it is for a fraction of a cent on the dollar and falls below any appropriate threshold in this regard or in regard to s. 173(1)(*a*) and s. 59(3)). For this and other reasons given, I think it in the public interest not to approve this proposal. In essence, the proposal (given the minuscule recovery aspect) was a bankruptcy without the investigative assistance possible in a bankruptcy, all in a situation where there was a demonstrated reluctance to provide information.

22 The non-approval of the proposal would then bring s. 61(2)(*a*)(iii) into play.

Application dismissed.

TAB 21

CITATION: Mustang GP Ltd. (Re), 2015 ONSC 6562
COURT FILE NOs.: 35-2041153, 35-2041155, 35-2041157
DATE: 2015/10/28

SUPERIOR COURT OF JUSTICE – ONTARIO – IN BANKRUPTCY

RE: IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF MUSTANG GP LTD.

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF HARVEST ONTARIO PARTNERS LIMITED PARTNERSHIP

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF HARVEST POWER MUSTANG GENERATION LTD.

BEFORE: Justice H. A. Rady

COUNSEL: Harvey Chaiton, for Mustang GP Ltd., Harvest Ontario Partners Limited Partnership and Harvest Power Mustang Generation Ltd.

Joseph Latham for Harvest Power Inc.

Jeremy Forrest for Proposal Trustee, Deloitte Restructuring Inc.

Robert Choi for Badger Daylighting Limited Partnership

Curtis Cleaver for StormFisher Ltd.

No one else appearing.

HEARD: October 19, 2015

ENDORSEMENT

Introduction

[1] This matter came before me as a time sensitive motion for the following relief:

(a) abridging the time for service of the debtors' motion record so that the motion was properly returnable on October 19, 2015;

(b) administratively consolidating the debtors' proposal proceeding;

(c) authorizing the debtors to enter into an interim financing term sheet (the DIP term sheet) with StormFisher Environmental Ltd. (in this capacity, the DIP lender), approving the DIP term sheet and granting the DIP lender a super priority charge to secure all of the debtors' obligations to the DIP lender under the DIP term sheet;

(d) granting a charge in an amount not to exceed $150,000 in favour of the debtors' legal counsel, the proposal trustee and its legal counsel to secure payment of their reasonable fees and disbursements;

(e) granting a charge in an amount not to exceed $2,000,000 in favour of the debtors' directors and officers;

(f) approving the process described herein for the sale and marketing of the debtors' business and assets;

(g) approving the agreement of purchase and sale between StormFisher Environmental Ltd. and the debtors; and

(h) granting the debtors an extension of time to make a proposal to their creditors.

Preliminary Matter

[2] As a preliminary matter, Mr. Choi, who acts for a creditor of the debtors, Badger Daylighting Limited Partnership, requested an adjournment to permit him an opportunity to review and consider the material, which was late served on October 15, 2015. He sought only a brief adjournment and I was initially inclined to grant one. However, having heard counsel's submissions and considered the material, I was concerned that even a brief adjournment had the potential to cause mischief as

the debtors attempt to come to terms with their debt. Any delay might ultimately cause prejudice to the debtors and their stakeholders. Both Mr. Chaiton and Mr. Latham expressed concern about adverse environmental consequences if the case were delayed. No other stakeholders appeared to voice any objection. As a result, the request was denied and the motion proceeded.

[3] Following submissions, I reserved my decision. On October 20, 2015, I released an endorsement granting the relief with reasons to follow.

Background

[4] The evidence is contained in the affidavit of Wayne Davis, the chief executive officer of Harvest Mustang GP Ltd. dated October 13, 2015. He sets out in considerable detail the background to the motion and what has led the debtors to seek the above described relief. The following is a summary of his evidence.

[5] On September 29, 2015, the moving parties, which are referred to collectively as the debtors, each filed a Notice of Intention to Make a Proposal pursuant to s. 50.4 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 as amended. Deloitte Restructuring Inc. was named proposal trustee.

[6] The debtors are indirect subsidiaries of Harvest Power Inc., a privately owned Delaware corporation that develops, builds, owns and operates facilities that generate renewable energy, as well as soil and mulch products from waste organic materials.

[7] Harvest Power Mustang Generation Ltd. was established in July 2010 in order to acquire assets related to a development opportunity in London. In October 2010, it purchased a property located at 1087 Green Valley Road from London Biogas Generation Inc., a subsidiary of StormFisher Ltd. The intent was to design, build, own and operate a biogas electricity production facility.

[8] In November 2011, a limited partnership was formed between Harvest Power Canada Ltd., Harvest Power Mustang GP Ltd. and Waste Management of Canada Corporation, referred to as Harvest Ontario Partners Limited Partnership or Harvest Ontario Partners. It was formed to permit the plant to accept organic waste to be used to generate renewable electricity. After the partnership was formed, Harvest Power Mustang Generation Ltd. became a 100 percent owned subsidiary of the partnership. In June 2012, its personal property was transferred to the partnership. It remains the registered owner of 1087 Green Valley Road.

[9] The plant employs twelve part and full time employees.

[10] The debtors began operating the biogas electrical facility in London in April 2013. Unfortunately, the plant has never met its production expectations, had negative EBITDA from the outset and could not reach profitability without new investment. The debtors had experienced significant "launch challenges" due to construction delays, lower than expected feedstock acquisition, higher than anticipated labour costs, and delays in securing a necessary approval from the Canadian Food Inspection Agency for the marketing and sale of fertilizer produced at the facility.

[11] Its difficulties were compounded by litigation with its general contractor, arising from the earlier construction of the facility. The lawsuit was ultimately resolved with the debtors paying $1 million from a holdback held by Harvest Ontario Partners as well as a 24 percent limited partnership interest in the partnership. The litigation was costly and "caused a substantial drain on the debtors' working capital resources".

[12] The debtors' working capital and operating losses had been funded by its parent company, Harvest Power Inc. However, in early 2015 Harvest Power Inc. advised the debtors that it would not continue to do so. By the year ended September 2015, the debtors had an operating loss of approximately $4.8 million.

[13] In January 2015, the debtors defaulted on their obligations to Farm Credit Canada, its senior secured creditor, which had extended a demand credit facility to secure up to $11 million in construction financing for the plant. The credit facility was converted to a twelve year term loan, secured by a mortgage, a first security interest and various guarantees. In February 2015, FCC began a process to locate a party to acquire its debt and security, with the cooperation of the debtors. FCC also advised the debtors that it would not fund any restructuring process or provide further financing. The marketing process failed to garner any offers from third parties that FCC found acceptable.

[14] On July 9, 2015, FCC demanded payment of its term loan from Harvest Ontario Partners and served a Notice of Intention to Enforce Security pursuant to s. 244(1) of the *BIA*. In August 2015, an indirect subsidiary of Harvest Power Inc. – 2478223 Ontario Limited – purchased and took an assignment of FCC's debt and security at a substantial discount.

[15] Shortly thereafter, StormFisher Ltd., which is a competitor of Harvest Power Inc., advised 2478223 that it was interested in purchasing the FCC debt and security in the hopes of acquiring the debtors' business. It was prepared to participate in the sale process as a stalking horse bidder and a DIP lender.

[16] On September 25, 2015, 2478223 assigned the debt and security to StormFisher Environmental Ltd., a subsidiary of StormFisher Ltd., incorporated for the purpose of purchasing the debtors' assets. The debt and security were purchased at a substantial discount from what 2478223 had paid and included cash, a promissory note and a minority equity interest. StormFisher Ltd. is described as having remained close to the Harvest Power group of companies in the time following its subsidiary's sale of the property to Harvest Power Generation Ltd. Some of its employees worked under contract for Harvest Power Inc. It was aware of the

debtors' financial difficulties and had participated in FCC's earlier attempted sale process.

[17] On September 29, 2015, the debtors commenced these proceedings under the *BIA*, in order to carry out the sale of the debtors' business as a going concern to StormFisher Environmental Ltd. as a stalking horse bidder or another purchaser. Given the lack of success in the sale process earlier initiated by FCC, and concerns respecting the difficulties facing the renewable energy industry in general and for the debtors specifically, the debtors believe that a stalking horse process is appropriate and necessary.

[18] In consultation with the proposal trustee, the debtors developed a process for the marketing and sale of their business and assets. The following summary of the process is described by Mr. Davis in his affidavit:

i. the sale process will be commenced immediately following the date of the order approving it;

ii. starting immediately after the sale process approval date, the debtors and the proposal trustee will contact prospective purchasers and will provide a teaser summary of the debtors' business in order to solicit interest. The proposal trustee will obtain a non-disclosure agreement from interested parties who wish to receive a confidential information memorandum and undertake due diligence. Following the execution of a non-disclosure agreement, the proposal trustee will provide access to an electronic data room to prospective purchasers;

iii. at the request of interested parties, the proposal trustee will facilitate plant tours and management meetings;

iv. shortly following the sale process approval date, the proposal trustee will advertise the opportunity in the national edition of the Globe and Mail;

v. the bid deadline for prospective purchasers will be 35 days following the sale process approval date. Any qualified bid must be accompanied by a cash deposit of 10% of the purchase price;

vi. the debtors and the proposal trustee will review all superior bids received to determine which bid it considers to be the most favourable and will then notify the successful party that its bid has been selected as the winning bid. Upon the selection of the winning bidder, there shall be a binding agreement of purchase and sale between the winning bidder and the debtors;

vii. if one or more superior bids is received, the debtors shall bring a motion to the Court within seven business days following the selection of the winning bidder for an order approving the agreement of purchase and sale between the winning bidder and the debtors and to vest the assets in the winning bidder;

viii. the closing of the sale transaction will take place within one business day from the sale approval date;

ix. in the event that a superior bid is not received by the bid deadline, the debtors will bring a motion as soon as possible following the bid deadline for an order approving the stalking horse agreement of purchase and sale.

[19] StormFisher Environmental Ltd. is prepared to purchase the business and assets of the debtors on a going-concern basis on the following terms:

> A partial credit bid for a purchase price equal to: (i) $250,000 of the debtors' total secured obligations to StormFisher Environmental Ltd. (plus the DIP loan described below); (ii) any amounts ranking in priority to StormFisher Environmental Ltd.'s security, including the amounts secured by: (a) the administration charge; (b) the D&O charge (both described below); and (c) the amount estimated by the proposal trustee to be the aggregate fees, disbursements and expenses for the period from and after closing of the transaction for the sale the debtors' business to the completion of the *BIA* proceedings and the discharge of Deloitte Restructuring Inc. as trustee in bankruptcy of estate of the debtors.

[20] The debtors and the proposal trustee prepared a cash flow forecast for September 25, 2015 to December 25, 2015. It shows that the debtors will require additional funds in order to see them through this process, while still carrying on business.

[21] StormFisher Environmental Ltd. has offered to make a DIP loan of up to $1 million to fund the projected shortfall in cash flow. In return, the DIP lender requires a charge that ranks in priority to all other claims and encumbrances, except the administration and D&O charges. The administration charge protects the reasonable fees and expenses of the debtors' professional advisors. The D&O charge is to indemnify the debtors for possible liabilities such as wages, vacation pay, source deductions and environmental remedy issues. The latter may arise in the event of a wind-down or shut down of the plant and for which existing insurance policies may be inadequate. According to Mr. Davis, the risk if such a charge is not granted is that the debtors' directors and officers might resign, thereby jeopardizing the proceedings.

[22] The debtors have other creditors. Harvest Power Partners had arranged for an irrevocable standby letter of credit, issued by the Bank of Montreal to fund the payment that might be required to the Ministry of Environment arising from any environment clean up that might become necessary.

[23] Searches of the *PPSA* registry disclosed the following registrations:

(a) Harvest Ontario Partners:

(i) FCC in respect of all collateral classifications other than consumer goods. On August 12, 2015, change statement filed to reflect the assignment of FCC's Debt and Security to 2478223;

(ii) BMO in respect of accounts.

(b) Harvest Power Mustang Generation Ltd.

(i) FCC in respect of all collateral classifications other than consumer goods. On August 12, 2015, change statement filed to reflect the assignment of FCC's Debt and Security to 2478223;

(ii) BMO in respect of accounts; and

(iii) Roynat Inc. in respect of certain equipment.

[24] There are two registrations on title to 1087 Green Valley Road. The first is for $11 million in favour of FCC dated February 28, 2012 and transferred to 2478223 on October 8, 2015. The second is a construction lien registered by Badger Daylighting Limited Partnership on July 2, 2015 for $239,191. The validity and priority of the lien claim is disputed by the debtors and 2478223.

Analysis

a) the administrative consolidation

[25] The administration order, consolidating the debtors' notice of intention proceedings is appropriate for a variety of reasons. First, it avoids a multiplicity of proceedings, the associated costs and the need to file three sets of motion

materials. There is no substantive merger of the bankruptcy estates but rather it provides a mechanism to achieve the just, most expeditious and least expensive determination mandated by the *BIA General Rules*. The three debtors are closely aligned and share accounting, administration, human resources and financial functions. The sale process contemplates that the debtors' assets will be marketed together and form a single purchase and sale transaction. Harvest Ontario Partners and Harvest Power Mustang Generation Ltd. have substantially the same secured creditors and obligations. Finally, no prejudice is apparent. A similar order was granted in *Re Electro Sonic Inc.*, 2014 ONSC 942 (S.C.J.).

b) the DIP agreement and charge

[26] S. 50.6 of the *BIA* gives the court jurisdiction to grant a DIP financing charge and to grant it a super priority. It provides as follows:

> **50.6(1)** ***Interim Financing:*** On application by a debtor in respect of whom a notice of intention was filed under section 50.4 or a proposal was filed under subsection 62(1) and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the debtor's property is subject to a security or charge – in an amount that the court considers appropriate – in favour of a person specified in the order who agrees to lend to the debtor an amount approved by the court as being required by the debtor, having regard to the debtor's cash-flow statement referred to in paragraph 50(b)(a) or 50.4(2)(a), as the case may be. The security or charge may not secure an obligation that exists before the order is made.
>
> **50.6(3)** ***Priority:*** The court may order that the security or charge rank in priority over the claim of any secured creditor of the debtor.

[27] S. 50.6(5) enumerates a list of factors to guide the court's decision whether to grant DIP financing:

> **50.6(5)** ***Factors to be considered:*** In deciding whether to make an order, the court is to consider, among other things,
>
> (a) the period during which the debtor is expected to be subject to proceedings under this Act;
>
> (b) how the debtor's business and financial affairs are to be managed during the proceedings;

> (c) whether the debtor's management has the confidence of its major creditors;
>
> (d) whether the loan would enhance the prospects of a viable proposal being made in respect of the debtor;
>
> (e) the nature and value of the debtor's property
>
> (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
>
> (g) the trustee's report referred to in paragraph 50(6)(b) or 50.4(2)(b), as the case may be.

[28] This case bears some similarity to *Re P.J. Wallbank Manufacturing*, 2011 ONSC 7641 (S.C.J.). The court granted the DIP charge and approved the agreement where, as here, the evidence was that the debtors would cease operations if the relief were not granted. And, as here, the DIP facility is supported by the proposal trustee. The evidence is that the DIP lender will not participate otherwise.

[29] The Court in *Wallbank* also considered any prejudice to existing creditors. While it is true that the DIP loan and charge may affect creditors to a degree, it seems to me that any prejudice is outweighed by the benefit to all stakeholders in a sale of the business as a going concern. I would have thought that the potential for creditor recovery would be enhanced rather than diminshed.

[30] In *Re Comstock Canada Ltd.*, 2013 ONSC 4756 (S.C.J.), Justice Morawetz was asked to grant a super priority DIP charge in the context of a *Companies' Creditors Arrangement Act* proceeding. He referred to the moving party's factum, which quoted from *Sun Indalex Finance, LLC* v. *United Steelworkers*, 2013 SCC 6 as follows:

> [I]t is important to remember that the purpose of CCAA proceedings is not to disadvantage creditors but rather to try to provide a constructive solution for all stakeholders when a company has become insolvent. As my colleague, Deschamps J. observed in *Century Services*, at para. 15:
>
> > …the purpose of the *CCAA*… is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets.

In the same decision, at para. 59, Deschamps J. also quoted with approval the following passage from the reasons of Doherty J.A. in *Elan Corp. v. Comiskey* (1990), 41 O.A.C. 282, at para. 57 (dissenting):

> The legislation is remedial in the purest sense in that it provides a means whereby the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made.
>
> …
>
> Given that there was no alternative for a going-concern solution, it is difficult to accept the Court of Appeal's sweeping intimation that the DIP lenders would have accepted that their claim ranked below claims resulting from the deemed trust. There is no evidence in the record that gives credence to this suggestion. Not only is it contradicted by the CCAA judge's findings of fact, but case after case has shown that "the priming of the DIP facility is a key aspect of the debtor's ability to attempt a workout" (J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at p. 97). The harsh reality is that lending is governed by the commercial imperatives of the lenders, not by the interests of the plan members or the policy considerations that lead provincial governments to legislate in favour of pension fund beneficiaries. The reasons given by Morawetz J. in response to the first attempt of the Executive Plan's members to reserve their rights on June 12, 2009 are instructive. He indicated that any uncertainty as to whether the lenders would withhold advances or whether they would have priority if advances were made did "not represent a positive development". He found that, in the absence of any alternative, the relief sought was "necessary and appropriate".
>
> [Emphasis in original]

[31] I recognize that in the *Comstock* decision, the court was dealing with a *CCAA* proceeding. However, the comments quoted above seem quite apposite to this case. After all, the *CCAA* is an analogous restructuring statute to the proposal provisions of the *BIA*.

c) administration charge

[32] The authority to grant this relief is found in s. 64.2 of the *BIA*.

> **64.2 (1)** ***Court may order security or charge to cover certain costs:*** On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) is subject to a security or charge, in an amount that the court considers appropriate, in respect of the fees and expenses of
>
> (a) the trustee, including the fees and expenses of any financial, legal or other experts engaged by the trustee in the performance of the trustee's duties;
>
> (b) any financial, legal or other experts engaged by the person for the purpose of proceedings under this Division; and
>
> (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for the effective participation of that person in proceedings under this Division.
>
> **64.2 (2)** ***Priority:*** The court may order that the security or charge rank in priority over the claim of any secured creditor of the person.

[33] In this case, notice was given although it may have been short. There can be no question that the involvement of professional advisors is critical to a successful restructuring. This process is reasonably complex and their assistance is self evidently necessary to navigate to completion. The debtors have limited means to obtain this professional assistance. See also *Re Colossus Minerals Inc.*, 2014 ONSC 514 (S.C.J.) and the discussion in it.

d) the D & O charge

[34] The *BIA* confers the jurisdiction to grant such a charge at s. 64.1, which provides as follows:

> **64.1 (1)** On application by a person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the property of the person is subject to a security or charge – in an amount that the court considers appropriate in favour of any director or officer of the person to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer after the filing of the notice of intention or the proposal, as the case may be.

> (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the person.
>
> (3) The court may not make the order if in its opinion the person could obtain adequate indemnification insurance for the director or officer at a reasonable cost.
>
> (4) The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional default.

[35] I am satisfied that such an order is warranted in this case for the following reasons:

- the D & O charge is available only to the extent that the directors and officers do not have coverage under existing policies or to the extent that those policies are insufficient;
- it is required only in the event that a sale is not concluded and a wind down of the facility is required;
- there is a possibility that the directors and officers whose participation in the process is critical, may not continue their involvement if the relief were not granted;
- the proposal trustee and the proposed DIP lender are supportive;

e) the sale process and the stalking horse agreement of purchaser sale

[36] The court's power to approve a sale of assets in the context of a proposal is set out in s. 65.13 of the *BIA*. However, the section does not speak to the approval of a sale process.

[37] In *Re Brainhunter* (2009), 62 C.B.R. (5th) 41, Justice Morawetz considered the criteria to be applied on a motion to approve a stalking horse sale process in a restructuring application under the *CCAA* and in particular s. 36, which parallels s. 65.13 of the *BIA*. He observed:

> 13. The use of a stalking horse bid process has become quite popular in recent CCAA filings. In *Nortel Networks Corp., Re,* [2009] O.J. No. 3169 (Ont. S.C.J. [Commercial List]), I approved a stalking horse sale process and set out four factors (the "Nortel Criteria") the court should consider in the exercise of its general statutory discretion to determine whether to authorize a sale process:
>
> (a) Is a sale transaction warranted at this time?
>
> (b) Will the sale benefit the whole "economic community"?
>
> (c) Do any of the debtors' creditors have a *bona fide* reason to object to a sale of the business?
>
> (d) Is there a better viable alternative?
>
> 14. The Nortel decision predates the recent amendments to the CCAA. This application was filed December 2, 2009 which post-dates the amendments.
>
> 15. Section 36 of the CCAA expressly permits the sale of substantially all of the debtors' assets in the absence of a plan. It also sets out certain factors to be considered on such a sale. However, the amendments do not directly assess the factors a court should consider when deciding to approve a sale process.
>
> 16. Counsel to the Applicants submitted that a distinction should be drawn between the approval of a sales process and the approval of an actual sale in that the Nortel Criteria is engaged when considering whether to approve a sales process, while s. 36 of the CCAA is engaged when determining whether to approve a sale. Counsel also submitted that s. 36 should also be considered indirectly when applying the Nortel Criteria.
>
> 17. I agree with these submissions. There is a distinction between the approval of the sales process and the approval of a sale. Issues can arise after approval of a sales process and prior to the approval of a sale that requires a review in the context of s. 36 of the CCAA. For example, it is only on a sale approval motion that the court can consider whether there has been any unfairness in the working out of the sales process.

[38] It occurs to me that the Nortel Criteria are of assistance in circumstances such as this – namely on a motion to approve a sale process in proposal proceedings under the *BIA*.

[39] In *CCM Master Qualified Fund Ltd.* v. *blutip Power Technologies* 2012 ONSC 175 (S.C.J.) the Court was asked to approve a sales process and bidding procedures, which included the use of a stalking horse credit bid. The court reasoned as follows:

> 6. Although the decision to approve a particular form of sales process is distinct from the approval of a proposed sale, the reasonableness and adequacy of any sales process proposed by a court-appointed receiver must be assessed in light of the factors which a court will take into account when considering the approval of a proposed sale. Those factors were identified by the Court of Appeal in its decision in *Royal Bank v. Soundair Corp*.: (i) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently; (ii) the efficacy and integrity of the process by which offers are obtained; (iii) whether there has been unfairness in the working out of the process; and, (iv) the interests of all parties. Accordingly, when reviewing a sales and marketing process proposed by a receiver a court should assess:
>
> (i) the fairness, transparency and integrity of the proposed process;
>
> (ii) the commercial efficacy of the proposed process in light of the specific circumstances facing the receiver; and,
>
> (iii) whether the sales process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale.
>
> 7. The use of stalking horse bids to set a baseline for the bidding process, including credit bid stalking horses, has been recognized by Canadian courts as a reasonable and useful element of a sales process. Stalking horse bids have been approved for use in other receivership proceedings, BIA proposals, and CCAA proceedings.

[40] I am satisfied that the sale process and stalking horse agreement should be approved. It permits the sale of the debtors' business as a going concern, with obvious benefit to them and it also maintains jobs, contracts and business relationships. The stalking horse bid establishes a floor price for the debtors' assets. It does not contain any compensation to StormFisher Environmental Ltd. in the event a superior bid is received, and as a result, a superior bid necessarily benefits the debtors' stakeholders rather than the stalking horse bidder. The process seems fair and transparent and there seems no viable alternative, particularly in light of FCC's earlier lack of success. Finally, the proposal trustee supports the process and agreement.

f) Extension of time to file a proposal

[41] It is desirable that an extension be granted under s. 50.4 (9) of the *BIA*. It appears the debtors are acting in good faith and with due diligence. Such an extension is

necessary so the sale process can be carried out. Otherwise, the debtors would be unable to formulate a proposal to their creditors and bankruptcy would follow.

[42] For these reasons, the relief sought is granted.

"Justice H.A. Rady"
Justice H.A. Rady

Date: October 28, 2015

TAB 22

2000 CarswellOnt 2797
Ontario Court of Justice, General Division (In Bankruptcy)

Nortec Colour Graphics Inc., Re

2000 CarswellOnt 2797, 18 C.B.R. (4th) 84, 98 A.C.W.S. (3d) 977

In the Matter of the Proposal of Nortec Colour Graphics Inc.

Deputy Registrar Sproat

Heard: July 24, 2000
Judgment: August 2, 2000
Docket: Estate No. 31-375711

Counsel: *B. Cohen Q.C.*, and *J. Simpson*, for Nortec Colour Graphics Inc.
A. MacFarlane, for creditor, Heidelberg Canada Graphic Equipment Limited.
J. Carhart, for CIT Group (formerly Newcourt Financial).

Subject: Insolvency; Civil Practice and Procedure

MOTION for order extending time to file proposal; CROSS-MOTION for order that stay of proceedings against bankrupt not apply to one creditor.

***Deputy Registrar Sproat*:**

1 This is a motion by Nortec Colour Graphics Inc. ("Nortec") pursuant to s.50.4(9) of the BIA for an order extending the time for the filing of a proposal. Nortec filed a notice of intention to make a proposal on May 25, 2000. On June 23, 2000, prior to the expiry of the initial thirty day period within which to file the proposal, Nortec brought a motion for an order extending the proposal period by a further thirty day period. I granted that motion and ordered that, in the event that a further extension was required, the motion be brought on notice to the creditors.

2 This motion is opposed by Heidelberg Canada Graphic Equipment Limited ("Heidelberg"). Heidelberg is the owner of certain highly specialized printing equipment valued at about $9.5 million. Pursuant to three leases, Heidelberg leased the equipment to Nortec and, thereafter, assigned the leases to CIT Group Inc. ("CIT"), formerly Newcourt Financial. Heidelberg did so on a "with recourse" basis and, hence, in the event of Nortec's default, Heidelberg will be liable to CIT. CIT has already put Heidelberg on notice of the default. In the circumstances, Heidelberg is in the process of having the leases reassigned to it, such that Heidelberg, and not CIT, will be the creditor of Nortec.

3 It may, on first impression, appear that Heidelberg is not a creditor of Nortec. However, CIT did appear on the motion and supported Heidelberg's opposition to the motion as well as Heidelberg's cross-motion. For the purposes of the motion and cross-motion, I accept Heidelberg's status as a creditor (in view of its arrangements with CIT) and, certainly, Nortec took no issue with Heidelberg's status.

4 At the commencement of argument of Nortec's motion to extend the proposal period, Heidelberg sought leave to file a cross-motion and affidavit in support thereof. The affidavit had been previously served upon Nortec's counsel and no issue was taken with respect to the filing of cross-motion. Accordingly, I permitted the cross-motion to be filed.

5 The cross-motion by Heidelberg seeks an order under s. 50.4(11) of the BIA terminating the proposal or, alternatively, an order under s. 69.4 of the BIA that the stay of proceedings does not apply to Heidelberg. Effectively, Heidelberg seeks to enforce its security in respect of the equipment to permit it to lease or sell the printing equipment.

The Motion to Extend the Proposal Period

6 Section 50.4(9) of the BIA provides for the jurisdiction of this court to extend the proposal period where the court is satisfied of the following factors:

1. the insolvent person has acted and is acting in good faith and with due diligence;

2. the insolvent person would likely be able to make a viable proposal; and

3. no creditor would be materially prejudiced if the extension were granted.

1. Has Nortec acted in good faith and with due diligence.

7 Nortec states that it has acted in good faith and has exercised due diligence. Nortec has had extensive negotiations with Grenville Printing ("Grenville") relative to Grenville's purchase of or investment in Nortec. At the time of the first motion to extend, Nortec had not finalized the structure of the transaction, although I accept that it was then expected that Nortec would be restructured by way of a newly established corporate entity. It later turned out that this structure would not be used. Instead, Nortec and Grenville determined to establish a partnership, which would provide certain tax benefits. This change in structure necessitated negotiation with the shareholders of Nortec (of which there are two principal shareholders) and their counsel, in addition to certain of Nortec's creditors.

8 Nortec has been aware from the outset of the necessity to obtain the approval of a number of its key creditors and, in this regard, Nortec and Grenville have been negotiating with Royal Bank of Canada ("RBC"), Canada Customs and Revenue Agency ("CCRA"), Nortec's landlord and Heidelberg. Insofar as Heidelberg is concerned, it appears that by May 2, 2000, well before the notice of intention was filed, Heidelberg was onside. Heidelberg had already agreed to amended terms of the leases relating to the equipment and was waiting to finalize the documentation in that regard.

9 Heidelberg suggests that because the documentation amending the terms of the leases for the printing equipment has not been finalized, this amounts to lack of due diligence. I do not find that this alone is sufficient for me to find that Nortec has failed to satisfy this aspect of the test. On the contrary, it seems to me that Nortec exercised due diligence by attending to the issue of the printing equipment leases well in advance of filing the notice of intention, which in turn has permitted Nortec to continue its negotiations with Grenville and other ceditors.

10 Although there have been a few obstacles along the way in terms of Nortec making a proposal, it seems to me that it, has taken steps to further the proposal process along. Grenville has taken an active role, with Nortec's consent, in negotiating with Nortec's creditors.

11 Heidelberg also claims that Nortec has not acted in good faith and has not exercised due diligence since negotiations with Grenville have stalled and are no further ahead today than one month ago. While it may be so, it does not mean there has been a lack of good faith or lack of due diligence. In my view, there is sufficient evidence to suggest that Nortec has been moving forward with the formulation of the proposal.

2. Will Nortec likely to make a viable proposal

12 Nortec suggests that it will likely make a viable proposal although it has not put forward a proposal yet. It appears that Nortec's major creditors, RBC, CCRA and the landlord are prepared to wait and to consider the proposal, once filed. "Viable proposal" as used in s. 50.4(9) of the BIA should be seen as one reasonable on its face to the reasonable creditor (*Re Baldwin Valley Investors Inc.* (1994), 23 C.B.R. (3d) 219 (Ont. Gen. Div. [Commercial List]) at p. 221). None of Nortec's creditors have come forward to say that it will not support any proposal and the fact that Nortec continues to discuss the structure of Grenville's proposed purchase/investment in Nortec is indicative of Nortec's efforts to lay the foundation of its proposal.

13 Heidelberg argued that it is not likely that Nortec will make a viable proposal. There is no evidence in support of this position. At best, Heidelberg's evidence is that it is *reluctant* to lend further support to the process in view of the fact that Grenville withdrew from the process (emphasis added). Heidelberg does not go so far as to say it will refuse to approve any proposal. In any event, although Grenville withdrew from the process, it was only for one day and Grenville, by its solicitors, agreed to continue discussions with Nortec and its principals relating to a new, proposed transaction. Thus, I do not see this argument, at this time, having merit.

3. Will any creditor be materially prejudiced?

14 Nortec submits that no creditor will be materially prejudiced, particularly since RBC and CCRA are content to take a "wait and see" approach and its landlord has consented to the extension. On the other hand, Heidelberg suggests that it is materially prejudiced since it is owed about $1 million on account of the leases of the printing equipment and since it has received inquiries relative to the purchase of the printing equipment now used by Nortec in its business. Heidelberg suggests that it should be permitted to lease or sell the printing equipment and that now would be an opportune time to do so. In support of this contention, Heidelberg suggests that there are few prospective purchasers in the market for the specialized printing equipment in question, these prospective purchasers would have to wait upwards of 8 months if the equipment were to be ordered today and that prospective purchasers require some lead time in which to plan for the integration of the printing equipment into its operations.

15 In my view, these facts operate against a finding of material prejudice. It seems to me that any prospective purchaser would need some time to integrate the new equipment into its operations and I see no reason why a transaction for the lease or sale of the printing equipment needs to be completed immediately.

16 In addition, I agree with submissions of counsel for Nortec that Heidelberg has failed to establish material prejudice. Of particular note, Heidelberg has not identified the prospective purchasers who have made inquiries (which would have permitted Nortec to test the allegation of material prejudice) and have not quantified the extent of the losses it will suffer as a result of Nortec's financial circumstances and the extension sought by Nortec.

17 Lastly, I wish to deal with the issue of Nortec's indebtedness to Heidelberg. Heidelberg claims that it is the largest single creditor of Nortec since it is owed about $1 million. It has filed one of the three leases covering the printing equipment as a sample lease. This lease calls for monthly payments of about $10,000. The other two leases were not filed and there was no evidence as to the total monthly obligation of Nortec. There was also no evidence of when default occurred.

18 On the other hand, Nortec claims that it owes about $382,000 to Heidelberg according to the notice of intention filed. This is in contrast to RBC total indebtedness of $890,000 (of which $350,000 is secured) and CCRA indebtedness of $300,000. There are also 6 debenture holders with total indebtedness of $385,000. Thus, I cannot say with certainty that Heidelberg is the largest single creditor as RBC, CCRA and the debenture holders (who have not opposed the extension) are collectively owed about $1,575,000.

4. Disposition of Nortec's motion

19 Nortec's business will most certainly fail if I refuse to grant Nortec's motion or alternatively, grant Heidelberg's cross-motion. Since I do not see any material prejudice to Heidelberg (or any other creditor for that matter), I am inclined to give Nortec some additional time to put forward a proposal. I am mindful of the need to balance the interests of Nortec and recognize the rights of creditors. That is to say, Nortec should not be permitted to carry on its business without regard to its creditors. While Nortec should be commended for acknowledging its financial predicament early on (as early as May 2, 2000), it should not be at the expense of Heidelberg or its other creditors. Heidelberg is, understandably, frustrated by the delays, now that almost 3 months since it initially agreed to revise the leases with Nortec. Thus, I am of the view that, while Nortec be given some additional time, it should not be the 45 days it requests. I am therefore granting Nortec's motion but extend the time for filing the proposal for 15 days. Thus, the deadline for the filing of the proposal is August 8, 2000.

The Cross-Motion to Terminate the Proposal Period

20 Given my determination of Nortec's motion, I need not consider Heidelberg's cross-motion under s. 50.4(11) of the *BIA*. I do note however that the arguments in response to Nortec's motion were the same arguments advanced by Heidelberg on its cross-motion. I have addressed these arguments above.

The Cross-Motion to Lift the Stay of Proceedings

21 The court has jurisdiction to lift the stay of proceedings imposed by s. 69(1) of the BIA if the creditor is materially prejudiced by the operation of the stay or if there are other equitable grounds upon which the stay should be lifted. In this case, neither of these factors are found. In the result, I have also dismissed Heidelberg's cross-motion

Costs

22 Nortec does not seek costs of its motion but seeks costs of Heidelberg's cross-motion fixed at $1,000. I agree with counsel for Heidelberg that its cross-motion was essentially a response to Nortec's motion and no additional time or materials were required in arguing the cross-motion. In the circumstances, I order no costs of the cross-motion.

Motion granted; cross-motion dismissed.

TAB 23

CITATION: Northstar Aerospace, Inc. (Re), 2013 ONSC 1780
COURT FILE NO.: CV-12-9761-00CL
DATE: 20130409

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C 36, AS AMENDED

RE: **IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF NORTHSTAR AEROSPACE, INC., NORTHSTAR AEROSPACE (CANADA) INC., 2007775 ONTARIO INC. AND 3024308 NOVA SCOTIA COMPANY, Applicants**

BEFORE: **MORAWETZ J.**

COUNSEL: **C. J. Hill and J. Szumski, for Ernst & Young Inc., Court-Appointed Monitor**

J. Wall, for Her Majesty the Queen in Right of Ontario, as Represented by the Ministry of the Environment

P. Guy and K. Montpetit, for the Former Directors and Officers Group

Steven Weisz, for Fifth Third Bank

ENDORSEMENT

Motion Overview

[1] This is a motion brought by Ernst & Young Inc., in its capacity as court-appointed Monitor (the "Monitor") of Northstar Aerospace, Inc. ("Northstar Inc."), Northstar Aerospace (Canada) Inc., 2007775 Ontario Inc. and 3024308 Nova Scotia Company (collectively, the "Applicants"), for approval of an adjudication process and for a final determination with respect to whether two claims submitted in the claims procedure (the "Claims Procedure") authorized by order of August 2, 2012 (the "Claims Procedure Order") are valid claims for which the former directors and officers of the Applicants (the "D&Os") are indemnified pursuant to the indemnity (the "Directors' Indemnity") contained in paragraph 23 of the Initial Order dated June 14, 2012 (the "Initial Order").

[2] If they are so indemnified, the D&Os may be entitled to the benefit of certain funds held in a reserve by the Monitor (the "D&O Charge Reserve") to satisfy such claims. If they are not, then there are no claims against the D&O Charge Reserve and the funds can be released to Fifth Third Bank, in its capacity as agent for itself, First Merit Bank, N.A. and North Shore Community Bank & Trust Company (in such capacity, the "Pre-Filing Agent").

[3] For the following reasons, I have determined that the adjudication process should be approved and that the D&Os are not entitled to the benefit of the D&O Charge Reserve.

[4] In my view, for the purposes of determining this motion, it is not necessary to determine whether the claims filed by the MOE and the D&Os are pre-filing or post-filing claims. References in this endorsement to "MOE Pre-Filing D&O Claim", "MOE Post-Filing D&O Claim" and "WeirFoulds Post-Filing D&O Claim" have been taken from the materials filed by the parties. This endorsement includes references to those terms for identification purposes, but no determination is being made as to whether these claims are pre-filing or post-filing claims.

[5] The two claims at issue are described in proofs of claim (collectively, "the Proofs of Claim") filed by Her Majesty the Queen in Right of the Province of Ontario as Represented by the Ministry of the Environment (the "MOE") and by WeirFoulds LLP ("WeirFoulds") on behalf of certain of the D&Os ("WeirFoulds D&Os").

[6] The MOE proof of claim (the "MOE Proof of Claim") asserts, among other things, a "Pre-Filing D&O Claim" (the "MOE Pre-Filing D&O Claim") and a "Post-Filing D&O Claim" (the "MOE Post-Filing D&O Claim") (collectively, the "MOE D&O Claims"), for costs incurred and to be incurred by the MOE in carrying out certain remediation activities originally imposed on the Applicants in an Ontario MOE Director's Order issued under the *Environmental Protection Act*, R.S.O. 1990, c. E. 19 (the "EPA") on March 15, 2012 (the "March 15 Order"). The basis for the D&Os' purported liability is a future Ontario MOE Director's Order (the "Future Director's Order"), which the MOE intends to issue against the D&Os. According to the Monitor's counsel, the Future Director's Order will require the D&Os to conduct the same remediation activities previously required of the Applicants.

[7] The WeirFoulds proof of claim (the "WeirFoulds Proof of Claim") responds to the threat of the Future Director's Order. It asserts a Post-Filing D&O Claim (the "WeirFoulds Post-Filing D&O Claim") by the individual WeirFoulds D&Os for contribution and indemnity against each other, and against the former directors and officers of the predecessors of Northstar Inc., in respect of any liability that they may incur under the Future Director's Order.

[8] Neither the MOE nor the D&Os object to the Monitor's proposed adjudication procedure.

Background to the CCAA Proceedings

[9] On May 14, 2012, the Applicants obtained protection from their creditors under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C. 36 ("CCAA"); Ernst & Young Inc. was subsequently appointed as the Monitor (the "CCAA Proceedings").

[10] A number of background facts have been set out in *Northstar Aerospace, Inc. (Re),* 2012 ONSC 4423 (*Northstar*) and *Northstar Aerospace, Inc. (Re)* 2012 ONSC 6362. A number of the issues with respect to MOE's claims against the Applicants have been covered in a previous decision. See *Northstar, supra.*

Directors' Indemnification and Directors' Charge

[11] The Initial Order provided that the Applicants would grant the Directors' Indemnity, indemnifying the D&Os against obligations and liabilities that they may incur as directors and officers of the Applicants after the commencement of the CCAA Proceedings.

[12] Paragraph 23 of the Initial Order provides:

> 23. This court orders that the CCAA Entities shall indemnify their directors and officers against obligations and liabilities that they may incur as directors and officers of the CCAA entities after the commencement of the within proceedings, except to the extent that, with respect to any director or officer the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct.

[13] Paragraph 24 of the Initial Order further provides that the D&Os and the chief restructuring officer would have the benefit of a charge, in the amount of US$1,750,000, on the Applicants' current and future assets, undertakings and properties, to secure the Directors' Indemnity (the "Directors' Charge").

[14] The Directors' Charge, as established in the Initial Order, was fixed ahead of all security interests in favour of any person, other than the "Administration Charge", "Critical Suppliers' Charge" and the "DIP Lenders' Charge".

[15] The statutory basis for the Directors' Charge is set out in section 11.51 of the CCAA, which reads as follows:

> 11.51(1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the company is subject to a security or charge – in an amount that the court considers appropriate – in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.
>
> 11.51(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

[16] Any order under this provision affects, or potentially affects, the priority status of creditors. It is through this lens that the court considers motions. The order is discretionary in nature, is extraordinary in nature and should be, in my view, applied restrictively as it alters the

general priority regime affecting secured creditors. In this case, the order was made and it has priority over Fifth Third Bank.

D&O Claims

[17] On August 2, 2012, the Claims Procedure Order was issued to solicit the submissions of Proofs of Claim by the claims bar date of October 23, 2012 (the "Claims Bar Date") in respect of all "D&O Claim[s]".

[18] As indicated by the Monitor's counsel, the definition of a "D&O Claim" is very broad. It includes both claims that arose prior to June 14, 2012 (pre-filing D&O claims) and claims that arose from and after June 14, 2012 (post-filing D&O claims). It also potentially includes both post-filing D&O claims which are secured by the Directors' Charge and post-filing D&O claims which are not secured by the Directors' Charge.

[19] Paragraph 25 of the Claims Procedure Order specifically recognizes this distinction:

> 25. This court orders that no Post-Filing D&O Claim shall be paid by the Monitor from the D&O Charge Reserve without the consent of the Pre-Filing Agent and the CRO Counsel and D&O Counsel or further Order of the court and the determination that a claim is a Post-Filing D&O Claim does not create a presumption that such D&O Claim is entitled to be paid by the Monitor from the D&O Charge Reserve.

[20] The MOE D&O Claims concurrently asserts the MOE Pre-Filing D&O Claim and the MOE Post-Filing D&O Claim for the same amounts, namely:

(a) $66,240.36 for costs incurred by the MOE to carry out the remediation activities described in the March 15 Order up to the date when the MOE Proof of Claim was filed;

(b) $15 million for future costs to be incurred by the MOE to carry out the remediation activities described in the March 15 Order; and

(c) a presently unknown amount required to conduct additional environmental remediation work necessary to decontaminate the Site and the Bishop Street Community.

[21] As there are no funds available for distribution to unsecured pre-filing creditors in the CCAA Proceedings, the Monitor appropriately has not considered the validity of the MOE Pre-Filing D&O Claim. This motion, from the Monitor's standpoint, therefore only addresses the MOE Post-Filing D&O Claim.

[22] The WeirFoulds Proof of Claim provides that:

> This proof of claim is filed in order to preserve the right to commence:

(1) any and all claims over that any of the [WeirFoulds D&Os] may have against each other; and

(2) any and all claims that any of the [WeirFoulds D&Os] may have against any former director or officer of Northstar Aerospace, Inc., or predecessor companies, for contribution or indemnity, based upon any applicable cause of action in law or in equity, in relation to any liability that may be found to exist against any of the [WeirFoulds D&Os] in connection with the proofs of claim filed in the within proceedings by the Ontario Ministry of the Environment, dated October 19, 2012.

[23] For the purpose of resolving the entitlement of any claimant to the D&O Charge Reserve, paragraph 22 of the Claims Procedure Order allows the Monitor and certain other parties to bring a motion seeking approval of an adjudication procedure for determination as to whether any claim asserted in the Claims Procedure is a post-filing D&O claim which constitutes a claim for which the D&Os are indemnified under the Directors' Indemnity.

Issues to Consider

[24] The D&Os are bringing a motion on April 18, 2013 to determine the proper venue for the adjudication of the Post-Filing D&O Claims. There is considerable overlap between the issues raised on this motion and the issues raised on the pending motion.

[25] In my view, it is appropriate for this endorsement to exclusively address the narrow issue raised in this motion, namely, whether the Proofs of Claims are valid claims for which the D&Os are indemnified pursuant to the Directors' Indemnity contained in the Initial Order. A consideration of whether the claims are pre-filing claims or post-filing claims, with respect to the D&Os, is better addressed in the motion returnable on April 18, 2013.

[26] The Monitor's counsel appropriately sets out the issues of this motion, as follows:

(a) Whether the court should approve the proposed adjudication process and issue a determination as to whether the disputed post-filing D&O claims constitute valid claims for which the D&Os are indemnified under the Directors' Indemnity;

(b) Whether the MOE Post-Filing D&O Claim is a valid claim for which the D&Os are indemnified under the Directors' Indemnity;

(c) Whether the WeirFoulds Post-Filing D&O Claim is a valid claim for which the D&Os are indemnified under the Directors' Indemnity; and

(d) Whether the D&O Charge Reserve should be released and paid over to the Pre-Filing Agent.

Analysis and Conclusion

[27] I conclude, for the following reasons, that (a) the adjudication process should be approved; (b) the MOE Post-Filing D&O Claims are not claims for which the D&Os are indemnified under paragraph 23 of the Initial Order; (c) the WeirFoulds Post-Filing D&O Claims are not claims for which the D&Os are indemnified under paragraph 23 of the Initial Order; and (d) the D&O Charge Reserve should be paid over to the Pre-Filing Agent.

[28] The Directors' Charge, as contemplated by section 11.51 of the CCAA, is appropriate in the current circumstances (notwithstanding it being a discretionary and extraordinary provision, as outlined above) because it is directly tailored to the purposes of creating a charge, and its impact is limited.

[29] The purpose of a section 11.51 charge is twofold: (1) to keep the directors and officers in place during the restructuring to avoid a potential destabilization of the business; and (2) to enable the CCAA applicants to benefit from experienced board of directors and experienced senior management. Courts have accepted that, without certain protections, officers and directors will often discontinue their service in CCAA restructurings. See *Canwest Global Communications, Re* (2009), 59 C.B.R. (5th) 72 (Ont. S.C.J.) and *Canwest Publishing Inc., Re*, 2010 ONSC 222.

[30] In this case, the Applicants' basis for seeking the Directors' Charge is set out in the affidavit of Mr. Yuen, sworn June 13, 2012, which was filed in support of the Initial Order application. He described the purpose of the Directors' Charge as:

> To ensure the ongoing stability of the CCAA Entities' business during the CCAA period, the CCAA Entities require the continued participation of the CRO and the CCAA Entities' officers and executives who manage the business and commercial activities of the CCAA Entities.

[31] The Yuen affidavit goes on to identify the specific obligations and liabilities for which the Directors' Charge was requested, including liability for unpaid wages, pension amounts, vacation pay, statutory employee deductions and HST. At paragraph 143 of his affidavit, Mr. Yuen states:

> I am advised by Daniel Murdoch of Stikeman Elliott LLP, counsel to the CCAA Entities, and do verily believe, that in certain circumstances directors can be held liable for certain obligations of a company owing to employees and government entities. As at May 18, 2012, the CCAA Entities were potentially liable for some or all of unpaid wages, pension amounts, vacation pay, statutory employee deductions, and HST (Harmonized Sales Tax) of approximately CDN $1.65 million …

[32] The Monitor's counsel submits that the quantum of the Directors' Charge was tailored to the Applicants' existing liability for such amounts.

[33] The scope of a section 11.51 charge is limited in several ways:

(a) section 11.51 does not authorize the creation of a charge in favour of any party other than a director or officer (or chief restructuring officer) of the companies under CCAA protection;

(b) section 11.51 does not authorize the creation of a charge for purposes other than to indemnify the directors and officers against obligations and liabilities that they may incur as a director or officer of the company after the commencement of its CCAA Proceedings; and

(c) section 11.51(4) requires the court to exclude from the section 11.51 charge the obligations and liabilities of directors and officers incurred through their own gross negligence or wilful misconduct.

[34] In my view, it would be inappropriate to determine that the Proofs of Claim are claims for which the D&Os are entitled to be indemnified under the Directors' Indemnity, as doing so would wrongly and inequitably affect the priority of claims as between the MOE and the Fifth Third Bank.

[35] In the context of the MOE claims against the Applicants in these CCAA proceedings, it has already been determined, in *Northstar*, *supra*, that the MOE claims are unsecured and subordinate to the position of Fifth Third Bank. It would be a strange outcome, and invariably lead to inconsistent results, if the MOE could, in the CCAA Proceedings, improve its unsecured position against Fifth Third Bank by issuing a Director's Order after the commencement of CCAA Proceedings, based on an environmental condition which occurred long before the CCAA Proceedings. This would result in the MOE achieving indirectly in these CCAA Proceedings that which it could not achieve directly.

[36] Simply put, the activity that gave rise to the MOE claims occurred prior to the CCAA proceedings. It is not the type of claim to which the Directors' Charge under section 11.51 responds. Rather, in the CCAA proceedings, it is an unsecured claim and does not entitle the MOE to obtain the remedy sought on this motion. The fact that the MOE seeks this remedy through the D&Os does not change the substance of the position.

[37] The situation facing the Applicants, the Monitor, Fifth Third Bank, and others affected by the Directors' Charge, has to be considered as part of the CCAA Proceedings. In my view, it would be highly inequitable to create a parallel universe, wherein certain MOE claims as against the Applicants are treated as unsecured claims and MOE D&O Claims and the WeirFoulds Post-Filing D&O Claim are treated as secured claims with respect to the Directors' Charge.

[38] It could be that the MOE has a remedy against the D&Os; however, any remedy they may have does not provide recourse against the D&O Charge in these CCAA Proceedings. Nevertheless, it remains open for the MOE to pursue its claims against the D&Os on the motion returnable on April 18, 2013.

Order

[39] In the result, I grant the Monitor's motion, approve the aforementioned adjudication process, and approve the activities of the Monitor as described in the Seventh Report of the Monitor dated November 7, 2012. I also direct the following:

(1) The MOE Post-Filing D&O Claim is not a claim for which the D&Os are indemnified under the Directors' Indemnity;

(2) The WeirFoulds Post-Filing D&O Claim is not a claim for which the D&Os are indemnified under the Directors' Indemnity; and

(3) The US$1,750,000 held by the Monitor in respect of the D&O Charge Reserve be paid to the Pre-Filing Agent.

MORAWETZ J.

Date: April 9, 2013

TAB 24

SUPERIOR COURT

(Commercial Division)

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No.: 500-11-062636-234

DATE: August 28, 2023

BY THE HONOURABLE CHRISTIAN IMMER, J.S.C.

In the Matter of the Notice of Intention to Make a Proposal Under the *Bankruptcy And Insolvency Act*, RSC 1985, c B-3 of :

BRUNSWICK HEALTH GROUP INC.
BRUNSWICK MEDICAL CENTER INC.
DMSC REAL ESTATE INC.
THE CHILDREN'S CLINIC @ POINTE-CLAIRE INC.
SANOMED SOLUTIONS INC.
BRUNSWICK MEDICAL CENTRE @ GLEN INC.
BRUNSWICK RESEARCH INC.
BRUNSWICK MINOR SURGERY CENTER INC.
BRUNSWICK ENDOSCOPY INC.
6892094 CANADA INC.
8981515 CANADA INC.

Debtors / Applicants

CORRECTED JUDGMENT (ART. 338 CCP)

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[1] **CONSIDERING** that the Court issued orders on August 17, 2023 and provided its written reasons on August 18, 2023;

[2] **CONSIDERING** that the reasons contain errors in writing at paragraphs 35, 37 and 47 which must be corrected, so as to reflect that the Administrative Charge is in the amount of $150,000 and that the Representative Counsel Charge ranks in third priority;

[3] **CONSIDERING** art. 338 CCP;

FOR THESE REASONS, THE COURT:

[4] **CORRECTS** its reasons dated August 18, 2023 so that the paragraphs 35, 37 and 47 read as follows:

> [35] The Group asked the Court to authorize it to pay fees and disbursements of any agent or counsel retained or employed by the Debtors in respect of these proceedings and to approve a $150,000 charge to guarantee payment.
>
> [37] Given the important amount of work to be carried out on a continuing basis, the $150,000 amount of the charge is reasonable.
>
> [47] Finally, the Court also found it appropriate for the Group to pay the Representative Counsel's reasonable and documented fees and disbursements incurred after the date of the order in connection with the Cycle 28 Payment and the Physicians' billings during the NOI Proceedings up to a maximum amount of $35,000 and to secure payment of same by a charge which would rank in priority to other secured obligations, but in third rank of priority. As for the other charges, with respect to any deemed trust or withholding tax owed by the Group to a taxing authority, the question of priority will, if necessary, be determined by the Court at a later date.

[5] **THE WHOLE** without costs.

CHRISTIAN IMMER, J.S.C.

Me François Alexandre Toupin
Me Pierre-Gabriel Grégoire
McCarthy Tétrault
For the Debtors

Me Martin Jutras
Kaufman Avocats LLP
For the Toronto-Dominion Bank

Me Rim Afegrouch
Attorney General of Canada

Me Marc Duchesne
Border Ladner Gervais LLP
For the Business Development Bank of Canada

Me François Gagnon
Borden Ladner Gervais LLP
For the MUHC

Me Neil Stein
Me Nicholas Chine
Stein & Stein Lawyers inc.
For a group of 25 physicians and as prospective representative counsel

SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No.: 500-11-062636-234

DATE: AUGUST 18, 2023

BY THE HONOURABLE CHRISTIAN IMMER, J.S.C.

In the Matter of the Notice of Intention to Make a Proposal Under the *Bankruptcy And Insolvency Act*, RSC 1985, c B-3 of :

BRUNSWICK HEALTH GROUP INC.
BRUNSWICK MEDICAL CENTER INC.
DMSC REAL ESTATE INC.
THE CHILDREN'S CLINIC @ POINTE-CLAIRE INC.
SANOMED SOLUTIONS INC.
BRUNSWICK MEDICAL CENTRE @ GLEN INC.
BRUNSWICK RESEARCH INC.
BRUNSWICK MINOR SURGERY CENTER INC.
BRUNSWICK ENDOSCOPY INC.
6892094 CANADA INC.
8981515 CANADA INC.

Debtors / Applicants

JUDGMENT
Reasons for order rendered
on August 17, 2023
(Sections 50.4, 50.6, 64.2 and 183 of the *BIA*)

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[1] The Applicants constitute the Brunswick Health Group (the "Group"). They all filed notices of intention to make a proposal ("NOI") under the *Bankruptcy and Insolvency Act* ("*BIA*") on July 14, 2023.[1]

[2] On August 17, 2023, they appeared before the Court praying it to render the following orders:

> 1. Extending the ongoing stay of proceedings and the time to file a proposal until and including October 2, 2023;
>
> 2. Authorizing the Applicants to pay certain pre-filing amounts owed to the Physicians
>
> 3. Approving an interim financing facility in the amount of $1,000,000 (the "Interim Financing Facility") to be provided by TD Bank and BDC and granting a $1,250,000 charge to secure the obligations under this facility;
>
> 4. Granting an administration charge in the amount of $150,000 (the "Administration Charge") to secure the payment of the professional fees and disbursements of the Applicant's legal counsel, the NOI Trustee and the Interim Receiver incurred in relation to these proceedings both before and after the date of the Order;
>
> 5. Granting a financial advisor charge in the amount of $350,000 (the "Financial Advisor Charge") over the Property to secure the payment of PwC's compensation.
>
> 6. Appointing Stein & Stein Inc. as representative counsel (the "Proposed Representative Counsel") to represent the interests of all of the physicians affiliated to Brunswick Group (the Physicians) and granting a charge in the amount of $35,000 (the Representative Counsel Charge);
>
> 7. Appointing C.S Adjami Inc. as interim receiver ("Interim Receiver") for the sole purpose of exercising control over the payment of the billings to certain Physicians during the NOI Proceedings.

[3] On August 17, 2023, the Court did indeed issue all such orders. These are the reasons why it did so.

CONTEXT

[4] The Group is presently constituted of the parent company, Brunswick Health Group inc. ("BHG"), and ten wholly owned subsidiaries. BHG's shares are held in equal proportion by seven shareholders. One of them, Vince Trevisonno, BHG's president and

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[1] RSC 1985, c. B-3.

general manager testified before the Court in support of this Application. The Court also reviewed the two reports filed by the trustee and heard his testimony.

[5] The Group operates out of rented premisses at the McGill University Health Center ("MUHC") and in a building in Pointe-Claire (the "PC Building") which is owned by one of the group's subsidiaries, DMSC Real Estate Inc. The 170 physicians associated with the Group provide health care to 300,000 patients. Approximately 150 persons are employed by the Group.

[6] Its operations are financed primarily by two secured lenders (the "Primary Lenders"): The Toronto-Dominion Bank ("TD") and the Business Development Bank of Canada ("BDC"). They hold security interest on most of the assets of the Group on a *pari passu basis* (except for some specific equipment that solely relates to a BDC loan). These assets are comprised of the operating assets of the Group's medical activities and the PC Building. In addition, the Bank of Nova Scotia has provided an overdraft facility to Brunswick Minor Surgery inc. and has registered security over its moveable property.

[7] In 2020, because of the cumulated effect of an aggressive expansion strategy which included building out its Pointe Claire premises and of the chilling effect of the Covid pandemic on patient traffic, the Group drifted into tumultuous waters. Also, the Group admits that due to its rapid expansion, it did not put in place strong governance practices to manage its operational issues. As a result, the Group ran important operational deficits and was faced with a liquidity crisis.

[8] Strategies were deployed to carry out asset divestures or receive cash injections from its shareholders. The Group has been assisted since April 2022 by the now trustee, C. S. Adjami Inc.

[9] A first transaction was closed on January 31, 2023 for the Brunswick Medical Center @ Glen inc. which provided some financial relief.

[10] On January 26, 2023, the Group retained PricewaterhouseCoopers Corporate Finance Inc. ("PwC") to assist it in completing a divestiture transaction of two lots: the medical activities and the PC Building.[2] Forbearance agreements were signed by the primary lenders. PwC began work in earnest in March 2023.

[11] As is explained by the Trustee in his two reports, PwC received several letters of intention and expressions of interest. It was determined that the value attributed in these LOIs and IOIs for the PC Building was not reflective of a going concern situation and that the Group would therefore direct its efforts first towards securing a transaction for the medical activities.

[12] The financial situation remained challenging. At the Group's financial year end on October 31, 2022, the consolidated book value of its assets was $40,073,935.

[2] See P-11.

Immediately prior to filing its NOI, the Group's total liabilities on a consolidated basis amounted to $46,348,300. Drawn in broad strokes, the Group's financial portrait as regards the Primary Lenders are owed the following sums which are secured as follows:

12.1. TD: it is estimated that as of June 30, 2023, Brunswick Health Group, DMSC, SanoMed, BMC Glen and 8981515 Canada inc. are indebted to the TD Bank to the tune of $18million. The TD Bank holds security on all their moveable property, save for BMC Glen which it discharged, as well as on the PC Building.

12.2. BDC: as of July 5, 2023, the Brunswick Health Group and DMSC were indebted towards BDC for an amount of approximately $20million to be perfected while Brunswick Endoscopy was indebted towards BDC for an amount of approximately $1.07 million, to be perfected, for a total of approximately $21.2 million. BDC holds security on all movable property for each of the Group's entities and on the PC Building.

12.3. BMO: Brunswick Minor Surgery owes $150,000 to the Bank of Montreal which holds security on its movable property.

12.4. Property taxes: as of July 10, 2023, DMSC owes approximately $1.42 million in unpaid property taxes.

[13] On June 30, 2023, the Primary Lenders did not extend the forbearance agreements and filed notices under s. 244 *BIA* to enforce their security. Consequently, the Group concluded that absent the ability to restructure its operations and financial affairs, it would be unable to continue its operations in the very short term. Hence, a NOI was filed on July 14, 2023. This would allow the Group to continue operations in the short term, while implementing its restructuring plan. It has the Primary Lenders' support in doing so.

ANALYSIS

[14] As explained by the Supreme Court in *Century Services*, the "contemporary thrust of legislative reform has been towards harmonizing aspects of insolvency law common to the extent possible"[3]. The purpose of a proposal to creditors under the *BIA*, just like under the CCAA, "is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets".[4] As the Supreme Court stated in *Callidus*, where reorganization is not a possibility, "a liquidation that preserves

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3 *Century Services Inc*. v. *Canada (Attorney General),* 2010 SCC 60, [2010] 3 S.C.R. 379, par. 24 ["Century Services"].

4 *Idem,* par. 15é

the going concern value and the ongoing business operations of the pre-filing company may become the predominant focus".[5]

[15] The medical activities are human resource driven. Aside from the secured and unsecured creditors, the stakes of these proceedings could not be higher for 300,000 patients, 170 physicians and 150 employees. Given the destabilizing effect of the group's financial distress, ensuring that the Group carries on business as a going concern and sustaining the stakeholders' confidence is of paramount concern. Nevertheless, it must be kept in mind that the Court's powers are drawn from the *BIA*, which provides for a "rules-based mechanism that offers less flexibility" than the *CCAA*'s provisions. [6]

[16] Since the filing of the NOI, the Group has received a Letter of Intent (the "LOI") which it has accepted on July 26, 2023, thereby granting exclusivity to a potential purchaser to negotiate a transaction in respect of the medical activities.

1. STAY EXTENSION

[17] The Group asked that the time in which to file a proposal and the corresponding stay of proceedings be extended to October 2, 2023. The Court acceded to this request for the following reasons.

[18] Subsection 50.4(9) *BIA* states that the Court may make such an order, provided that three conditions are met.

[19] First the Group must have acted and is acting in good faith and with due diligence. The Trustee's report demonstrates that this is so. The third quarter's results show a net improvement in the Group's finances. The Group continues to work in earnest toward finalizing a transaction as contemplated in the LOI. Management is providing its support. Significant communications are maintained with stakeholders to the point that they require channelling.

[20] Secondly, the Court must determine if the Group will be likely to make a viable proposal if the extension is granted. The reprieve which is provided by the stay is allowing for the negotiations regarding the medical activities at the PC Building to be carried out in an orderly fashion. This in turn will allow for maximization of their realization value and will eventually enhance the PC Building's commercial value. Whether this will ultimately lead to a viable proposal remains to be seen, but for the moment this condition is also met.

[21] Finally, no creditor is prejudiced as a transaction would allow for the business' continuation on a going concern which is to the advantage of all stakeholders. The TD and BDC have given their support. No creditor has objected. Not maintaining the Group

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5 *9354-9186 Québec inc.* v.*Callidus Capital Corp*., 2020 SCC 10, [2020] 1 S.C.R. 521,

6 *Century Services*, par. 15.

as a going concern will have disastrous effects on its value, on its patients, its employees and the associated physicians.

[22] That being said, the MUHC has made its concerns known that at present, the trustee and the Group are not paying post-filing rents. It has indicated that it may petition the Court to seek relief under s. 65.1 *BIA*. This will be dealt with in due course, if and when such a request is made. For the moment, the MUHC is not opposing the stay.

2. THE PAYMENT OF THE CYCLE 28 PAYMENTS TO THE PHYSICIANS

[23] For most of the physicians of the Group – approximately 150 out of 170 doctors – it is the Group which submits their bills to the RAMQ and collects revenues which it remits, approximately ten days later, to these physicians by cheques after deducting the management fees.

[24] Immediately prior to the filing of the NOI, the Group had received payments from the RAMQ for an approximate total of $700,000 for the Cycle 28 Payment. It was in the process of allocating expenses and management fees for purposes of deduction. Cheques were then to be cut and handed to the physicians on July 20, 2023. The NOI intervened in the middle of this process. The payment of $700,000 was not made and is arguably a pre-filing obligation.

[25] Also, somewhat surprisingly, cheques were not necessarily cashed for previous cycles upon receipt by the physicians. Subject to further confirmation, cheques totalling approximately $630,000 have not been cashed by some physicians.

[26] In light of this situation, the Group sought the Court's authorization to make the Cycle 28 payment in the aggregate amount of $700,000. No order was sought for the $630,000 component. The Court granted the authorization and did so order. This is why.

[27] The physicians are the cornerstone of the Group's operations. If the physicians lose confidence in the Group's ability to pay them, they will seek alternate arrangements at other clinics. The Group's market value will disintegrate. Paying the Cycle 28 payment is key to ensuring retention and to operating medical activities on a going concern.

[28] Under the *CCAA*, courts have authorized payment of pre-filing obligations for critical suppliers.

[29] There is no express rule in the *BIA* allowing a Court to do so. Nevertheless, the Ontario Court of Appeal has stated in *Re 1732427 Ontario inc*. that it would "undermine the first stage of the BIA process that serves to encourage a debtor's successful reorganization as a going concern" if the debtor could not enter into an agreement for the payment of past debts to ensure future supply. As the purpose of the BIA's provisions is to provide "breathing room to reorganize", "legitimate agreements with key suppliers also

form a vital part of that process".[7] This has led commentators to posit that the message form the Court of Appeal is clear: "the BIA does not prevent a debtor company from entering into an agreement to pay a greater proportion of an unsecured supplier creditor's pre-filing debt, compared with other unsecured creditors, if that supplier is sufficiently important to the debtor's business that the business would be imperilled without the supplier's support."[8]

[30] That being so, the Court can certainly order payment of the Cycle 28 payment to the physicians as they are inescapably critical to the Group's ability to earn revenue.

3. THE INTERIM FINANCING FACILITY AND THE ASSOCIATED CHARGE

[31] Section 50.6 of the *BIA* expressly confers on this Court the power to grant a security or charge to secure interim financing advanced to a debtor, provided that the secured creditors who are likely affected by the charge are notified. It may also order that the security rank in priority over the claim of any secured creditor.

[32] The Primary Lenders have agreed to extend to the Borrower a debtor-in-possession non-revolving interim loan facility for an aggregate amount of $1 million.

[33] The cash flow provided by the Trustee eloquently demonstrates the need for interim financing to bridge the delay until the transaction related to medical activities closes. In particular, it will enable the Group to pay the Cycle 28 $700,000 payment.

[34] The Trustee has examined the term sheet's conditions and finds them commercially sound. The Court therefore approved the interim financing facility and in order to guarantee this loan, it found that its was appropriate to impose a charge that will have a first ranking priority. However, with respect to any deemed trust or withholding tax owed by the Group to a taxing authority, the question of priority will, if necessary, be determined by the Court at a later date.

4. THE ADMINISTRATION CHARGE

[35] The Group asked the Court to authorize it to pay fees and disbursements of any agent or counsel retained or employed by the Debtors in respect of these proceedings and to approve a $500,00 charge to guarantee payment.

[36] Paragraphs 64.2(1) and (2) *BIA* expressly provide for the granting of such charges and they are indeed routinely granted by courts. The purpose of the *BIA* would be frustrated if the Group could not resort to professionals. There is no doubt that the professionals would not be willing to act if payment of their fees is not secured.

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7 *1732427 Ontario Inc*. v. *1787930 Ontario Inc*., 2019 ONCA 947, par. 13.

8 Miranda Spence, Karen Kimel and Anastasia Jones, *More Flexible Than You Think: An Exploration of Creative Uses of the BIA Proposal Regime for Corporate Restructuring*, 2022 20th Annual Review of Insolvency Law, 2022 CanLIIDocs 4305.

[37] Given the important amount of work to be carried out on a continuing basis, the $500,000 amount of the charge is reasonable.

[38] All creditors agree that the administration charge's priority should come in second rank. Given the crucial contribution of these professionals, this is reasonable. Once again, with respect to any deemed trust or withholding tax owed by the Group to a taxing authority, the question of priority will, if necessary, be determined by the Court at a later date.

5. THE FINANCIAL ADVISOR CHARGE

[39] PwC has been since January 2023 played a key role in securing the LOI and continues to act in earnest towards ensuring the closing of the transaction.

[40] After some discussion during the hearing, the Group modified its request with regard to the financial advisor charge. It asked for the Court to authorize the Group to pay PwC a fee equal to the percentage provided for the sale of the Medical and Corporate Segment, as specified in the January 25, 2023 engagement letter, on the Total Enterprise Value with respect to the Transaction and subject to the Interim Financing Conditions up to a maximum amount of $350,000, but only in the event that a transaction outlined in the Letter of Intent dated July 25, 2023 was accepted by the Group and was closed no later than September 30, 2023.

[41] The Primary Lenders and the Trustee all agree that the commercial terms of this fee are sound.

[42] The Court granted a charge, hypothec and security in the proceeds of the Transaction to cover the fees related to the Transaction only, in the amount of $350,000.

6. THE REPRESENTATIVE COUNSEL CHARGE

[43] Providing information to the Group of 170 physicians has proven to be challenging. Understandably, they are very worried as to what will come of the payment of outstanding sums as well as future billings. They are therefore very justifiably asking pointed questions. There is a great interest to streamline communications through one channel.

[44] 25 physicians have already hired Me Neil Stein to advise them and guide them through this situation. The Court was therefore asked to order that Me Stein be named Representative Counsel for all physicians, that he be paid a maximum of $35,000 and that payment be guaranteed by a charge. The Court did accede to this request for the following reasons.

[45] In CCAA proceedings, courts have relied routinely on section 11 over the years to appoint representative counsel on behalf of a diverse number of stakeholder groups in complex restructuring proceedings.

[46] Given the Court's general jurisdiction under s. 183 *BIA* and the overarching principle that *BIA* and *CCAA* processes be harmonized, but always being mindful that the *BIA* proceedings are rule based and less flexible, the Court finds that, it has the power to order the appointment of a representative counsel. It draws support in this regard from the reasoning set out in *Roman Catholic Episcopal Corporation of St John's (Re)*[9]. In this decision, Justice Garrett A. Handrigan sets out a number of criteria drawn from Justice Sarah Pepall's reasons in *Canwest Publishing Inc.* [10]. Applied to the present case, they all militate for the nomination of representative counsel as:

46.1. The physicians are a vulnerable Group: the financial and legal matters raised by these proceedings are complex.

46.2. The Group will benefit from this at it will streamline information and allow the Group and the trustee to focus on completing transactions.

46.3. Society more generally will benefit from this as the physicians may again focus on health care and not be burdened by financial and legal issues.

46.4. It will avoid multiplicity of retainers of counsel representing the physicians.

46.5. Given the economies of scale and the relatively limited expense, it is fair to creditors.

46.6. Me Stein has already been appointed by 25 physicians.

46.7. The Primary Lenders do not object.

[47] Finally, the Court also found it appropriate for the Group to pay the Representative Counsel's reasonable and documented fees and disbursements incurred after the date of the order in connection with the Cycle 28 Payment and the Physicians' billings during the NOI Proceedings up to a maximum amount of $35,000 and to secure payment of same by a charge which would in priority to other secured obligations, but in fourth rank of priority. As for the other charges, with respect to any deemed trust or withholding tax owed by the Group to a taxing authority, the question of priority will, if necessary, be determined by the Court at a later date.

[48] The Court has however insisted that any physician can opt out of representation by representative counsel and deal directly with the Group with counsel of his or her choice and that the appointment of the representative counsel does in no way preclude his or her hiring of counsel.

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9 *Roman Catholic Episcopal Corporation of St. John's (Re)*, 2022 NLSC 22

10 *Canwest Publishing Inc. / Publications Canwest Inc., Re*, 2010 ONSC 1328.

7. THE INTERIM RECEIVER

[49] The physicians also fear that the Cycle 28 payment situation may occur again. Hence, the Group is seeking the appointment of the Interim Receiver (C.S. Adjami Inc.) for the sole purpose of exercising control over the payment of the billings for certain physicians during the NOI Proceedings. The Court so ordered as this will serve to greatly alleviate the physicians' concerns and will also serve to ensure that the Group continue to collect administrative fees.

[50] Subparagraph 47.1(1)(a) of the *BIA* provides that this Court may, at any time after the filing, appoint as interim receiver of any part of the debtor's property the NOI Trustee.

[51] This arrangement is to the advantage of all involved. The Group will continue to perform billing on behalf of the Physicians for those having selected Option 1. Once collected, the billings for the physicians will be remitted by the Group to the Interim Receiver and held in a trust account from which the Interim Receiver will carry out the net payment to Physicians after deduction of the Group's administrative fees via direct deposit.

[52] It is for all these reasons therefore that the Court signed its Order on August 17, 2023.

_____

CHRISTIAN IMMER, J.S.C.

Me François Alexandre Toupin
Pierre-Gabriel Grégoire
McCarthy Tétrault
For the Debtors

Me Martin Jutras
Kaufman Avocats LLP
For the Toronto-Dominion Bank

Me Rim Afegrouch
Attorney General of Canada

Me Marc Duchesne
Border Ladner Gervais LLP
For the Business Development Bank of Canada

Me François Gagnon
Borden Ladner Gervais LLP
For the MUHC

Me Neil Stein
Me Nicholas Chine
Stein & Stein Lawyers inc.
For a group of 25 physicians and as prospective representative counsel

Hearing date: August 17, 2023

TAB 25

2016 ONSC 8192
Ontario Superior Court of Justice [Commercial List]

Rizzo, Re

2016 CarswellOnt 21774, 2016 ONSC 8192, 282 A.C.W.S. (3d) 245, 50 C.B.R. (6th) 316

IN THE MATTER OF THE PROPOSAL OF MARCO RIZZO AND ANGELA RIZZO OF THE CITY OF MISSISSAUGA IN THE PROVINCE OF ONTARIO

Penny J.

Judgment: December 14, 2016 *
Docket: 32-2132473, 32-2132474

Proceedings: additional reasons at *Rizzo, Re* (2017), 2017 ONSC 4234, 2017 CarswellOnt 12497, Penny J. (Ont. S.C.J. [Commercial List])

Counsel: P. Gertler, for Trustee
M. Harris, for Rizzos
L. Hansen, for Royal Bank of Canada

Subject: Corporate and Commercial; Estates and Trusts; Insolvency

MOTION by trustee for approval of proposal.

***Penny J.*:**

1 This is a motion by the Trustee for approval of the joint proposal of the debtors, the Rizzos. The motion is opposed by RBC.

2 RBC opposes on the basis that its vote against the proposal was not counted. It is common ground that RBC's vote, if counted, would have defeated the proposal.

3 The Trustee says the "vote" of RBC was not valid, that RBC was advised of this and did nothing to file a valid vote. RBC failed to attend the meeting of creditors. Only one creditor voted; it voted in favour of the proposal.

4 The threshold question is whether the Trustee was right to reject RBC's purported "vote." There is a secondary issue about whether RBC was served with the proposal and notice of meeting.

5 Section 53 provides that any creditor with a proven unsecured claim may indicated assent or dissent *from a proposal prior to* the first meeting of creditors.

6 What happened in this case is that the Trustee received a joint NOI from the debtors on June 8, 2016. The Trustee served the NOI on all known creditors by ordinary mail. RBC was served at two addresses: i) legal counsel for RBC; and ii) BankruptcyHighway.com, an agent for RBC. This was sent out on June 9, 2016.

7 In response to the NOI, which did not contain any proposal whatsoever, the Trustee received, from Security Recovery Group Inc., another agent for RBC, two proofs of claim, each in the amount of $438,434.31; one proof for each debtor.

8 SRG also sent a voting letter. It asked the Trustee to count RBC's vote "with respect to the proposal" of the Rizzos "against acceptance of the proposal made as of the 08 th day of June, 2016."

9 As of June 8, or indeed the date of SRG's letter, June 20 and the date of the Trustee's response to SRG on June 22, 2016, There was no proposal filed by the debtors.

10 The Trustee wrote to SRG on June 22, 2016 advising that the Trustee's position was that because no proposal was yet in existence, the RBC/SRG "vote" was invalid and that RBC would have to provide a proper voting letter once the proposal was received. This was also sent to RBC's counsel. The Trustee received no response to this communication.

11 The debtors filed a proposal July 7. The Trustee served the proposal on all creditors. The Evidence is that the Trustee served RBC three ways: i) to RBC's counsel; ii) to SRG; and iii) to BankrputcyHighway.com. This package included not only the proposal by notice of the first meeting of creditors and forms for proof of claim and a voting letter.

12 The Trustee received nothing further from RBC. The meeting provided proceeded on July 27. RBC did not attend. One creditor, with a claim of $278,561.29, attended and voted for the proposal. The Proposal was deemed to have been accepted. Consistent with its position, the Trustee did not count the RBC June 22 "vote".

13 RBC claims its vote was valid and ought to have been counted. While I would not go so far as to say a creditor could never lodge a valid vote against a proposal before receiving it, in this case, I find the vote was not valid. The Trustee was correct in not counting it.

14 Section 53 permits a creditor to assent or dissent "from a proposal" before a meeting. Section 54 says the creditor may accept or refuse "the proposal" at the meeting. The statutory scheme for creditor voting assumes there *is* a proposal.

15 SRG's purported "vote" was on its face defective. It tells the Trustee to lodge RBC's vote "against the proposal of June 8." There was no proposal of June 8.

16 The "vote" was defective. It purports to vote on a proposal that did not exist and which by definition RBC or its agent SRG had never seen. The Trustee was right to reject an obviously defective "vote".

17 The Trustee made its position abundantly clear to RBC's agents. RBC had every opportunity to cure the defect. It failed to do so. This conclusion is consistent with the rehabilitative purpose of the proposal provision of the *BIA*. The Trustee was correct not to record RBC's "vote" against a non-existent proposal.

18 RBC, in the alternative, argues that it was never served with the proposal, notice of meeting or additional voting letters. It argues that it was therefore deprived of the opportunity to review the proposal and lodge a further vote or attend the meeting.

19 I do not thing this argument can be sustained.

20 The Trustee personally swore and affidavit of service which included service on three RBC agents. The Trustee was not cross-examined on his affidavit. A representative of SRG says he did not received this package. He too was not cross-examined. There is no doubt that RBC's lawyers and BankruptcyHighway.com received the proposal etc. as RBC's agents.

21 I do not think RBC's argument affords valid grounds for complaint for three reasons.

1. First, RBC does not dispute that it received the Trustee's rejection of its original June 22 voting letter. It never did anything to follow up on that. It was put on notice there was a problem. It took no action. In the *BIA* system, there is an expectation that parties, especially sophisticated parties, exercise due diligence in the advancement of their interests. Ignoring the Trustee's email was not duly diligent.

2. SRG admits it received every other communication sent to it about this file from the Trustee. It would have to do better than a bald denial, especially in the face of the Trustee's affidavit of service, to convince me that the notice of meeting etc. was never received by SRG.

3. Further, RBC cannot deny that at least two other agents involved in this file received the proposal and the notice.

22 For these reasons, I find that the Trustee was correct in rejecting the June 22 "vote" and that RBC was not denied due process.

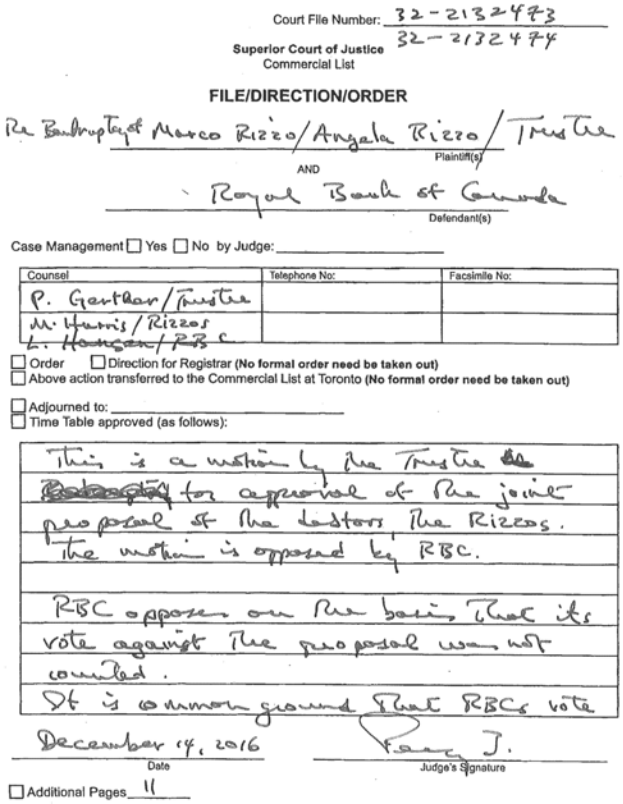
23 The motion for approval of the proposal is granted.

24 In a separate endorsement, I have already dealt with the debtors' request to lift the stay[sic] to enable their house to be sold.

25 The Trustee is entitled to its costs. He may file a brief written submission of no more than two typed double-spaced pages together with a bill of costs within 7 days. RBC may respond with a similar submission, subject to the same limit, within another 7 days.

Motion granted.

Appendix



Court File Number: 32-2132473
32-2132474

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Re Bankrupt of Marco Rizzo/Angela Rizzo / Trustee
Plaintiff(s)
AND
Royal Bank of Canada
Defendant(s)

Case Management ☐ Yes ☐ No by Judge:

Counsel	Telephone No:	Facsimile No:
P. Gerthar / Trustee		
M. Harris / Rizzos		
L. Hoegen / RBC		

☐ Order ☐ Direction for Registrar (No formal order need be taken out)
☐ Above action transferred to the Commercial List at Toronto (No formal order need be taken out)

☐ Adjourned to:
☐ Time Table approved (as follows):

This is a motion by the Trustee for approval of the joint proposal of the debtors, the Rizzos. The motion is opposed by RBC.

RBC opposes on the basis that its vote against the proposal was not counted.

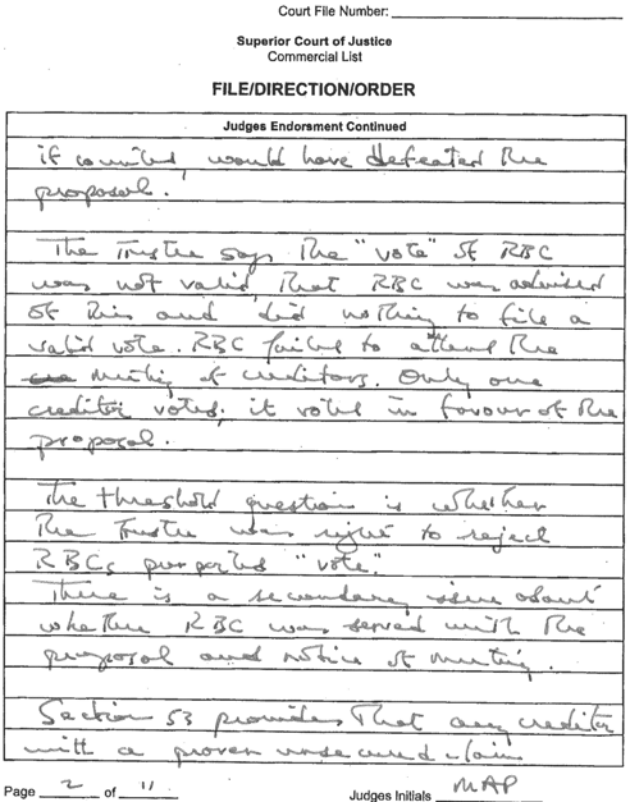
It is common ground that RBC's vote

December 14, 2016
Date

Judge's Signature

☐ Additional Pages 11

Graphic 1



Court File Number: _____

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

if counted, would have defeated the proposal.

The Trustee says the "vote" of RBC was not valid that RBC was advised of this and did nothing to file a valid vote. RBC failed to attend the meeting of creditors. Only one creditor voted; it voted in favour of the proposal.

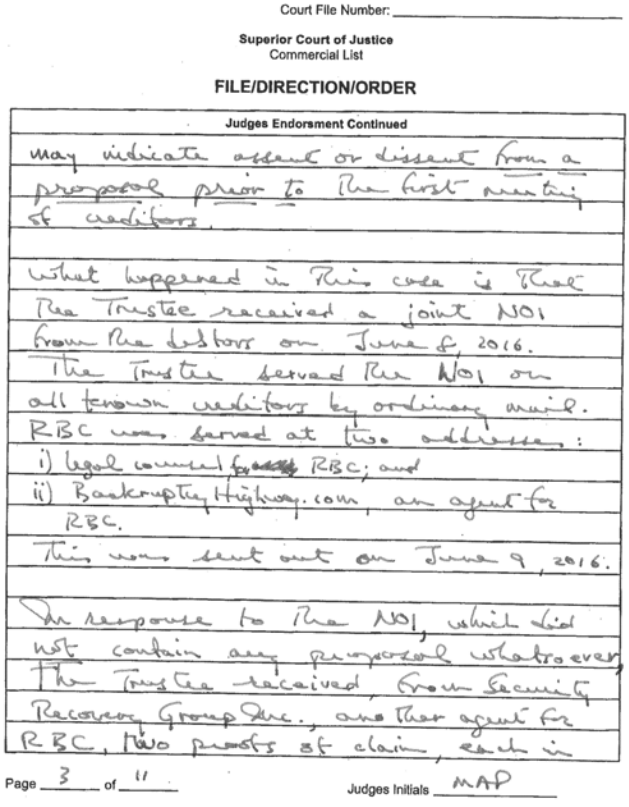
The threshold question is whether the Trustee was right to reject RBC's purported "vote."

There is a secondary issue about whether RBC was served with the proposal and notice of meeting.

Section 53 provides that any creditor with a proven unsecured claim

Page 2 of 11 Judges Initials MAP

Graphic 2



Court File Number: _____

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

may indicate assent or dissent from a proposal prior to the first meeting of creditors.

What happened in this case is that the Trustee received a joint NOI from the debtors on June 6, 2016. The Trustee served the NOI on all known creditors by ordinary mail. RBC was served at two addresses:

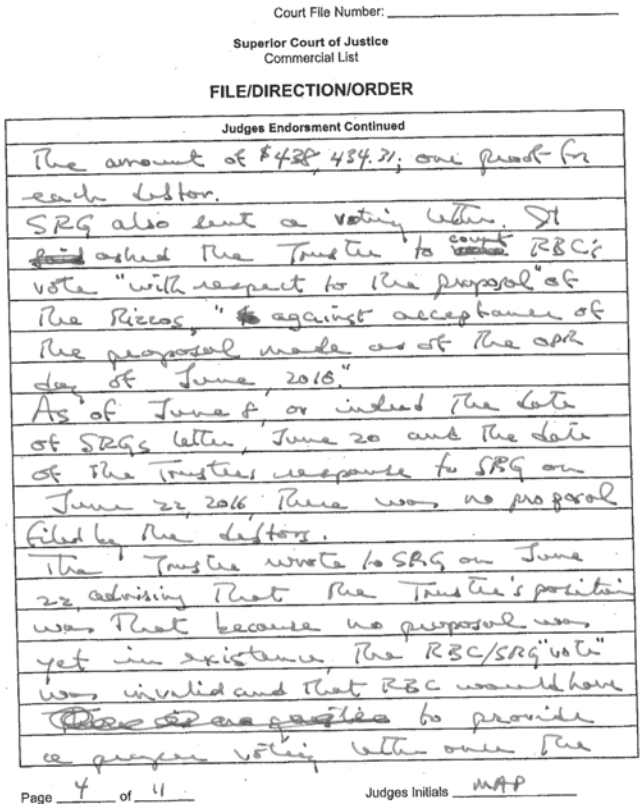
i) legal counsel for RBC; and
ii) Bankruptcy Highway.com, an agent for RBC.

This was sent out on June 9, 2016.

In response to the NOI, which did not contain any proposal whatsoever, the Trustee received, from Security Recovery Group Inc., one that agent for RBC, two proofs of claim, each in

Page 3 of 11 Judges Initials MAP

Graphic 3



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Superior Court of Justice
Commercial List

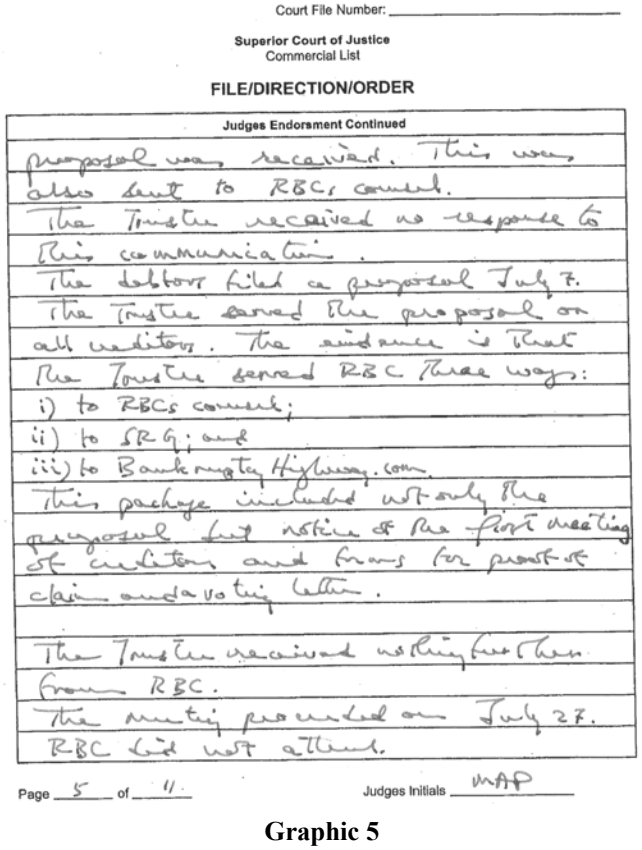
FILE/DIRECTION/ORDER

Judges Endorsment Continued

The amount of $428,434.71; one proof for each debtor.
SRG also sent a voting letter. It asked the Trustee to count RBC's vote "with respect to the proposal of the Rizzos," against acceptance of the proposal made as of the 6th day of June, 2016."
As of June 8, or indeed the date of SRG's letter, June 20 and the date of the Trustee's response to SRG on June 22, 2016 there was no proposal filed by the debtors.
The Trustee wrote to SRG on June 22 advising that the Trustee's position was that because no proposal was yet in existence, the RBC/SRG "vote" was invalid and that RBC would have the opportunity to provide a proper voting letter once the

Page 4 of 11 Judges Initials MAP

Graphic 4



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Superior Court of Justice
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FILE/DIRECTION/ORDER

Judges Endorsment Continued

proposal was received. This was also sent to RBC's counsel.
The Trustee received no response to this communication.
The debtors filed a proposal July 7.
The Trustee served the proposal on all creditors. The evidence is that the Trustee served RBC three ways:
i) to RBC's counsel;
ii) to SRG; and
iii) to Bankruptcy Highway.com.
This package included not only the proposal but notice of the first meeting of creditors and forms for proof of claim and a voting letter.
The Trustee received nothing further from RBC.
The meeting proceeded on July 27. RBC did not attend.

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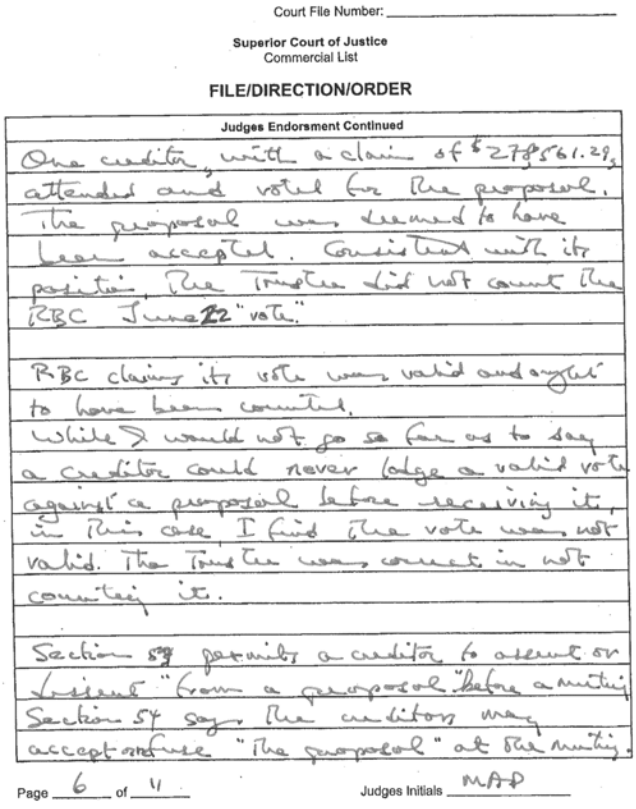
Graphic 5



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Superior Court of Justice
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FILE/DIRECTION/ORDER

Judges Endorsment Continued

One creditor, with a claim of $278561.29, attended and voted for the proposal. The proposal was deemed to have been accepted. Consistent with its position, the Trustee did not count the RBC June 22 "vote."

RBC claims its vote was valid and ought to have been counted.

While I would not go so far as to say a creditor could never lodge a valid vote against a proposal before receiving it, in this case, I find the vote was not valid. The Trustee was correct in not counting it.

Section 54 permits a creditor to assent or dissent "from a proposal" before a meeting. Section 54 says the creditors may accept or refuse "the proposal" at the meeting.

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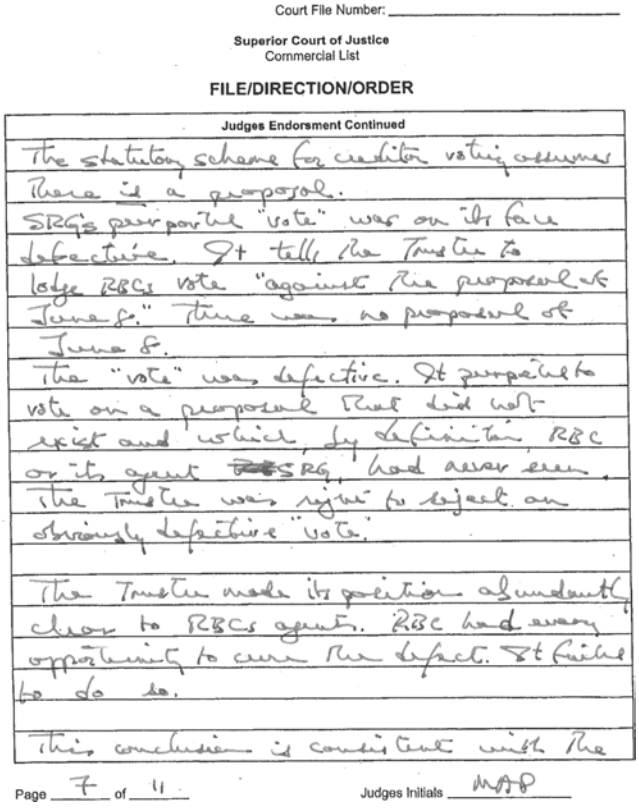
Graphic 6



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Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

The statutory scheme for creditor voting assumes there is a proposal.

SRG's purported "vote" was on its face defective. It tells the Trustee to lodge RBC's vote "against the proposal of June 8." There was no proposal of June 8.

The "vote" was defective. It purported to vote on a proposal that did not exist and which, by definition, RBC or its agent ~~RBC~~ SRG, had never seen. The Trustee was right to reject an obviously defective "vote."

The Trustee made its position abundantly clear to RBC's agents. RBC had every opportunity to cure the defect. It failed to do so.

This conclusion is consistent with the

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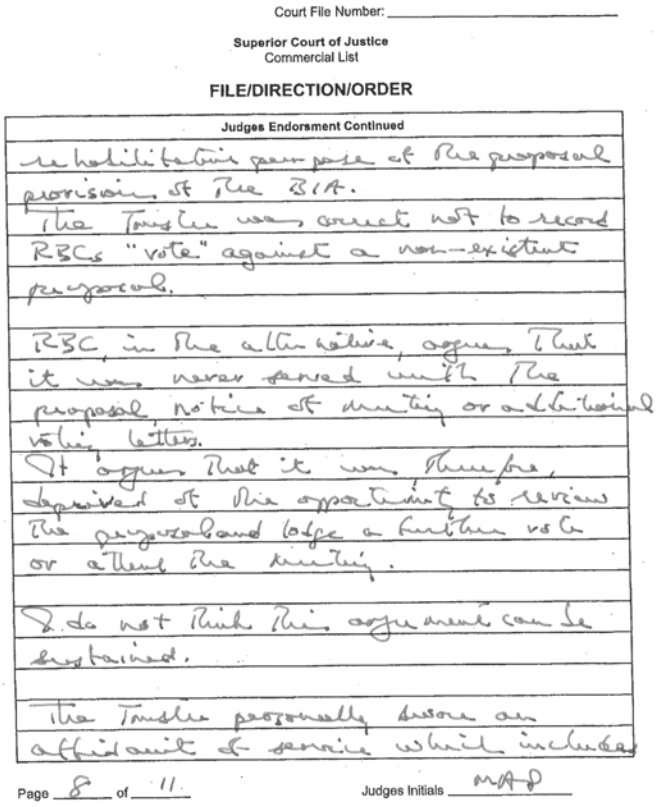
Graphic 7



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FILE/DIRECTION/ORDER

Judges Endorsment Continued

re habilitation's purpose of the proposal provision of the BIA.
The Trustee was correct not to record RBC's "vote" against a non-existent proposal.

RBC, in the alternative, argues that it was never served with the proposal, notice of meeting or additional voting letters.
It argues that it was therefore, deprived of the opportunity to review the proposal and lodge a further vote or attend the meeting.

I do not think this argument can be sustained.

The Trustee personally swore an affidavit of service which includes

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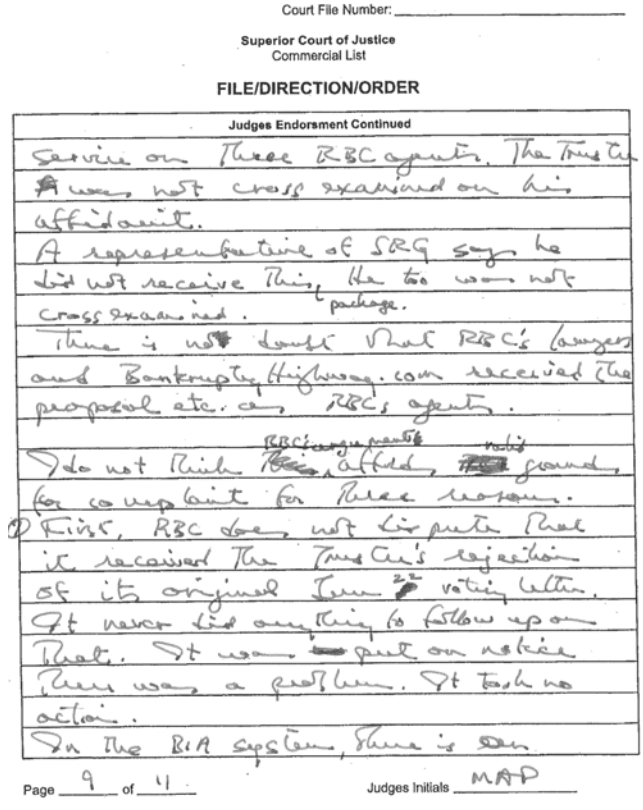
Graphic 8



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FILE/DIRECTION/ORDER

Judges Endorsment Continued

service on three RBC agents. The Trustee was not cross examined on his affidavit.
A representative of SRC says he did not receive this, he too was not cross examined. package.
There is no doubt that RBC's lawyers and Bankruptcy Highway.com received the proposal etc. as RBC's agents.

I do not think RBC's argument, affidavit, notice grounds for complaint for three reasons.
1) First, RBC does not dispute that it received the Trustee's rejection of its original Form 2 voting letter. It never did anything to follow up on that. It was put on notice there was a problem. It took no action.
In the BIA system, there is

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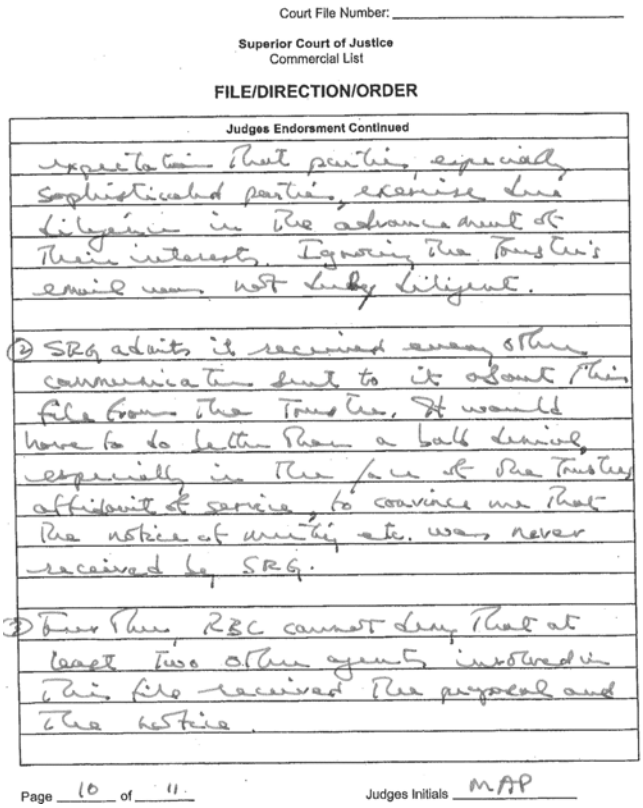
Graphic 9



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FILE/DIRECTION/ORDER

Judges Endorsment Continued

expectation that parties, especially sophisticated parties, exercise due diligence in the advancement of their interests. Ignoring the Trustee's email was not duly diligent.

(2) SRG admits it received many other communications sent to it about this file from the Trustee. It would have to do better than a bald denial, especially in the face of the Trustee's affidavit of service, to convince me that the notice of motion etc. was never received by SRG.

(3) Even then, RBC cannot deny that at least two other agents involved in this file received the proposal and the notice.

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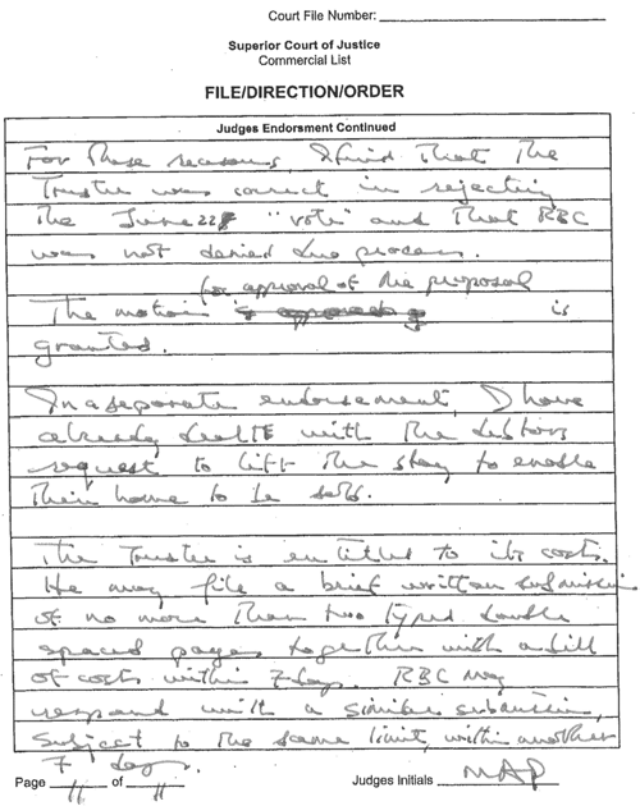
Graphic 10



Court File Number: _____

Superior Court of Justice
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FILE/DIRECTION/ORDER

Judges Endorsment Continued

For those reasons, I find that the Trustee was correct in rejecting the June 22nd "vote" and that RBC was not denied due process.

The motion for approval of the proposal is granted.

In a separate endorsement, I have already dealt with the debtors request to lift the stay to enable their home to be sold.

The Trustee is entitled to its costs. He may file a brief written submission of no more than two typed double spaced pages, together with a bill of costs within 7 days. RBC may respond with a similar submission, subject to the same limit, within another 7 days.

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Graphic 11

Footnotes

* Additional reasons at *Rizzo, Re* (2017), 2017 CarswellOnt 12497, 2017 ONSC 4234, 50 C.B.R. (6th) 332 (Ont. S.C.J. [Commercial List]).

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TAB 26

SUPREME COURT OF CANADA

CITATION: Sherman Estate *v.* Donovan, 2021 SCC 25

APPEAL HEARD: October 6, 2020
JUDGMENT RENDERED: June 11, 2021
DOCKET: 38695

BETWEEN:

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

and

Kevin Donovan and Toronto Star Newspapers Ltd.
Respondents

- and -

Attorney General of Ontario, Attorney General of British Columbia, Canadian Civil Liberties Association, Income Security Advocacy Centre, Ad IDEM/Canadian Media Lawyers Association, Postmedia Network Inc., CTV, a Division of Bell Media Inc., Global News, a division of Corus Television Limited Partnership, The Globe and Mail Inc., Citytv, a division of Rogers Media Inc., British Columbia Civil Liberties Association, HIV & AIDS Legal Clinic Ontario, HIV Legal Network and Mental Health Legal Committee
Interveners

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

REASONS FOR JUDGMENT: (paras. 1 to 108)	Kasirer J. (Wagner C.J. and Moldaver, Karakatsanis, Brown, Rowe and Martin JJ. concurring)

NOTE: This document is subject to editorial revision before its reproduction in final form in the *Canada Supreme Court Reports*.

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*

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 interest — Privacy — Dignity — Physical safety — Unexplained deaths of prominent couple generating intense public scrutiny and prompting trustees of estates to apply for sealing of probate files — Whether privacy and physical safety concerns advanced by estate trustees amount to important public interests at such serious risk to justify issuance of sealing orders.

A prominent couple was found dead in their home. Their deaths had no apparent explanation and generated intense public interest. To this day, the identity and motive of those responsible remain unknown, and the deaths are being investigated as homicides. The estate trustees sought to stem the intense press scrutiny prompted by the events by seeking sealing orders of the probate files. Initially granted, the sealing orders were challenged by a journalist who had reported on the couple's deaths, and by the newspaper for which he wrote. The application judge sealed the probate files, concluding that the harmful effects of the sealing orders were substantially outweighed by the salutary effects on privacy and physical safety interests. The Court of Appeal unanimously allowed the appeal and lifted the sealing orders. It concluded that the privacy interest advanced lacked a public interest quality, and that there was no evidence of a real risk to anyone's physical safety.

Held: The appeal should be dismissed.

The estate trustees have failed to establish a serious risk to an important public interest under the test for discretionary limits on court openness. As such, the sealing orders should not have been issued. Open courts can be a source of inconvenience and embarrassment, but this discomfort is not, as a general matter, enough to overturn the strong presumption of openness. That said, personal information disseminated in open court can be more than a source of discomfort and may result in an affront to a person's dignity. Insofar as privacy serves to protect individuals from this affront, it is an important public interest and a court can make an exception to the open court principle if it is at serious risk. In this case, the risks to privacy and physical safety cannot be said to be sufficiently serious.

Court proceedings are presumptively open to the public. Court openness is protected by the constitutional guarantee of freedom of expression and is essential to the proper functioning of Canadian democracy. Reporting on court proceedings by a free press is often said to be inseparable from the principle of open justice. The open court principle is engaged by all judicial proceedings, whatever their nature. Matters in a probate file are not quintessentially private or fundamentally administrative. Obtaining a certificate of appointment of estate trustee in Ontario is a court proceeding engaging the fundamental rationale for openness — discouraging mischief and ensuring confidence in the administration of justice through transparency — such that the strong presumption of openness applies.

The test for discretionary limits on court openness is directed at maintaining the presumption while offering sufficient flexibility for courts to protect other public interests where they arise. 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.

The recognized scope of what interests might justify a discretionary exception to open courts has broadened over time and now extends generally to important public interests. The breadth of this category transcends the interests of the parties to the dispute and provides significant flexibility to address harm to fundamental values in our society that unqualified openness could cause. While there is no closed list of important public interests, courts must be cautious and alive to the fundamental importance of the open court rule when they are identifying them. Determining what is an important public interest can be done in the abstract at the level of general principles that extend beyond the parties to the particular dispute. By contrast, whether that interest is at serious risk is a fact-based finding that is necessarily made in context. The identification of an important interest and the seriousness of the risk to that interest are thus theoretically separate and qualitatively distinct operations.

Privacy has been championed as a fundamental consideration in a free society, and its public importance has been recognized in various settings. Though an individual's privacy will be pre-eminently important to that individual, the protection of privacy is also in the interest of society as a whole. Privacy therefore cannot be rejected as a mere personal concern: some personal concerns relating to privacy overlap with public interests.

However, cast too broadly, the recognition of a public interest in privacy could threaten the strong presumption of openness. The privacy of individuals will be at risk in many court proceedings. Furthermore, privacy is a complex and contextual concept, making it difficult for courts to measure. Recognizing an important interest in privacy generally would accordingly be unworkable.

Instead, the public character of the privacy interest involves protecting individuals from the threat to their dignity. Dignity in this sense involves the right to present core aspects of oneself to others in a considered and controlled manner; it is an expression of an individual's unique personality or personhood. This interest is consistent with the Court's emphasis on the importance of privacy, but is tailored to preserve the strong presumption of openness.

Privacy as predicated on dignity will be at serious risk in limited circumstances. Neither the sensibilities of individuals nor the fact that openness is disadvantageous, embarrassing or distressing to certain individuals will generally on their own warrant interference with court openness. Dignity will be at serious risk only

where the information that would be disseminated as a result of court openness is sufficiently sensitive or private such that openness can be shown to meaningfully strike at the individual's biographical core in a manner that threatens their integrity. The question is whether the information reveals something intimate and personal about the individual, their lifestyle or their experiences.

In cases where the information is sufficiently sensitive to strike at an individual's biographical core, a court must then ask whether a serious risk to the interest is made out in the full factual context of the case. The seriousness of the risk may be affected by the extent to which information is disseminated and already in the public domain, and the probability of the dissemination actually occurring. The burden is on the applicant to show that privacy, understood in reference to dignity, is at serious risk; this erects a fact-specific threshold consistent with the presumption of openness.

There is also an important public interest in protecting individuals from physical harm, but a discretionary order limiting court openness can only be made where there is a serious risk to this important public interest. Direct evidence is not necessarily required to establish a serious risk to an important public interest, as objectively discernable harm may be identified on the basis of logical inferences. But this process of inferential reasoning is not a licence to engage in impermissible speculation. It is not just the probability of the feared harm, but also the gravity of the harm itself that is relevant to the assessment of serious risk. Where the feared harm is particularly serious, the probability that this harm materialize need not be shown to be

likely, but must still be more than negligible, fanciful or speculative. Mere assertions of grave physical harm are therefore insufficient.

In addition to a serious risk to an important interest, it must be shown that the particular order sought is necessary to address the risk and that the benefits of the order outweigh its negative effects as a matter of proportionality. This contextual balancing, informed by the importance of the open court principle, presents a final barrier to those seeking a discretionary limit on court openness for the purposes of privacy protection.

In the present case, the risk to the important public interest in privacy, defined in reference to dignity, is not serious. The information contained in the probate files does not reveal anything particularly private or highly sensitive. It has not been shown that it would strike at the biographical core of the affected individuals in a way that would undermine their control over the expression of their identities. Furthermore, the record does not show a serious risk of physical harm. The estate trustees asked the application judge to infer not only the fact that harm would befall the affected individuals, but also that a person or persons exist who wish to harm them. To infer all this on the basis of the deaths and the association of the affected individuals with the deceased is not a reasonable inference but is speculation.

Even if the estate trustees had succeeded in showing a serious risk to privacy, a publication ban — less constraining on openness than the sealing orders — would have likely been sufficient as a reasonable alternative to prevent this risk. As a

final barrier, the estate trustees would have had to show that the benefits of any order necessary to protect from a serious risk to the important public interest outweighed the harmful effects of the order.

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By Kasirer J.

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Workers, Local 401, 2013 SCC 62, [2013] 3 S.C.R. 733; *Toronto Star Newspaper Ltd. v. Ontario*, 2012 ONCJ 27, 289 C.C.C. (3d) 549; *Douez v. Facebook, Inc.*, 2017 SCC 33, [2017] 1 S.C.R. 751; *R. v. Paterson* (1998), 102 B.C.A.C. 200; *S. v. Lamontagne*, 2020 QCCA 663; *Himel v. Greenberg*, 2010 ONSC 2325, 93 R.F.L. (6th) 357; *A.B. v. Canada (Citizenship and Immigration)*, 2017 FC 629; *R. v. Pickton*, 2010 BCSC 1198; *Lac d'Amiante du Québec Ltée v. 2858-0702 Québec Inc.*, 2001 SCC 51, [2001] 2 S.C.R. 743; *3834310 Canada inc. v. Chamberland*, 2004 CanLII 4122; *R. v. Spencer*, 2014 SCC 43, [2014] 2 S.C.R. 212; *Coltsfoot Publishing Ltd. v. Foster-Jacques*, 2012 NSCA 83, 320 N.S.R. (2d) 166; *Goulet v. Transamerica Life Insurance Co. of Canada*, 2002 SCC 21, [2002] 1 S.C.R. 719; *Godbout v. Longueuil (Ville de)*, [1995] R.J.Q. 2561, aff'd [1997] 3 S.C.R. 844; *A. v. B.*, 1990 CanLII 3132; *R. v. Plant*, [1993] 3 S.C.R. 281; *R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432; *R. v. Cole*, 2012 SCC 53, [2012] 3 S.C.R. 34; *Work Safe Twerk Safe v. Her Majesty the Queen in Right of Ontario*, 2021 ONSC 1100; *Fedeli v. Brown*, 2020 ONSC 994; *R. v. Marakah*, 2017 SCC 59, [2017] 2 S.C.R. 608; *R. v. Quesnelle*, 2014 SCC 46, [2014] 2 S.C.R. 390; *R. v. Mabior*, 2012 SCC 47, [2012] 2 S.C.R. 584; *R. v. Chanmany*, 2016 ONCA 576, 352 O.A.C. 121; *X. v. Y.*, 2011 BCSC 943, 21 B.C.L.R. (5th) 410; *R. v. Esseghaier*, 2017 ONCA 970, 356 C.C.C. (3d) 455.

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Chantelle Cseh and *Timothy Youdan*, for the appellants.

Iris Fischer and *Skye A. Sepp*, for the respondents.

Peter Scrutton, for the intervener the Attorney General of Ontario.

Jacqueline Hughes, for the intervener the Attorney General of British Columbia.

Ryder Gilliland, for the intervener the Canadian Civil Liberties Association.

Ewa Krajewska, for the intervener the Income Security Advocacy Centre.

Robert S. Anderson, *Q.C.*, for the interveners Ad IDEM/Canadian Media Lawyers Association, Postmedia Network Inc., CTV, a Division of Bell Media Inc., Global News, a division of Corus Television Limited Partnership, The Globe and Mail Inc. and Citytv, a division of Rogers Media Inc.

Adam Goldenberg, for the intervener the British Columbia Civil Liberties Association.

Khalid Janmohamed, for the interveners the HIV & AIDS Legal Clinic Ontario, the HIV Legal Network and the Mental Health Legal Committee.

The judgment of the Court was delivered by

KASIRER J. —

I. Overview

[1] This Court has been resolute in recognizing that the open court principle is protected by the constitutionally-entrenched right of freedom of expression and, as such, it represents a central feature of a liberal democracy. As a general rule, the public can attend hearings and consult court files and the press — the eyes and ears of the public — is left free to inquire and comment on the workings of the courts, all of which helps make the justice system fair and accountable.

[2] Accordingly, there is a strong presumption in favour of open courts. It is understood that this allows for public scrutiny which can be the source of inconvenience and even embarrassment to those who feel that their engagement in the justice system brings intrusion into their private lives. But this discomfort is not, as a general matter, enough to overturn the strong presumption that the public can attend hearings and that court files can be consulted and reported upon by the free press.

[3] Notwithstanding this presumption, exceptional circumstances do arise where competing interests justify a restriction on the open court principle. Where a discretionary court order limiting constitutionally-protected openness is sought — for example, a sealing order, a publication ban, an order excluding the public from a hearing, or a redaction order — the applicant must demonstrate, as a threshold requirement, that openness presents a serious risk to a competing interest of public

importance. That this requirement is considered a high bar serves to maintain the strong presumption of open courts. Moreover, the protection of open courts does not stop there. The applicant must still show that the order is necessary to prevent the risk and that, as a matter of proportionality, the benefits of that order restricting openness outweigh its negative effects.

[4] This appeal turns on whether concerns advanced by persons seeking an exception to the ordinarily open court file in probate proceedings — the concerns for privacy of the affected individuals and their physical safety — amount to important public interests that are at such serious risk that the files should be sealed. The parties to this appeal agree that physical safety is an important public interest that could justify a sealing order but disagree as to whether that interest would be at serious risk, in the circumstances of this case, should the files be unsealed. They further disagree whether privacy is in itself an important interest that could justify a sealing order. The appellants say that privacy is a public interest of sufficient import that can justify limits on openness, especially in light of the threats individuals face as technology facilitates widespread dissemination of personally sensitive information. They argue that the Court of Appeal was mistaken to say that personal concerns for privacy, without more, lack the public interest component that is properly the subject-matter of a sealing order.

[5] This Court has, in different settings, consistently championed privacy as a fundamental consideration in a free society. Pointing to cases decided in other contexts, the appellants contend that privacy should be recognized here as a public interest that,

on the facts of this case, substantiates their plea for orders sealing the probate files. The respondents resist, recalling that privacy has generally been seen as a poor justification for an exception to openness. After all, they say, virtually every court proceeding entails some disquiet for the lives of those concerned and these intrusions on privacy must be tolerated because open courts are essential to a healthy democracy.

[6] This appeal offers, then, an occasion to decide whether privacy can amount to a public interest in the open court jurisprudence and, if so, whether openness puts privacy at serious risk here so as to justify the kind of orders sought by the appellants.

[7] For the reasons that follow, I propose to recognize an aspect of privacy as an important public interest for the purposes of the relevant test from *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522. Proceedings in open court can lead to the dissemination of highly sensitive personal information that would result not just in discomfort or embarrassment, but in an affront to the affected person's dignity. Where this narrower dimension of privacy, rooted in what I see as the public interest in protecting human dignity, is shown to be at serious risk, an exception to the open court principle may be justified.

[8] In this case, and with this interest in mind, it cannot be said that the risk to privacy is sufficiently serious to overcome the strong presumption of openness. The same is true of the risk to physical safety here. The Court of Appeal was right in the circumstances to set aside the sealing orders and I would therefore dismiss the appeal.

II. Background

[9] Prominent in business and philanthropic circles, Bernard Sherman and Honey Sherman were found dead in their Toronto home in December of 2017. Their deaths had no apparent explanation and generated intense public interest and press scrutiny. In January of the following year, the Toronto Police Service announced that the deaths were being investigated as homicides. As the present matter came before the courts, the identity and motive of those responsible remained unknown.

[10] The couple's estates and estate trustees (collectively the "Trustees")[1] sought to stem the intense press scrutiny prompted by the events. The Trustees hoped to see to the orderly transfer of the couple's property, at arm's length from what they saw as the public's morbid interest in the unexplained deaths and the curiosity around apparently great sums of money involved.

[11] When the time came to obtain certificates of appointment of estate trustee from the Superior Court of Justice, the Trustees sought a sealing order so that the estate trustees and beneficiaries ("affected individuals") might be spared any further intrusions into their privacy and be protected from what was alleged to be a risk to their safety. The Trustees argued that if the information in the court files was revealed to the public, the safety of the affected individuals would be at risk and their privacy

[1] As noted in the title of proceedings, the appellants in this matter have been referred to consistently as the "Estate of Bernard Sherman and Trustees of the Estate and Estate of Honey Sherman and Trustees of the Estate." In these reasons the appellants are referred to throughout as the "Trustees" for convenience.

compromised as long as the deaths were unexplained and those responsible for the tragedy remained at large. In support of their request, they argued that there was a real and substantial risk that the affected individuals would suffer serious harm from the public exposure of the materials in the circumstances.

[12] Initially granted, the sealing orders were challenged by Kevin Donovan, a journalist who had written a series of articles on the couple's deaths, and Toronto Star Newspapers Ltd., for which he wrote (collectively the "Toronto Star").[2] The Toronto Star said the orders violated its constitutional rights of freedom of expression and freedom of the press, as well as the attending principle that the workings of the courts should be open to the public as a means of guaranteeing the fair and transparent administration of justice.

III. Proceedings Below

A. *Ontario Superior Court of Justice, 2018 ONSC 4706, 41 E.T.R. (4th) 126 (Dunphy J.)*

[13] In addressing whether the circumstances warranted interference with the open court principle, the application judge relied on this Court's judgment in *Sierra Club*. He noted that a confidentiality order should only be granted when: "(1) such an

[2] The use of "Toronto Star" as a collective term referring to both respondents should not be taken to suggest that only Toronto Star Newspapers Ltd. is participating in this appeal. Mr. Donovan is the only respondent to have been a party throughout. Toronto Star Newspapers Ltd. was a party in first instance, but was removed as a party on consent at the Court of Appeal. By order of Karakatsanis J. dated March 25, 2020, Toronto Star Newspapers Ltd. was added as a respondent in this Court.

order is necessary . . . to prevent a serious risk to an important interest because reasonable alternative measures will not prevent the risk; and (2) the salutary effects of the confidentiality order outweigh its deleterious effects, including the effects on the right to free expression and the public interest in open and accessible court proceedings" (para. 13(d)).

[14] The application judge considered whether the Trustees' interests would be served by granting the sealing orders. In his view, the Trustees had correctly identified two legitimate interests in support of making an exception to the open court principle: "protecting the privacy and dignity of victims of crime and their loved ones" and "a reasonable apprehension of risk on behalf of those known to have an interest in receiving or administering the assets of the deceased" (paras. 22-25). With respect to the first interest, the application judge found that "[t]he degree of intrusion on that privacy and dignity has already been extreme and . . . excruciating" (para. 23). For the second interest, although he noted that "it would have been preferable to include objective evidence of the gravity of that risk from, for example, the police responsible for the investigation", he concluded that "the lack of such evidence is not fatal" (para. 24). Rather, the necessary inferences could be drawn from the circumstances notably the "willingness of the perpetrator(s) of the crimes to resort to extreme violence to pursue whatever motive existed" (*ibid.*). He concluded that the "current uncertainty" was the source of a reasonable apprehension of the risk of harm and, further, that the foreseeable harm was "grave" (*ibid.*).

[15] The application judge ultimately accepted the Trustees' submission that these interests "very strongly outweigh" what he called the proportionately narrow public interest in the "essentially administrative files" at issue (paras. 31 and 33). He therefore concluded that the harmful effects of the sealing orders were substantially outweighed by the salutary effects on the rights and interests of the affected individuals.

[16] Finally, the application judge considered what order would protect the affected individuals while infringing upon the open court principle to the minimum extent possible. He decided no meaningful part of either file could be disclosed if one were to make the redactions necessary to protect the interests he had identified. Open-ended sealing orders did not, however, sit well with him. The application judge therefore sealed the files for an initial period of two years, with the possibility of renewal.

B. *Court of Appeal for Ontario, 2019 ONCA 376, 47 E.T.R. (4th) 1 (Doherty, Rouleau and Hourigan JJ.A.)*

[17] The Toronto Star's appeal was allowed, unanimously, and the sealing orders were lifted.

[18] The Court of Appeal considered the two interests advanced before the application judge in support of the orders to seal the probate files. As to the need to protect the privacy and dignity of the victims of violent crime and their loved ones, it recalled that the kind of interest that is properly protected by a sealing order must have

a public interest component. Citing *Sierra Club*, the Court of Appeal wrote that "[p]ersonal concerns cannot, without more, justify an order sealing material that would normally be available to the public under the open court principle" (para. 10). It concluded that the privacy interest for which the Trustees sought protection lacked this quality of public interest.

[19] While it recognized the personal safety of individuals as an important public interest generally, the Court of Appeal wrote that there was no evidence in this case that could warrant a finding that disclosure of the contents of the estate files posed a real risk to anyone's physical safety. The application judge had erred on this point: "the suggestion that the beneficiaries and trustees are somehow at risk because the Shermans were murdered is not an inference, but is speculation. It provides no basis for a sealing order" (para. 16).

[20] The Court of Appeal concluded that the Trustees had failed the first stage of the test for obtaining orders sealing the probate files. It therefore allowed the appeal and set aside the orders.

C. *Subsequent Proceedings*

[21] The Court of Appeal's order setting aside the sealing orders has been stayed pending the disposition of this appeal. The Toronto Star brought a motion to adduce new evidence on this appeal, comprised of land titles documents, transcripts of the cross-examination of a detective on the murder investigation, and various news articles.

This evidence, it says, supports the conclusion that the sealing orders should be lifted. The motion was referred to this panel.

IV. Submissions

[22] The Trustees have appealed to this Court seeking to restore the sealing orders made by the application judge. In addition to contesting the motion for new evidence, they maintain that the orders are necessary to prevent a serious risk to the privacy and physical safety of the affected individuals and that the salutary effects of sealing the court probate files outweigh the harmful effects of limiting court openness. The Trustees argue that two legal errors led the Court of Appeal to conclude otherwise.

[23] First, they submit the Court of Appeal erred in holding that privacy is a personal concern that cannot, without more, constitute an important interest under *Sierra Club*. The Trustees say the application judge was right to characterize privacy and dignity as an important public interest which, as it was subject to a serious risk, justified the orders. They ask this Court to recognize that privacy in itself is an important public interest for the purposes of the analysis.

[24] Second, the Trustees submit that the Court of Appeal erred in overturning the application judge's conclusion that there was a serious risk of physical harm. They argue that the Court of Appeal failed to recognize that courts have the ability to draw reasonable inferences by applying reason and logic even in the absence of specific evidence of the alleged risk.

[25] The Trustees say that these errors led the Court of Appeal to mistakenly set aside the sealing orders. In answer to questions at the hearing, the Trustees acknowledged that an order redacting certain documents in the file or a publication ban could assist in addressing some of their concerns, but maintained neither is a reasonable alternative to the sealing orders in the circumstances.

[26] The Trustees submit further that the protection of these interests outweighs the deleterious effects of the orders. They argue that the importance of the open court principle is attenuated by the nature of these probate proceedings. Given that it is non-contentious and not strictly speaking necessary for the transfer of property at death, probate is a court proceeding of an "administrative" character, which diminishes the imperative of applying the open court principle here (paras. 113-14).

[27] The Toronto Star takes the position that the Court of Appeal made no mistake in setting aside the sealing orders and that the appeal should be dismissed. In the Toronto Star's view, while privacy can be an important interest where it evinces a public component, the Trustees have only identified a subjective desire for the affected individuals in this case to avoid further publicity, which is not inherently harmful. According to the Toronto Star and some of the interveners, the Trustees' position would allow that measure of inconvenience and embarrassment that arises in every court proceeding to take precedence over the interest in court openness protected by the *Canadian Charter of Rights and Freedoms* in which all of society has a stake. The Toronto Star argues further that the information in the court files is not highly sensitive.

On the issue of whether the sealing orders were necessary to protect the affected individuals from physical harm, the Toronto Star submits that the Court of Appeal was right to conclude that the Trustees had failed to establish a serious risk to this interest.

[28] In the alternative, even if there were a serious risk to one or another important interest, the Toronto Star says the sealing orders are not necessary because the risk could be addressed by an alternative, less onerous order. Furthermore, it says the orders are not proportionate. In seeking to minimize the importance of openness in probate proceedings, the Trustees invite an inflexible approach to balancing the effects of the order that is incompatible with the principle that openness applies to all court proceedings. In any event, there is a public interest in openness specifically here, given that the certificates sought can affect the rights of third parties and that openness ensures the fairness of the proceedings, whether they are contested or not.

V. Analysis

[29] The outcome of the appeal turns on whether the application judge should have made the sealing orders pursuant to the test for discretionary limits on court openness from this Court's decision in *Sierra Club*.

[30] Court openness is protected by the constitutional guarantee of freedom of expression and is essential to the proper functioning of our democracy (*Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480, at para. 23; *Vancouver Sun (Re)*, 2004 SCC 43, [2004] 2 S.C.R. 332, at paras. 23-26).

Reporting on court proceedings by a free press is often said to be inseparable from the principle of open justice. "In reporting what has been said and done at a public trial, the media serve as the eyes and ears of a wider public which would be absolutely entitled to attend but for purely practical reasons cannot do so" (*Khuja v. Times Newspapers Limited*, [2017] UKSC 49, [2019] A.C. 161, at para. 16, citing *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, at pp. 1326-39, per Cory J.). Limits on openness in service of other public interests have been recognized, but sparingly and always with an eye to preserving a strong presumption that justice should proceed in public view (*Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, at p. 878; *R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442, at paras. 32-39; *Sierra Club*, at para. 56). The test for discretionary limits on court openness is directed at maintaining this presumption while offering sufficient flexibility for courts to protect these other public interests where they arise (*Mentuck*, at para. 33). The parties agree that this is the appropriate framework of analysis for resolving this appeal.

[31] The parties and the courts below disagree, however, about how this test applies to the facts of this case and this calls for clarification of certain points of the *Sierra Club* analysis. Most centrally, there is disagreement about how an important interest in the protection of privacy could be recognized such that it would justify limits on openness, and in particular when privacy can be a matter of public concern. The parties bring two settled principles of this Court's jurisprudence to bear in support of their respective positions. First, this Court has often observed that privacy is a

fundamental value necessary to the preservation of a free and democratic society (*Lavigne v. Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53, [2002] 2 S.C.R. 773, at para. 25; *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403, at paras. 65-66, per La Forest J. (dissenting but not on this point); *New Brunswick*, at para. 40). Courts have invoked privacy, in some instances, as the basis for an exception to openness under the *Sierra Club* test (see, e.g., *R. v. Henry*, 2009 BCCA 86, 270 B.C.A.C. 5, at paras. 11 and 17). At the same time, the jurisprudence acknowledges that some degree of privacy loss — resulting in inconvenience, even in upset or embarrassment — is inherent in any court proceeding open to the public (*New Brunswick*, at para. 40). Accordingly, upholding the presumption of openness has meant recognizing that neither individual sensibilities nor mere personal discomfort associated with participating in judicial proceedings are likely to justify the exclusion of the public from court (*Attorney General of Nova Scotia v. MacIntyre*, [1982] 1 S.C.R. 175, at p. 185; *New Brunswick*, at para. 41). Determining the role of privacy in the *Sierra Club* analysis requires reconciling these two ideas, which is the nub of the disagreement between the parties. The right of privacy is not absolute; the open court principle is not without exceptions.

[32] For the reasons that follow, I disagree with the Trustees that the ostensibly unbounded privacy interest they invoke qualifies as an important public interest within the meaning of *Sierra Club*. Their broad claim fails to focus on the elements of privacy that are deserving of public protection in the open court context. That is not to say, however, that privacy can never ground an exceptional measure such as the sealing

orders sought in this case. While the mere embarrassment caused by the dissemination of personal information through the open court process does not rise to the level justifying a limit on court openness, circumstances do exist where an aspect of a person's private life has a plain public interest dimension.

[33] Personal information disseminated in open court can be more than a source of discomfort and may result in an affront to a person's dignity. Insofar as privacy serves to protect individuals from this affront, it is an important public interest relevant under *Sierra Club*. Dignity in this sense is a related but narrower concern than privacy generally; it transcends the interests of the individual and, like other important public interests, is a matter that concerns the society at large. A court can make an exception to the open court principle, notwithstanding the strong presumption in its favour, if the interest in protecting core aspects of individuals' personal lives that bear on their dignity is at serious risk by reason of the dissemination of sufficiently sensitive information. The question is not whether the information is "personal" to the individual concerned, but whether, because of its highly sensitive character, its dissemination would occasion an affront to their dignity that society as a whole has a stake in protecting.

[34] This public interest in privacy appropriately focuses the analysis on the impact of the dissemination of sensitive personal information, rather than the mere fact of this dissemination, which is frequently risked in court proceedings and is necessary in a system that privileges court openness. It is a high bar — higher and more precise

than the sweeping privacy interest relied upon here by the Trustees. This public interest will only be seriously at risk where the information in question strikes at what is sometimes said to be the core identity of the individual concerned: information so sensitive that its dissemination could be an affront to dignity that the public would not tolerate, even in service of open proceedings.

[35] I hasten to say that applicants for an order making exception to the open court principle cannot content themselves with an unsubstantiated claim that this public interest in dignity is compromised any more than they could by an unsubstantiated claim that their physical integrity is endangered. Under *Sierra Club*, the applicant must show on the facts of the case that, as an important interest, this dignity dimension of their privacy is at "serious risk". For the purposes of the test for discretionary limits on court openness, this requires the applicant to show that the information in the court file is sufficiently sensitive such that it can be said to strike at the biographical core of the individual and, in the broader circumstances, that there is a serious risk that, without an exceptional order, the affected individual will suffer an affront to their dignity.

[36] In the present case, the information in the court files was not of this highly sensitive character that it could be said to strike at the core identity of the affected persons; the Trustees have failed to show how the lifting of the sealing orders engages the dignity of the affected individuals. I am therefore not convinced that the intrusion on their privacy raises a serious risk to an important public interest as required by *Sierra Club*. Moreover, as I shall endeavour to explain, there was no serious risk of

physical harm to the affected individuals by lifting the sealing orders. Accordingly, this is not an appropriate case in which to make sealing orders, or any order limiting access to these court files. In the circumstances, the admissibility of the Toronto Star's new evidence is moot. I propose to dismiss the appeal.

A. *The Test for Discretionary Limits on Court Openness*

[37] Court proceedings are presumptively open to the public (*MacIntyre*, at p. 189; *A.B. v. Bragg Communications Inc.*, 2012 SCC 46, [2012] 2 S.C.R. 567, at para. 11).

[38] The test for discretionary limits on presumptive court openness has been expressed as a two-step inquiry involving the necessity and proportionality of the proposed order (*Sierra Club*, at para. 53). Upon examination, however, this test rests upon three core prerequisites that a person seeking such a limit must show. Recasting the test around these three prerequisites, without altering its essence, helps to clarify the burden on an applicant seeking an exception to the open court principle. In order to succeed, the person asking a court to exercise discretion in a way that limits the open court presumption must establish that:

(1) court openness poses a serious risk to an important public interest;

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

(3) as a matter of proportionality, the benefits of the order outweigh its negative effects.

Only where all three of these prerequisites have been met can a discretionary limit on openness — for example, a sealing order, a publication ban, an order excluding the public from a hearing, or a redaction order — properly be ordered. This test applies to all discretionary limits on court openness, subject only to valid legislative enactments (*Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41, [2005] 2 S.C.R. 188, at paras. 7 and 22).

[39] The discretion is structured and controlled in this way to protect the open court principle, which is understood to be constitutionalized under the right to freedom of expression at s. 2(b) of the Charter (*New Brunswick*, at para. 23). Sustained by freedom of expression, the open court principle is one of the foundations of a free press given that access to courts is fundamental to newsgathering. This Court has often highlighted the importance of open judicial proceedings to maintaining the independence and impartiality of the courts, public confidence and understanding of their work and ultimately the legitimacy of the process (see, e.g., *Vancouver Sun*, at paras. 23-26). In *New Brunswick*, La Forest J. explained the presumption in favour of court openness had become "'one of the hallmarks of a democratic society'" (citing *Re Southam Inc. and The Queen (No.1)* (1983), 41 O.R. (2d) 113 (C.A.), at p. 119), that "acts as a guarantee that justice is administered in a non-arbitrary manner, according to the rule of law . . . thereby fostering public confidence in the integrity of the court system and

understanding of the administration of justice" (para. 22). The centrality of this principle to the court system underlies the strong presumption — albeit one that is rebuttable — in favour of court openness (para. 40; *Mentuck*, at para. 39).

[40] The test ensures that discretionary orders are subject to no lower standard than a legislative enactment limiting court openness would be (*Mentuck*, at para. 27; *Sierra Club*, at para. 45). To that end, this Court developed a scheme of analysis by analogy to the *Oakes* test, which courts use to understand whether a legislative limit on a right guaranteed under the *Charter* is reasonable and demonstrably justified in a free and democratic society (*Sierra Club*, at para. 40, citing *R. v. Oakes*, [1986] 1 S.C.R. 103; see also *Dagenais*, at p. 878; *Vancouver Sun*, at para. 30).

[41] The recognized scope of what interests might justify a discretionary exception to open courts has broadened over time. In *Dagenais*, Lamer C.J. spoke of a requisite risk to the "fairness of the trial" (p. 878). In *Mentuck*, Iacobucci J. extended this to a risk affecting the "proper administration of justice" (para. 32). Finally, in *Sierra Club*, Iacobucci J., again writing for a unanimous Court, restated the test to capture any serious risk to an "important interest, including a commercial interest, in the context of litigation" (para. 53). He simultaneously clarified that the important interest must be expressed as a public interest. For example, on the facts of that case, a harm to a particular business interest would not have been sufficient, but the "general commercial interest of preserving confidential information" was an important interest because of its public character (para. 55). This is consistent with the fact that this test

was developed in reference to the *Oakes* jurisprudence that focuses on the "pressing and substantial" objective of legislation of general application (*Oakes*, at pp. 138-39; see also *Mentuck*, at para. 31). The term "important interest" therefore captures a broad array of public objectives.

[42] While there is no closed list of important public interests for the purposes of this test, I share Iacobucci J.'s sense, explained in *Sierra Club*, that courts must be "cautious" and "alive to the fundamental importance of the open court rule" even at the earliest stage when they are identifying important public interests (para. 56). Determining what is an important public interest can be done in the abstract at the level of general principles that extend beyond the parties to the particular dispute (para. 55). By contrast, whether that interest is at "serious risk" is a fact-based finding that, for the judge considering the appropriateness of an order, is necessarily made in context. In this sense, the identification of, on the one hand, an important interest and, on the other, the seriousness of the risk to that interest are, theoretically at least, separate and qualitatively distinct operations. An order may therefore be refused simply because a valid important public interest is not at serious risk on the facts of a given case or, conversely, that the identified interests, regardless of whether they are at serious risk, do not have the requisite important public character as a matter of general principle.

[43] The test laid out in *Sierra Club* continues to be an appropriate guide for judicial discretion in cases like this one. The breadth of the category of "important interest" transcends the interests of the parties to the dispute and provides significant

flexibility to address harm to fundamental values in our society that unqualified openness could cause (see, e.g., P. M. Perell and J. W. Morden, *The Law of Civil Procedure in Ontario* (4th ed. 2020), at para. 3.185; J. Bailey and J. Burkell, "Revisiting the Open Court Principle in an Era of Online Publication: Questioning Presumptive Public Access to Parties' and Witnesses' Personal Information" (2016), 48 *Ottawa L. Rev.* 143, at pp. 154-55). At the same time, however, the requirement that a serious risk to an important interest be demonstrated imposes a meaningful threshold necessary to maintain the presumption of openness. Were it merely a matter of weighing the benefits of the limit on court openness against its negative effects, decision-makers confronted with concrete impacts on the individuals appearing before them may struggle to put adequate weight on the less immediate negative effects on the open court principle. Such balancing could be evasive of effective appellate review. To my mind, the structure provided by *Dagenais*, *Mentuck*, and *Sierra Club* remains appropriate and should be affirmed.

[44] Finally, I recall that the open court principle is engaged by all judicial proceedings, whatever their nature (*MacIntyre* at pp. 185-86; *Vancouver Sun*, at para. 31). To the extent the Trustees suggested, in their arguments about the negative effects of the sealing orders, that probate in Ontario does not engage the open court principle or that the openness of these proceedings has no public value, I disagree. The certificates the Trustees sought from the court are issued under the seal of that court, thereby bearing the imprimatur of the court's authority. The court's decision, even if rendered in a non-contentious setting, will have an impact on third parties, for example

by establishing the testamentary paper that constitutes a valid will (see *Otis v. Otis* (2004), 7 E.T.R. (3d) 221 (Ont. S.C.), at paras. 23-24). Contrary to what the Trustees argue, the matters in a probate file are not quintessentially private or fundamentally administrative. Obtaining a certificate of appointment of estate trustee in Ontario is a court proceeding and the fundamental rationale for openness — discouraging mischief and ensuring confidence in the administration of justice through transparency — applies to probate proceedings and thus to the transfer of property under court authority and other matters affected by that court action.

[45] It is true that other non-probate estate planning mechanisms may allow for the transfer of wealth outside the ordinary avenues of testate or intestate succession — that is the case, for instance, for certain insurance and pension benefits, and for certain property held in co-ownership. But this does not change the necessarily open court character of probate proceedings. That non-probate transfers keep certain information related to the administration of an estate out of public view does not mean that the Trustees here, by seeking certificates from the court, somehow do not engage this principle. The Trustees seek the benefits that flow from the public judicial probate process: transparency ensures that the probate court's authority is administered fairly and efficiently (*Vancouver Sun*, at para. 25; *New Brunswick*, at para. 22). The strong presumption in favour of openness plainly applies to probate proceedings and the Trustees must satisfy the test for discretionary limits on court openness.

B. *The Public Importance of Privacy*

[46] As mentioned, I disagree with the Trustees that an unbounded interest in privacy qualifies as an important public interest under the test for discretionary limits on court openness. Yet in some of its manifestations, privacy does have social importance beyond the person most immediately concerned. On that basis, it cannot be excluded as an interest that could justify, in the right circumstances, a limit to court openness. Indeed, the public importance of privacy has been recognized by this Court in various settings, and this sheds light on why the narrower aspect of privacy related to the protection of dignity is an important public interest.

[47] I respectfully disagree with the manner in which the Court of Appeal disposed of the claim by the Trustees that there is a serious risk to the interest in protecting personal privacy in this case. For the appellate judges, the privacy concerns raised by the Trustees amounted to "[p]ersonal concerns" which cannot, "without more", satisfy the requirement from *Sierra Club* that an important interest be framed as a public interest (para. 10). The Court of Appeal in our case relied, at para. 10, on *H. (M.E.) v. Williams*, 2012 ONCA 35, 108 O.R. (3d) 321, in which it was held that "[p]urely personal interests cannot justify non-publication or sealing orders" (para. 25). Citing as authority judgments of this Court in *MacIntyre* and *Sierra Club*, the court continued by observing that "personal concerns of a litigant, including concerns about the very real emotional distress and embarrassment that can be occasioned to litigants when justice is done in public, will not, standing alone, satisfy the necessity branch of the test" (para. 25). Respectfully stated, the emphasis that the Court of Appeal placed on personal concerns as a means of deciding that the sealing orders failed to meet the

necessity requirement in this case and in *Williams* is, I think, mistaken. Personal concerns that relate to aspects of the privacy of an individual who is before the courts can coincide with a public interest in confidentiality.

[48] Like the Court of Appeal, I do agree with the view expressed particularly in the pre-*Charter* case of *MacIntyre*, that where court openness results in an intrusion on privacy which disturbs the "sensibilities of the individuals involved" (p. 185), that concern is generally insufficient to justify a sealing or like order and does not amount to an important public interest under *Sierra Club*. But I disagree with the Court of Appeal in this case and in *Williams* that this is because the intrusion only occasions "personal concerns". Certain personal concerns — even "without more" — can coincide with important public interests within the meaning of *Sierra Club*. To invoke the expression of Binnie J. in *F.N. (Re)*, 2000 SCC 35, [2000] 1 S.C.R. 880, at para. 10, there is a "public interest in confidentiality" that is felt, first and foremost, by the person involved and is most certainly a personal concern. Even in *Williams*, the Court of Appeal was careful to note that where, without privacy protection, an individual would face "a substantial risk of serious debilitating emotional . . . harm", an exception to openness should be available (paras. 29-30). The means of discerning whether a privacy interest reflects a "public interest in confidentiality" is therefore not whether the interest reflects or is rooted in "personal concerns" for the privacy of the individuals involved. Some personal concerns relating to privacy overlap with public interests in confidentiality. These interests in privacy can be, in my view, important public interests within the meaning of *Sierra Club*. It is true that an individual's privacy is

pre-eminently important to that individual. But this Court has also long recognized that the protection of privacy is, in a variety of settings, in the interest of society as a whole.

[49] The proposition that privacy is important, not only to the affected individual but to our society, has deep roots in the jurisprudence of this Court outside the context of the test for discretionary limits on court openness. This background helps explain why privacy cannot be rejected as a mere personal concern. However, the key differences in these contexts are such that the public importance of privacy cannot be transposed to open courts without adaptation. Only specific aspects of privacy interests can qualify as important public interests under *Sierra Club*.

[50] In the context of s. 8 of the *Charter* and public sector privacy legislation, La Forest J. cited American privacy scholar Alan F. Westin for the proposition that privacy is a fundamental value of the modern state, first in *R. v. Dyment*, [1988] 2 S.C.R. 417, at pp. 427-28 (concurring), and then in *Dagg*, at para. 65 (dissenting but not on this point). In the latter case, La Forest J. wrote: "The protection of privacy is a fundamental value in modern, democratic states. An expression of an individual's unique personality or personhood, privacy is grounded on physical and moral autonomy — the freedom to engage in one's own thoughts, actions and decisions" (para. 65 (citations omitted)). That statement was endorsed unanimously by this Court in *Lavigne*, at para. 25.

[51] Further, in *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401*, 2013 SCC 62, [2013] 3 S.C.R. 733

("*UFCW*"), decided in the context of a statute regulating the use of information by organizations, the objective of providing an individual with some control over their information was recognized as "intimately connected to individual autonomy, dignity and privacy, self-evidently significant social values" (para. 24). The importance of privacy, its "quasi-constitutional status" and its role in protecting moral autonomy continues to find expression in our recent jurisprudence (see, e.g., *Lavigne*, at para. 24; *Bragg*, at para. 18, per Abella J., citing *Toronto Star Newspaper Ltd. v. Ontario*, 2012 ONCJ 27, 289 C.C.C. (3d) 549, at paras. 40-41 and 44; *Douez v. Facebook, Inc.*, 2017 SCC 33, [2017] 1 S.C.R. 751, at para. 59). In *Douez*, Karakatsanis, Wagner (as he then was) and Gascon JJ. underscored this same point, adding that "the growth of the Internet, virtually timeless with pervasive reach, has exacerbated the potential harm that may flow from incursions to a person's privacy interests" (para. 59).

[52] Privacy as a public interest is underlined by specific aspects of privacy protection present in legislation at the federal and provincial levels (see, e.g., *Privacy Act*, R.S.C. 1985, c. P-21; *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5 ("PIPEDA"); *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31; *Charter of Human Rights and Freedoms*, CQLR, c. C-12, s. 5; *Civil Code of Québec*, arts. 35 to 41).[3] Further, in assessing the constitutionality of a legislative exception to the open court principle, this Court has recognized that the protection of individual privacy can be a pressing and substantial objective

[3] At the time of writing the House of Commons is considering a bill that would replace part one of *PIPEDA*: Bill C-11, *An Act to enact the Consumer Privacy Protection Act and the Personal Information and Data Protection Tribunal Act and to make consequential and related amendments to other Acts*, 2nd Sess., 43rd Parl., 2020.

(*Edmonton Journal*, at p. 1345, per Cory J.; see also the concurring reasons of Wilson J., at p. 1354, in which "the public interest in protecting the privacy of litigants generally in matrimonial cases against the public interest in an open court process" was explicitly noted). There is also continued support for the social and public importance of individual privacy in the academic literature (see, e.g., A. J. Cockfield, "Protecting the Social Value of Privacy in the Context of State Investigations Using New Technologies" (2007), 40 *U.B.C. L. Rev.* 41, at p. 41; K. Hughes, "A Behavioural Understanding of Privacy and its Implications for Privacy Law" (2012), 75 *Modern L. Rev.* 806, at p. 823; P. Gewirtz, "Privacy and Speech" (2001), *Sup. Ct. Rev.* 139, at p. 139). It is therefore inappropriate, in my respectful view, to dismiss the public interest in protecting privacy as merely a personal concern. This does not mean, however, that privacy generally is an important public interest in the context of limits on court openness.

[53] The fact that the case before the application judge concerned individuals who were advancing their own privacy interests, which were undeniably important to them as individuals, does not mean that there is no public interest at stake. In *F.N. (Re)*, this was the personal interest that young offenders had in remaining anonymous in court proceedings as a means of encouraging their personal rehabilitation (para. 11). All of society had a stake, according to Binnie J., in the young person's personal prospect for rehabilitation. This same idea from *F.N. (Re)* was cited in support of finding the interest in *Sierra Club* to be a public interest. That interest, rooted first in an agreement of personal concern to the contracting parties involved, was a private matter that evinced,

alongside its personal interest to the parties, a "public interest in confidentiality" (*Sierra Club*, at para. 55). Similarly, while the Trustees have a personal interest in preserving their privacy, this does not mean that the public has no stake in this same interest because — as this Court has made clear — it is related to moral autonomy and dignity which are pressing and substantial concerns.

[54] In this appeal, the Toronto Star suggests that legitimate privacy concerns would be effectively protected by a discretionary order where there is "something more" to elevate them beyond personal concerns and sensibilities (R.F., at para. 73). The Income Security Advocacy Centre, by way of example, submits that privacy serves the public interests of preventing harm and of ensuring individuals are not dissuaded from accessing the courts. I agree that these concepts are related, but in my view care must be taken not to conflate the public importance of privacy with that of other interests; aspects of privacy, such as dignity, may constitute important public interests in and of themselves. A risk to personal privacy may be tied to a risk to psychological harm, as it was in *Bragg* (para. 14; see also J. Rossiter, *Law of Publication Bans, Private Hearings and Sealing Orders* (loose-leaf), s. 2.4.1). But concerns for privacy may not always coincide with a desire to avoid psychological harm, and may focus instead, for example, on protecting one's professional standing (see, e.g., *R. v. Paterson* (1998), 102 B.C.A.C. 200, at paras. 76, 78 and 87-88). Similarly, there may be circumstances where the prospect of surrendering the personal information necessary to pursue a legal claim may deter an individual from bringing that claim (see *S. v. Lamontagne*, 2020 QCCA 663, at paras. 34-35 (CanLII)). In the same way, the prospect

of surrendering sensitive commercial information would have impaired the conduct of the party's defence in *Sierra Club* (at para. 71), or could pressure an individual into settling a dispute prematurely (K. Eltis, *Courts, Litigants and the Digital Age* (2nd ed. 2016), at p. 86). But this does not necessarily mean that a public interest in privacy is wholly subsumed by such concerns. I note, for example, that access to justice concerns do not apply where the privacy interest to be protected is that of a third party to the litigation, such as a witness, whose access to the courts is not at stake and who has no choice available to terminate the litigation and avoid any privacy impacts (see, e.g., *Himel v. Greenberg*, 2010 ONSC 2325, 93 R.F.L. (6th) 357, at para. 58; see also Rossiter, s. 2.4.2(2)). In any event, the recognition of these related and valid important public interests does not answer the question as to whether aspects of privacy in and of themselves are important public interests and does not diminish the distinctive public character of privacy, considered above.

[55] Indeed, the specific harms to privacy occasioned by open courts have not gone unnoticed nor been discounted as merely personal concerns. Courts have exercised their discretion to limit court openness in order to protect personal information from publicity, including to prevent the disclosure of sexual orientation (see, e.g., *Paterson*, at paras. 76, 78 and 87-88), HIV status (see, e.g., *A.B. v. Canada (Citizenship and Immigration)*, 2017 FC 629, at para. 9 (CanLII)) and a history of substance abuse and criminality (see, e.g., *R. v. Pickton*, 2010 BCSC 1198, at paras. 11 and 20 (CanLII)). This need to reconcile the public interest in privacy with the open court principle has been highlighted by this Court (see, e.g., *Edmonton Journal*, at

p. 1353, per Wilson J.). Writing extra-judicially, McLachlin C.J. explained that "[i]f we are serious about peoples' private lives, we must preserve a modicum of privacy. Equally, if we are serious about our justice system, we must have open courts. The question is how to reconcile these dual imperatives in a fair and principled way" ("Courts, Transparency and Public Confidence: To the Better Administration of Justice" (2003), 8 *Deakin L. Rev.* 1, at p. 4). In seeking that reconciliation, the question becomes whether the relevant dimension of privacy amounts to an important public interest that, when seriously at risk, would justify rebutting the strong presumption favouring open courts.

C. *The Important Public Interest in Privacy Bears on the Protection of Individual Dignity*

[56] While the public importance of privacy has clearly been recognized by this Court in various settings, caution is required in deploying this concept in the test for discretionary limits on court openness. It is a matter of settled law that open court proceedings by their nature can be a source of discomfort and embarrassment and these intrusions on privacy are generally seen as of insufficient importance to overcome the presumption of openness. The Toronto Star has raised the concern that recognizing privacy as an important public interest will lower the burden for applicants because the privacy of litigants will, in some respects, always be at risk in court proceedings. I agree that the requirement to show a serious risk to an important interest is a key threshold component of the analysis that must be preserved in order to protect the open court principle. The recognition of a public interest in privacy could threaten the strong

presumption of openness if privacy is cast too broadly without a view to its public character.

[57] Privacy poses challenges in the test for discretionary limits on court openness because of the necessary dissemination of information that openness implies. It bears recalling that when Dickson J., as he then was, wrote in *MacIntyre* that "covertness is the exception and openness the rule", he was explicitly treating a privacy argument, returning to and dismissing the view, urged many times before, "that the 'privacy' of litigants requires that the public be excluded from court proceedings" (p. 185 (emphasis added)). Dickson J. rejected the view that personal privacy concerns require closed courtroom doors, explaining that "[a]s a general rule the sensibilities of the individuals involved are no basis for exclusion of the public from judicial proceedings" (p. 185).

[58] Though writing before *Dagenais*, and therefore not commenting on the specific steps of the analysis as we now understand them, to my mind, Dickson J. was right to recognize that the open court principle brings necessary limits to the right to privacy. While individuals may have an expectation that information about them will not be revealed in judicial proceedings, the open court principle stands presumptively in opposition to that expectation. For example, in *Lac d'Amiante du Québec Ltée v. 2858-0702 Québec Inc.*, 2001 SCC 51, [2001] 2 S.C.R. 743, LeBel J. held that "a party who institutes a legal proceeding waives his or her right to privacy, at least in part" (para. 42). *MacIntyre* and cases like it recognize — in stating that openness is the rule

and covertness the exception — that the right to privacy, however defined, in some measure gives way to the open court ideal. I share the view that the open court principle presumes that this limit on the right to privacy is justified.

[59] The Toronto Star is therefore right to say that the privacy of individuals will very often be at some risk in court proceedings. Disputes between and concerning individuals that play out in open court necessarily reveal information that may have otherwise remained out of public view. Indeed, much like the Court of Appeal in this case, courts have explicitly adverted to this concern when concluding that mere inconvenience is insufficient to cross the initial threshold of the test (see, e.g., *3834310 Canada inc. v. Chamberland*, 2004 CanLII 4122 (Que. C.A.), at para. 30). Saying that any impact on individual privacy is sufficient to establish a serious risk to an important public interest for the purposes of the test for discretionary limits on court openness could render this initial requirement moot. Many cases would turn on the balancing at the proportionality stage. Such a development would amount to a departure from *Sierra Club*, which is the appropriate framework and one which must be preserved.

[60] Further, recognizing an important interest in privacy generally could prove to be too open-ended and difficult to apply. Privacy is a complex and contextual concept (*Dagg*, at para. 67; see also B. McIsaac, K. Klein and S. Brown, *The Law of Privacy in Canada* (loose-leaf), vol. 1, at pp. 1-4; D. J. Solove, "Conceptualizing Privacy" (2002), 90 *Cal. L. Rev.* 1087, at p. 1090). Indeed, this Court has described the nature of limits of privacy as being in a state of "theoretical disarray" (*R. v. Spencer*,

2014 SCC 43, [2014] 2 S.C.R. 212, at para. 35). Much turns on the context in which privacy is invoked. I agree with the Toronto Star that a bald recognition of privacy as an important interest in the context of the test for discretionary limits on court openness, as the Trustees advance here, would invite considerable confusion. It would be difficult for courts to measure a serious risk to such an interest because of its multi-faceted nature.

[61] While I acknowledge these concerns have merit, I disagree that they require that privacy never be considered in determining whether there is a serious risk to an important public interest. I reach this conclusion for two reasons. First, the problem of privacy's complexity can be attenuated by focusing on the purpose underlying the public protection of privacy as it is relevant to the judicial process, in order to fix precisely on that aspect which transcends the interests of the parties in this context. That narrower dimension of privacy is the protection of dignity, an important public interest that can be threatened by open courts. Indeed, rather than attempting to apply a single unwieldy concept of privacy in all contexts, this Court has generally fixed on more specific privacy interests tailored to the particular situation (*Spencer*, at para. 35; *Edmonton Journal*, at p. 1362, per Wilson J.). That is what must be done here, with a view to identifying the public aspect of privacy that openness might inappropriately undermine.

[62] Second, I recall that in order to pass the first stage of the analysis one must not simply invoke an important interest, but must also overcome the presumption of

openness by showing a serious risk to this interest. The burden of showing a risk to such an interest on the facts of a given case constitutes the true initial threshold on the person seeking to restrict openness. It is never sufficient to plead a recognized important public interest on its own. The demonstration of a serious risk to this interest is still required. What is important is that the interest be accurately defined to capture only those aspects of privacy that engage legitimate public objectives such that showing a serious risk to that interest remains a high bar. In this way, courts can effectively maintain the guarantee of presumptive openness.

[63] Specifically, in order to preserve the integrity of the open court principle, an important public interest concerned with the protection of dignity should be understood to be seriously at risk only in limited cases. Nothing here displaces the principle that covertness in court proceedings must be exceptional. Neither the sensibilities of individuals nor the fact that openness is disadvantageous, embarrassing or distressing to certain individuals will generally on their own warrant interference with court openness (*MacIntyre*, at p. 185; *New Brunswick*, at para. 40; *Williams*, at para. 30; *Coltsfoot Publishing Ltd. v. Foster-Jacques*, 2012 NSCA 83, 320 N.S.R. (2d) 166, at para. 97). These principles do not preclude recognizing the public character of a privacy interest as important when it is related to the protection of dignity. They merely require that a serious risk be shown to exist in respect of this interest in order to justify, exceptionally, a limit on openness, as is the case with any important public interest under *Sierra Club*. As Professors Sylvette Guillemard and Séverine Menétrey explain, [TRANSLATION] "[t]he confidentiality of the proceedings may be justified, in

particular, in order to protect the parties' privacy . . . . However, the jurisprudence indicates that embarrassment or shame is not a sufficient reason to order that proceedings be held *in camera* or to impose a publication ban" (*Comprendre la procédure civile québécoise* (2nd ed. 2017), at p. 57).

[64] How should the privacy interest at issue be understood as raising an important public interest relevant to the test for discretionary limits on court openness in this context? It is helpful to recall that the orders below were sought to limit access to documents and information in the court files. The Trustees' argument on this point focused squarely on the risk of immediate and widespread dissemination of the personally identifying and other sensitive information contained in the sealed materials by the Toronto Star. The Trustees submit that this dissemination would constitute an unwarranted intrusion into the privacy of the affected individuals beyond the upset they have already suffered as a result of the publicity associated with the death of the Shermans.

[65] In my view, there is value in leaving individuals free to restrict when, how and to what extent highly sensitive information about them is communicated to others in the public sphere, because choosing how we present ourselves in public preserves our moral autonomy and dignity as individuals. This Court has had occasion to underscore the connection between the privacy interest engaged by open courts and the protection of dignity specifically. For example, in *Edmonton Journal*, Wilson J. noted that the impugned provision which would limit publication about matrimonial

proceedings addressed "a somewhat different aspect of privacy, one more closely related to the protection of one's dignity . . . namely the personal anguish and loss of dignity that may result from having embarrassing details of one's private life printed in the newspapers" (pp. 1363-64). In *Bragg*, as a further example, the protection of a young person's ability to control sensitive information was said to foster respect for "dignity, personal integrity and autonomy" (para. 18, citing *Toronto Star Newspaper Ltd.*, at para. 44).

[66] Consistent with this jurisprudence, I note by way of example that the Quebec legislature expressly highlighted the preservation of dignity when the *Sierra Club* test was codified in the *Code of Civil Procedure*, CQLR, c. C-25.01 ("*C.C.P.*"), art. 12 (see also Ministère de la Justice, *Commentaires de la ministre de la Justice: Code de procédure civile*, *chapitre C-25.01* (2015), art. 12). Under art. 12 *C.C.P.*, a discretionary exception to the open court principle can be made by the court if "public order, in particular the preservation of the dignity of the persons involved or the protection of substantial and legitimate interests", requires it.

[67] The concept of public order evidences flexibility analogous to the concept of an important public interest under *Sierra Club* yet it recalls that the interest invoked transcends, in importance and consequence, the purely subjective sensibilities of the persons affected. Like the "important public interest" that must be at serious risk to justify the sealing orders in the present appeal, public order encompasses a wide array of general principles and imperative norms identified by a legislature and the courts as

fundamental to a given society (see *Goulet v. Transamerica Life Insurance Co. of Canada*, 2002 SCC 21, [2002] 1 S.C.R. 719, at paras. 42-44, citing *Godbout v. Longueuil (Ville de)*, [1995] R.J.Q. 2561 (C.A.), at p. 2570, aff'd [1997] 3 S.C.R. 844). As one Quebec judge wrote, referring to *Sierra Club* prior to the enactment of art. 12 *C.C.P.*, the interest must be understood as defined [TRANSLATION] "in terms of a public interest in confidentiality" (see *3834310 Canada inc.*, at para. 24, per Gendreau J.A. for the court of appeal). From among the various considerations that make up the concept of public order and other legitimate interests to which art. 12 *C.C.P.* alludes, it is significant that dignity, and not an untailored reference to either privacy, harm or access to justice, was given pride of place. Indeed, it is that narrow aspect of privacy considered to be a fundamental right that courts had fixed upon before the enactment of art. 12 *C.C.P.* — [TRANSLATION] "what is part of one's personal life, in short, what constitutes a minimum personal sphere" (*Godbout*, at p. 2569, per Baudouin J.A.; see also *A. v. B.*, 1990 CanLII 3132 (Que. C.A.), at para. 20, per Rothman J.A.).

[68] The "preservation of the dignity of the persons involved" is now consecrated as the archetypal public order interest in art. 12 *C.C.P.* It is the exemplar of the *Sierra Club* important public interest in confidentiality that stands as justification for an exception to openness (S. Rochette and J.-F. Côté, "Article 12", in L. Chamberland, ed., *Le grand collectif*: *Code de procédure civile — Commentaires et annotations* (5th ed. 2020), vol. 1, at p. 102; D. Ferland and B. Emery, *Précis de procédure civile du Québec* (6th ed. 2020), vol. 1, at para. 1-111). Dignity gives concrete expression to this public order interest because all of society has a stake in its

preservation, notwithstanding its personal connections to the individuals concerned. This codification of *Sierra Club*'s notion of important public interest highlights the superordinate importance of human dignity and the appropriateness of limiting court openness on this basis as against an overbroad understanding of privacy that might be otherwise unsuitable to the open court context.

[69] Consistent with this idea, understanding privacy as predicated on dignity has been advanced as useful in connection with challenges brought by digital communications (K. Eltis, "The Judicial System in the Digital Age: Revisiting the Relationship between Privacy and Accessibility in the Cyber Context" (2011), 56 *McGill L.J.* 289, at p. 314).

[70] It is also significant, in my view, that the application judge in this case explicitly recognized, in response to the relevant arguments from the Trustees, an interest in "protecting the privacy and dignity of victims of crime and their loved ones" (para. 23 (emphasis added)). This elucidates that the central concern for the affected individuals on this point is not merely protecting their privacy for its own sake but privacy where it coincides with the public character of the dignity interests of these individuals.

[71] Violations of privacy that cause a loss of control over fundamental personal information about oneself are damaging to dignity because they erode one's ability to present aspects of oneself to others in a selective manner (D. Matheson, "Dignity and Selective Self-Presentation", in I. Kerr, V. Steeves and C. Lucock, eds., *Lessons from*

the Identity Trail: Anonymity, Privacy and Identity in a Networked Society (2009), 319, at pp. 327-28; L. M. Austin, "Re-reading Westin" (2019), 20 *Theor. Inq. L.* 53, at pp. 66-68; Eltis (2016), at p. 13). Dignity, used in this context, is a social concept that involves presenting core aspects of oneself to others in a considered and controlled manner (see generally Matheson, at pp. 327-28; Austin, at pp. 66-68). Dignity is eroded where individuals lose control over this core identity-giving information about themselves, because a highly sensitive aspect of who they are that they did not consciously decide to share is now available to others and may shape how they are seen in public. This was even alluded to by La Forest J., dissenting but not on this point, in *Dagg*, where he referred to privacy as "[a]n expression of an individual's unique personality or personhood" (para. 65).

[72] Where dignity is impaired, the impact on the individual is not theoretical but could engender real human consequences, including psychological distress (see generally *Bragg*, at para. 23). La Forest J., concurring, observed in *Dyment* that privacy is essential to the well-being of individuals (p. 427). Viewed in this way, a privacy interest, where it shields the core information associated with dignity necessary to individual well-being, begins to look much like the physical safety interest also raised in this case, the important and public nature of which is neither debated, nor, in my view, seriously debatable. The administration of justice suffers when the operation of courts threatens physical well-being because a responsible court system is attuned to the physical harm it inflicts on individuals and works to avoid such effects. Similarly, in my view, a responsible court must be attuned and responsive to the harm it causes to

other core elements of individual well-being, including individual dignity. This parallel helps to understand dignity as a more limited dimension of privacy relevant as an important public interest in the open court context.

[73] I am accordingly of the view that protecting individuals from the threat to their dignity that arises when information revealing core aspects of their private lives is disseminated through open court proceedings is an important public interest for the purposes of the test.

[74] Focusing on the underlying value of privacy in protecting individual dignity from the exposure of private information in open court overcomes the criticisms that privacy will always be at risk in open court proceedings and is theoretically complex. Openness brings intrusions on personal privacy in virtually all cases, but dignity as a public interest in protecting an individual's core sensibility is more rarely in play. Specifically, and consistent with the cautious approach to the recognition of important public interests, this privacy interest, while determined in reference to the broader factual setting, will be at serious risk only where the sensitivity of the information strikes at the subject's more intimate self.

[75] If the interest is ultimately about safeguarding a person's dignity, that interest will be undermined when the information reveals something sensitive about them as an individual, as opposed to generic information that reveals little if anything about who they are as a person. Therefore the information that will be revealed by court openness must consist of intimate or personal details about an individual — what this

Court has described in its jurisprudence on s. 8 of the *Charter* as the "biographical core" — if a serious risk to an important public interest is to be recognized in this context (*R. v. Plant*, [1993] 3 S.C.R. 281, at p. 293; *R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432, at para. 60; *R. v. Cole*, 2012 SCC 53, [2012] 3 S.C.R. 34, at para. 46). Dignity transcends personal inconvenience by reason of the highly sensitive nature of the information that might be revealed. This Court in *Cole* drew a similar line between the sensitivity of personal information and the public interest in protecting that information in reference to the biographical core. It held that "reasonable and informed Canadians" would be more willing to recognize the existence of a privacy interest where the relevant information cuts to the "biographical core" or, "[p]ut another way, the more personal and confidential the information" (para. 46). The presumption of openness means that mere discomfort associated with lesser intrusions of privacy will generally be tolerated. But there is a public interest in ensuring that openness does not unduly entail the dissemination of this core information that threatens dignity — even if it is "personal" to the affected person.

[76] The test for discretionary limits on court openness imposes on the applicant the burden to show that the important public interest is at serious risk. Recognizing that privacy, understood in reference to dignity, is only at serious risk where the information in the court file is sufficiently sensitive erects a threshold consistent with the presumption of openness. This threshold is fact specific. It addresses the concern, noted above, that personal information can frequently be found in court files and yet finding this sufficient to pass the serious risk threshold in every case would undermine the

structure of the test. By requiring the applicant to demonstrate the sensitivity of the information as a necessary condition to the finding of a serious risk to this interest, the scope of the interest is limited to only those cases where the rationale for not revealing core aspects of a person's private life, namely protecting individual dignity, is most actively engaged.

[77] There is no need here to provide an exhaustive catalogue of the range of sensitive personal information that, if exposed, could give rise to a serious risk. It is enough to say that courts have demonstrated a willingness to recognize the sensitivity of information related to stigmatized medical conditions (see, e.g., *A.B.*, at para. 9), stigmatized work (see, e.g., *Work Safe Twerk Safe v. Her Majesty the Queen in Right of Ontario*, 2021 ONSC 1100, at para. 28 (CanLII)), sexual orientation (see, e.g., *Paterson*, at paras. 76, 78 and 87-88), and subjection to sexual assault or harassment (see, e.g., *Fedeli v. Brown*, 2020 ONSC 994, at para. 9 (CanLII)). I would also note the submission of the intervener the Income Security Advocacy Centre, that detailed information about family structure and work history could in some circumstances constitute sensitive information. The question in every case is whether the information reveals something intimate and personal about the individual, their lifestyle or their experiences.

[78] I pause here to note that I refer to cases on s. 8 of the *Charter* above for the limited purpose of providing insight into types of information that are more or less personal and therefore deserving of public protection. If the impact on dignity as a

result of disclosure is to be accurately measured, it is critical that the analysis differentiate between information in this way. Helpfully, one factor in determining whether an applicant's subjective expectation of privacy is objectively reasonable in the s. 8 jurisprudence focuses on the degree to which information is private (see, e.g., *R. v. Marakah*, 2017 SCC 59, [2017] 2 S.C.R. 608, at para. 31; *Cole*, at paras. 44-46). But while these decisions may assist for this limited purpose, this is not to say that the remainder of the s. 8 analysis has any relevance to the application of the test for discretionary limits on court openness. For example, asking what the Trustees' reasonable expectation of privacy was here could invite a circular analysis of whether they reasonably expected their court files to be open to the public or whether they reasonably expected to be successful in having them sealed. Therefore, it is only for the limited purpose described above that the s. 8 jurisprudence is useful.

[79] In cases where the information is sufficiently sensitive to strike at an individual's biographical core, a court must then ask whether a serious risk to the interest is made out in the full factual context of the case. While this is obviously a fact-specific determination, some general observations may be made here to guide this assessment.

[80] I note that the seriousness of the risk may be affected by the extent to which information would be disseminated without an exception to the open court principle. If the applicant raises a risk that the personal information will come to be known by a large segment of the public in the absence of an order, this is a plainly more serious

risk than if the result will be that a handful of people become aware of the same information, all else being equal. In the past, the requirement that one be physically present to acquire information in open court or from a court record meant that information was, to some extent, protected because it was "practically obscure" (D. S. Ardia, "Privacy and Court Records: Online Access and the Loss of Practical Obscurity" (2017), 4 *U. Ill. L. Rev.* 1385, at p. 1396). However, today, courts should be sensitive to the information technology context, which has increased the ease with which information can be communicated and cross-referenced (see Bailey and Burkell, at pp. 169-70; Ardia, at pp. 1450-51). In this context, it may well be difficult for courts to be sure that information will not be broadly disseminated in the absence of an order.

[81] It will be appropriate, of course, to consider the extent to which information is already in the public domain. If court openness will simply make available what is already broadly and easily accessible, it will be difficult to show that revealing the information in open court will actually result in a meaningful loss of that aspect of privacy relating to the dignity interest to which I refer here. However, just because information is already accessible to some segment of the public does not mean that making it available through the court process will not exacerbate the risk to privacy. Privacy is not a binary concept, that is, information is not simply either private or public, especially because, by reason of technology in particular, absolute confidentiality is best thought of as elusive (see generally *R. v. Quesnelle*, 2014 SCC 46, [2014] 2 S.C.R. 390, at para. 37; *UFCW*, at para. 27). The fact that certain information is already available somewhere in the public sphere does not preclude

further harm to the privacy interest by additional dissemination, particularly if the feared dissemination of highly sensitive information is broader or more easily accessible (see generally Solove, at p. 1152; Ardia, at p. 1393-94; E. Paton-Simpson, "Privacy and the Reasonable Paranoid: The Protection of Privacy in Public Places" (2000), 50 *U.T.L.J.* 305, at p. 346).

[82] Further, the seriousness of the risk is also affected by the probability that the dissemination the applicant suggests will occur actually occurs. I hasten to say that implicit in the notion of risk is that the applicant need not establish that the feared dissemination will certainly occur. However, the risk to the privacy interest related to the protection of dignity will be more serious the more likely it is that the information will be disseminated. While decided in a different context, this Court has held that the magnitude of risk is a product of both the gravity of the feared harm and its probability (*R. v. Mabior*, 2012 SCC 47, [2012] 2 S.C.R. 584, at para. 86).

[83] That said, the likelihood that an individual's highly sensitive personal information will be disseminated in the absence of privacy protection will be difficult to quantify precisely. It is best to note as well that probability in this context need not be identified in mathematical or numerical terms. Rather, courts may merely discern probability in light of the totality of the circumstances and balance this one factor alongside other relevant factors.

[84] Finally, and as discussed above, individual sensitivities alone, even if they can be notionally associated with "privacy", are generally insufficient to justify a

restriction on court openness where they do not rise above those inconveniences and discomforts that are inherent to court openness (*MacIntyre*, at p. 185). An applicant will only be able to establish that the risk is sufficient to justify a limit on openness in exceptional cases, where the threatened loss of control over information about oneself is so fundamental that it strikes meaningfully at individual dignity. These circumstances engage "social values of superordinate importance" beyond the more ordinary intrusions inherent to participating in the judicial process that Dickson J. acknowledged could justify curtailing public openness (pp. 186-87).

[85] To summarize, the important public interest in privacy, as understood in the context of the limits on court openness, is aimed at allowing individuals to preserve control over their core identity in the public sphere to the extent necessary to preserve their dignity. The public has a stake in openness, to be sure, but it also has an interest in the preservation of dignity: the administration of justice requires that where dignity is threatened in this way, measures be taken to accommodate this privacy concern. Although measured by reference to the facts of each case, the risk to this interest will be serious only where the information that would be disseminated as a result of court openness is sufficiently sensitive such that openness can be shown to meaningfully strike at the individual's biographical core in a manner that threatens their integrity. Recognizing this interest is consistent with this Court's emphasis on the importance of privacy and the underlying value of individual dignity, but is also tailored to preserve the strong presumption of openness.

D. *The Trustees Have Failed to Establish a Serious Risk to an Important Public Interest*

[86] As *Sierra Club* made plain, a discretionary order limiting court openness can only be made where there is a serious risk to an important public interest. The arguments on this appeal concerned whether privacy is an important public interest and whether the facts here disclose the existence of serious risks to privacy and safety. While the broad privacy interest invoked by the Trustees cannot be relied on to justify a limit on openness, the narrower concept of privacy understood in relation to dignity is an important public interest for the purposes of the test. I also recognize that a risk to physical safety is an important public interest, a point on which there is no dispute here. Accordingly, the relevant question at the first step is whether there is a serious risk to one or both of these interests. For reasons that follow, the Trustees have failed to establish a serious risk to either. This alone is sufficient to conclude that the sealing orders should not have been issued.

(1) The Risk to Privacy Alleged in this Case Is Not Serious

[87] As I have said, the important public interest in privacy must be understood as one tailored to the protection of individual dignity and not the broadly defined interest the Trustees have asked this Court to recognize. In order to establish a serious risk to this interest, the information in the court files about which the Trustees are concerned must be sufficiently sensitive in that it strikes at the biographical core of the affected individuals. If it is not, there is no serious risk that would justify an exception

to openness. If it is, the question becomes whether a serious risk is made out in light of the facts of this case.

[88] The application judge never explicitly identified a serious risk to the privacy interest he identified but, to the extent he implicitly reached this conclusion, I respectfully do not share his view. His finding was limited to the observation that "[t]he degree of intrusion on that privacy and dignity [i.e., that of the victims and their loved ones] has already been extreme and, I am sure, excruciating" (para. 23). But the intense scrutiny faced by the Shermans up to the time of the application is only part of the equation. As the sealing orders can only protect against the disclosure of the information in these court files relating to probate, the application judge was required to consider the sensitivity of the specific information they contained. He made no such measure. His conclusion about the seriousness of the risk then focused entirely on the risk of physical harm, with no indication that he found that the Trustees met their burden as to the serious risk to the privacy interest. Said very respectfully and with the knowledge that the application judge did not have the benefit of the above framework, the failure to assess the sensitivity of the information constituted a failure to consider a required element of the legal test. This warranted intervention on appeal.

[89] Applying the appropriate framework to the facts of this case, I conclude that the risk to the important public interest in the affected individuals' privacy, as I have defined it above in reference to dignity, is not serious. The information the

Trustees seek to protect is not highly sensitive and this alone is sufficient to conclude that there is no serious risk to the important public interest in privacy so defined.

[90] There is little controversy in this case about the likelihood and extent of dissemination of the information contained in the estate files. There is near certainty that the Toronto Star will publish at least some aspects of the estate files if it is provided access. Given the breadth of the audience of its media organization, and the high-profile nature of the events surrounding the death of the Shermans, I have no difficulty in concluding that the affected individuals would lose control over this information to a significant extent should the files be open.

[91] With regard to the sensitivity of the information, however, the information contained in these files does not reveal anything particularly private about the affected individuals. What would be revealed might well cause inconvenience and perhaps embarrassment, but it has not been shown that it would strike at their biographical core in a way that would undermine their control over the expression of their identities. Their privacy would be troubled, to be sure, but the relevant privacy interest bearing on the dignity of the affected persons has not been shown to be at serious risk. At its highest, the information in these files will reveal something about the relationship between the deceased and the affected individuals, in that it may reveal to whom the deceased entrusted the administration of their estates and those who they wished or were deemed to wish to be beneficiaries of their property at death. It may also reveal some basic personal information, such as addresses. Some of the beneficiaries might

well, it may fairly be presumed, bear family names other than Sherman. I am mindful that the deaths are being investigated as homicides by the Toronto Police Service. However, even in this context, none of this information provides significant insight into who they are as individuals, nor would it provoke a fundamental change in their ability to control how they are perceived by others. The fact of being linked through estate documents to victims of an unsolved murder is not in itself highly sensitive. It may be the source of discomfort but has not been shown to constitute an affront to dignity in that it does not probe deeply into the biographical core of these individuals. As a result, the Trustees have failed to establish a serious risk to an important public interest as required by *Sierra Club*.

[92] The fact that some of the affected individuals may be minors is also insufficient to cross the seriousness threshold. While the law recognizes that minors are especially vulnerable to intrusions of privacy (see *Bragg*, at para. 17), the mere fact that information concerns minors does not displace the generally applicable analysis (see, e.g., *Bragg*, at para. 11). Even taking into account the increased vulnerability of minors who may be affected individuals in the probate files, there is no evidence that they would lose control of information about themselves that reveals something close to the core of their identities. Merely associating the beneficiaries or trustees with the Shermans' unexplained deaths is not enough to constitute a serious risk to the identified important public interest in privacy, defined in reference to dignity.

[93] Further, while the intense media scrutiny on the family following the deaths suggests that the information would likely be widely disseminated, it is not in itself indicative of the sensitivity of the information contained in the probate files.

[94] Showing that the information that would be revealed by court openness is sufficiently sensitive and private such that it goes to the biographical core of the affected individual is a necessary prerequisite to showing a serious risk to the relevant public interest aspect of privacy. The Trustees did not advance any specific reason why the contents of these files are more sensitive than they may seem at first glance. When asserting a privacy risk, it is essential to show not only that information about individuals will escape the control of the person concerned — which will be true in every case — but that this particular information concerns who the individuals are as people in a manner that undermines their dignity. This the Trustees have not done.

[95] Therefore, while some of the material in the court files may well be broadly disseminated, the nature of the information has not been shown to give rise to a serious risk to the important public interest in privacy, as appropriately defined in this context in reference to dignity. For that reason alone, I conclude that the Trustees have failed to show a serious risk to this interest.

(2) The Risk to Physical Safety Alleged in this Case is Not Serious

[96] Unlike the privacy interest raised in this case, there was no controversy that there is an important public interest in protecting individuals from physical harm. It is

worth underscoring that the application judge correctly treated the protection from physical harm as a distinct important interest from that of the protection of privacy and found that this risk of harm was "foreseeable" and "grave" (paras. 22-24). The issue is whether the Trustees have established a serious risk to this interest for the purpose of the test for discretionary limits on court openness. The application judge observed that it would have been preferable to include objective evidence of the seriousness of the risk from the police service conducting the homicide investigation. He nevertheless concluded there was sufficient proof of risk to the physical safety of the affected individuals to meet the test. The Court of Appeal says that was a misreading of the evidence, and the Toronto Star agrees that the application judge's conclusion as to the existence of a serious risk to safety was mere speculation.

[97] At the outset, I note that direct evidence is not necessarily required to establish a serious risk to an important interest. This Court has held that it is possible to identify objectively discernable harm on the basis of logical inferences (*Bragg*, at paras. 15-16). But this process of inferential reasoning is not a licence to engage in impermissible speculation. An inference must still be grounded in objective circumstantial facts that reasonably allow the finding to be made inferentially. Where the inference cannot reasonably be drawn from the circumstances, it amounts to speculation (*R. v. Chanmany*, 2016 ONCA 576, 352 O.A.C. 121, at para. 45).

[98] As the Trustees correctly argue, it is not just the probability of the feared harm, but also the gravity of the harm itself that is relevant to the assessment of serious

risk. Where the feared harm is particularly serious, the probability that this harm materialize need not be shown to be likely, but must still be more than negligible, fanciful or speculative. The question is ultimately whether this record allowed the application judge to objectively discern a serious risk of physical harm.

[99] This conclusion was not open to the application judge on this record. There is no dispute that the feared physical harm is grave. I agree with the Toronto Star, however, that the probability of this harm occurring was speculative. The application judge's conclusion as to the seriousness of the risk of physical harm was grounded on what he called "the degree of mystery that persists regarding both the perpetrator and the motives" associated with the deaths of the Shermans and his supposition that this motive might be "transported" to the trustees and beneficiaries (para. 5; see also paras. 19 and 23). The further step in reasoning that the unsealed estate files would lead to the perpetrator's next crime, to be visited upon someone mentioned in the files, is based on speculation, not the available affidavit evidence, and cannot be said to be a proper inference or some kind of objectively discerned harm or risk thereof. If that were the case, the estate files of every victim of an unsolved murder would pass the initial threshold of the test for a sealing order.

[100] Further, I recall that what is at issue here is not whether the affected individuals face a safety risk in general, but rather whether they face such a risk as a result of the openness of these court files. In light of the contents of these files, the

Trustees had to point to some further reason why the risk posed by this information becoming publicly available was more than negligible.

[101] The speculative character of the chain of reasoning leading to the conclusion that a serious risk of physical harm exists in this case is underlined by differences between these facts and those cases relied on by the Trustees. In *X. v. Y.*, 2011 BCSC 943, 21 B.C.L.R. (5th) 410, the risk of physical harm was inferred on the basis that the plaintiff was a police officer who had investigated "cases involving gang violence and dangerous firearms" and wrote sentencing reports for such offenders which identified him by full name (para. 6). In *R. v. Esseghaier*, 2017 ONCA 970, 356 C.C.C. (3d) 455, Watt J.A. considered it "self-evident" that the disclosure of identifiers of an undercover operative working in counter-terrorism would compromise the safety of the operative (para. 41). In both cases, the danger flowed from facts establishing that the applicants were in antagonistic relationships with alleged criminal or terrorist organizations. But in this case, the Trustees asked the application judge to infer not only the fact that harm would befall the affected individuals, but also that a person or persons exist who wish to harm them. To infer all this on the basis of the Shermans' deaths and the association of the affected individuals with the deceased is not reasonably possible on this record. It is not a reasonable inference but, as the Court of Appeal noted, a conclusion resting on speculation.

[102] Were the mere assertion of grave physical harm sufficient to show a serious risk to an important interest, there would be no meaningful threshold in the analysis.

Instead, the test requires the serious risk asserted to be well grounded in the record or the circumstances of the particular case (*Sierra Club*, at para. 54; *Bragg*, at para. 15). This contributes to maintaining the strong presumption of openness.

[103] Again, in other cases, circumstantial facts may allow a court to infer the existence of a serious risk of physical harm. Applicants do not necessarily need to retain experts who will attest to the physical or psychological risk related to the disclosure. But on this record, the bare assertion that such a risk exists fails to meet the threshold necessary to establish a serious risk of physical harm. The application judge's conclusion to the contrary was an error warranting the intervention of the Court of Appeal.

E. *There Would Be Additional Barriers to a Sealing Order on the Basis of the Alleged Risk to Privacy*

[104] While not necessary to dispose of the appeal, it bears mention that the Trustees would have faced additional barriers in seeking the sealing orders on the basis of the privacy interest they advanced. I recall that to meet the test for discretionary limits on court openness, a person must show, in addition to a serious risk to an important interest, that the particular order sought is necessary to address the risk and that the benefits of the order outweigh its negative effects as a matter of proportionality (*Sierra Club*, at para. 53).

[105] Even if the Trustees had succeeded in showing a serious risk to the privacy interest they assert, a publication ban — less constraining on openness than the sealing orders — would have likely been sufficient as a reasonable alternative to prevent this risk. The condition that the order be necessary requires the court to consider whether there are alternatives to the order sought and to restrict the order as much as reasonably possible to prevent the serious risk (*Sierra Club*, at para. 57). An order imposing a publication ban could restrict the dissemination of personal information to only those persons consulting the court record for themselves and prohibit those individuals from spreading the information any further. As I have noted, the likelihood and extent of dissemination may be relevant factors in determining the seriousness of a risk to privacy in this context. While the Toronto Star would be able to consult the files subject to a publication ban, for example, which may assist it in its investigations, it would not be able to publish and thereby broadly disseminate the contents of the files. A publication ban would seem to protect against this latter harm, which has been the focus of the Trustees' argument, while allowing some access to the file, which is not possible under the sealing orders. Therefore, even if a serious risk to the privacy interest had been made out, it would likely not have justified a sealing order, because a less onerous order would have likely been sufficient to mitigate this risk effectively. I hasten to add, however, that a publication ban is not available here since, as noted, the seriousness of the risk to the privacy interest at play has not been made out.

[106] Further, the Trustees would have had to show that the benefits of any order necessary to protect from a serious risk to the important public interest outweighed the

harmful effects of the order, including the negative impact on the open court principle (*Sierra Club*, at para. 53). In balancing the privacy interests against the open court principle, it is important to consider whether the information the order seeks to protect is peripheral or central to the judicial process (paras. 78 and 86; *Bragg*, at paras. 28-29). There will doubtless be cases where the information that poses a serious risk to privacy, bearing as it does on individual dignity, will be central to the case. But the interest in important and legally relevant information being aired in open court may well overcome any concern for the privacy interests in that same information. This contextual balancing, informed by the importance of the open court principle, presents a final barrier to those seeking a discretionary limit on court openness for the purposes of privacy protection.

VI. Conclusion

[107] The conclusion that the Trustees have failed to establish a serious risk to an important public interest ends the analysis. In such circumstances, the Trustees are not entitled to any discretionary order limiting the open court principle, including the sealing orders they initially obtained. The Court of Appeal rightly concluded that there was no basis for asking for redactions because the Trustees had failed at this stage of the test for discretionary limits on court openness. This is dispositive of the appeal. The decision to set aside the sealing orders rendered by the application judge should be affirmed. Given that I propose to dismiss the appeal on the existing record, I would dismiss the Toronto Star's motion for new evidence as being moot.

[108] For the foregoing reasons, I would dismiss the appeal. The Toronto Star requests no costs given the important public issues in dispute. As such, there will be no order as to costs.

Appeal dismissed.

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