COURT FILE NUMBER:	2301-13922
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
PROCEEDING	IN THE MATTER OF THE RECEIVERSHIP OF OGEN HOLDINGS LTD. and OGEN LTD.
APPLICANT	ALVAREZ & MARSAL CANADA INC.

BRIEF OF THE RECEIVER, ALVAREZ & MARSAL CANADA INC.

FOR A COMMERCIAL LIST HEARING ON FEBRUARY 16, 2024 AT 11:00 A.M. BEFORE THE HONOURABLE JUSTICE M.J. LEMA

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I. INTRODUCTION

1. This brief is provided in support of an application (the "**Application**") filed on February 8, 2024 by Alvarez & Marsal Canada Inc. ("**A&M**") in its capacity as the receiver and manager (the "**Receiver**") of certain assets, undertakings and properties (the "**Property**") of OGEN Holdings Ltd. ("**OHL**") and OGEN Ltd. ("**OL**") (collectively, "**OGEN**" or the "**Debtor**").

2. The Brief is in support of the following relief:

   (a) authorizing the Receiver to conduct, under the supervision of this Court, a sale and investment solicitation process ("**SISP**") in the form attached as **Schedule "A"** to the Application (the "**SISP Order**") and to perform all steps and actions required in connection with the SISP, as further described herein;

   (b) an Order sealing (the "**Sealing Order**") Confidential Appendix 1, Confidential Appendix 2, and Confidential Appendix 3 (collectively, the "**Confidential Appendices**") which are appended to the Second Report of the Receiver dated February 8, 2024 (the "**Second Report**") as further described herein in the form attached as **Schedule "B"** to the Application;

   (c) approval of the professional fees and disbursements of the Receiver and its legal counsel, MLT Akins LLP (the "**Professional Fees**").

3. The facts relevant to the Application are set out in detail in the First Report of the Receiver dated November 16, 2023 (the "**First Report**"), the Second Report, and the SISP. Capitalized terms not otherwise defined herein have the meaning ascribed to such terms in the First Report, the Second Report, and the SISP, as applicable.[1]

II. ISSUES

4. The issues to be determined by this Honourable Court are:

   (a) whether the form of SISP should be approved;

   (b) whether a Sealing Order should be granted with respect to the Confidential Appendices; and

[1] First Report of Alvarez & Marsal Canada Inc., dated November 16, 2023 ("**First Report**"); Second Report of Alvarez & Marsal Canada Inc., dated February 8, 2023 ("**Second Report**") at Appendix "A" – SISP.

(c) whether the Professional Fees should be approved.

III. LAW AND ARGUMENT

A. The SISP Should be Approved

5. This Court's jurisdiction to approve the SISP is pursuant to subsection 243(1) of the Bankruptcy and *Insolvency Act*, RSC 1985, c B-3 (the "***BIA***"), subsection 13(2) of the *Judicature Act*, RSA 2000, c J-2, (the "***Judicature Act***") and subsection 65(7) of the *Personal Property Security Act*, RSA 2000, c P-7 (the "***PPSA***") whereby the Court may appoint a receiver to take action that the Court considers to be just or convenient to do.[2]

6. In addition, subparagraphs 6(d), 6(k) and 6(l) of the Receivership Order expressly authorize the Receiver to:

(a) engage consultants, appraisals, agents, experts, auditors, accounts and managers to assist the Receiver in exercising its power and duties;

(b) market the Property, including advertising and soliciting offers in respect of the Property or any part or parts thereof and negotiate such terms and conditions of sale as the Receiver, in its discretion, may deem appropriate; and

(c) apply for any vesting order or other orders necessary to convey the Property or any parts thereof to a potential purchaser or purchasers, free and clear of liens and encumbrances affecting the Property.

7. In determining whether to approve the SISP, the Court must assess not whether a sales process is perfect, but only whether it is fair and reasonable.[3] Courts typically rely on the following factors set out by the Ontario Court of Appeal in *Royal Bank v Soundair* ("***Soundair***"), to determine if a sale process is fair and reasonable (collectively, the "***Soundair Criteria***"):

(a) whether the monitor has made a sufficient effort to get the best price and has not acted improvidently;

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[2] *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 subsection 243(1) (the "***BIA***"), at **TAB A**; *Judicature Act*, RSA 2000, c J-2 subsection 13(2) (the "***Judicature Act***"), at **TAB B**; *Personal Property Security Act*, RSA 2000, c P-7 subsection 65(7) (the "***PPSA***"), at **TAB C**.

[3] *Sanjel Corporation (Re),* 2016 ABQB 257 ("***Sanjel***") at para 80, at **TAB D**.

(b) whether the interests of all parties have been considered;

(c) the efficacy and integrity of the process by which offers are obtained; and

(d) whether there has been an unfairness in the working out of the process.[4]

8. As further explained by Justice Brown (as he then was) in *CCM Master Qualified Fund Ltd. v. Blutip Power Technologies Ltd.*, the approval of a particular form of SISP must keep the *Soundair* Criteria in mind and also assess the following criteria (collectively, the "***CCM* Criteria**"):

(a) the fairness, transparency and integrity of the proposed process;

(b) the commercial efficacy of the proposed process in light of the specific circumstances facing the monitor; and

(c) whether the sales process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale.[5]

9. The application of the *CCM* Criteria were recently affirmed in *Ontario Securities Commission v Bridging Finance Inc.* 2021 ONSC 5338 ("***Bridging Finance***") and *iSpan Systems LLP* 2023 ONSC 6212 ("***iSpan***").[6]

10. All of the *CCM* Criteria support the approval of the SISP for the reasons set out below.

(i) The Sale Procedure is Fair and Transparent

11. The proposed SISP is a fair and transparent marketing process designed to identify the highest and best offers for the Property and to maximize recoveries.

12. The SISP is fair and reasonable given the liquidity issues experienced by the Applicants. It strikes a balance between providing sufficient time for interested parties to complete thorough due diligence, while also maintaining a high degree of efficiency.

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[4] *Royal Bank v Soundair Corp*, 1991 CarswellOnt 205 (Ont CA) ("***Soundair***"), at para. 16 at **TAB E**.
[5] *Choice Properties Limited Partnership*, 2020 ONSC 3517, at paras. 15-16 ("***Choice Properties***"), at **TAB F**, citing *Soundair*, at **TAB E**, and *CCM Master Qualified Fund Ltd. v. Blutip Power Technologies Ltd*., 2012 ONSC 1750 ("***CCM Master***"), at **TAB G**.
[6] *Ontario Securities Commission v Bridging Finance Inc.* 2021 ONSC 5338 at paras. 7-8 ("***Bridging Finance***"), at **TAB H**; *iSpan Systems LLP* 2023 ONSC 6212 at paras 41-42 ("**iSpan**"), at **TAB I**.

13. The marketing and advertisement contemplated in the SISP will ensure the Property is adequately exposed to the market. The proposed SISP calls for a fulsome marketing process, with the Receiver and the Marketing Agent directly marketing to Known Potential Bidders interested and capable of closing such a transaction and issuing the Notice and Press Release in industry-specific publications.[7]

14. The proposed SISP also allows for potential bidders to conduct sufficient due diligence and make informed offers. Upon execution and delivery of the NDA to the Marketing Agent, each Known Potential Bidder is granted access to the Data Room in order to make an informed commercial decision as to whether they should pursue the Opportunity.[8]

15. Further, the SISP transparently articulates the bid and approval processes and the factors the Receiver uses to evaluate bids.[9]

(ii) The Sale Procedure is Commercially Efficient

16. The SISP contemplates two bid phases. These two bid phases afford the Receiver and Marketing Agent an opportunity to ensure that the process is running effectively and focus their resources on serious, competitive bids.[10]

17. The proposed SISP requires interested parties to submit Phase 1 Bids within approximately five weeks of the Teaser Letter being published, and Phase 2 Bids approximately 2 weeks thereafter. The SISP contemplates a closing date of April 19, 2024. While there is sufficient time for the parties to complete their necessary due diligence, they do need to move quickly given the limited funds available to run a sale process.

18. In *CCM*, the Court noted that:

> *…a timetable for the sale of a business in distress is a fast track ride that requires interested parties to move quickly or miss the opportunity. The court has to balance the need to move quickly, to address the real or perceived deterioration of value of business during a sale process or the limited availability of restructuring financing, with a realistic timetable that encourages and does not chill the auction process.*[11]

[7] Second Report at Appendix "A" – SISP at paras. 15-16.
[8] Second Report at Appendix "A" – SISP at para. 18.
[9] Second Report at Appendix "A" – SISP at para. 37-41.
[10] Second Report at Appendix "A" – SISP at para. 12.
[11] *CCM Master*, at para. 8 at **TAB G**.

19. As set out above, the SISP strikes a balance between providing sufficient time for interested parties to complete thorough due diligence, while also maintaining a high degree of efficiency.

20. The proposed timeline is as follows:

Milestone	Estimated Timeline
Pre-Marketing and Marketing	
SISP Order granted	February 16, 2024
Posting and distribution of non-confidential marketing materials	February 20, 2024
Further advertisement of the SISP in various publications	February 20, 2024 – March 1, 2024
Open Data Room	February 21, 2024
Phase I Qualified Bidders to review materials, complete due diligence and schedule appointments to inspect the Property	February 16, 2024 – March 22, 2024
Offer Submission and Evaluation	
Phase 1 Bid Deadline	**March 22, 2024**
Receiver to review the bids received, in consultation with the Marketing Agent and Lender	March 22, 2024 – March 25, 2024
Phase II Due Diligence Period	March 22, 2024 – April 8, 2024
Phase 2 Bid Deadline	**April 8, 2024**
Receiver to review the Qualified Bids, negotiate as required, and select Successful Bidder(s)	April 8, 2024 – April 12, 2024
Receiver to seek Court approval of Successful Bid(s) submitted by Successful Bidder(s)	Week of April 19, 2024 or as soon as practicable thereafter

21. The SISP is also commercially efficient as the Receiver may waive strict compliance with any of the bidding requirements pertaining to Phase 2 Qualified Bids to facilitate unique circumstances that arise in the course of the process.[12]

(iii) The SISP Optimizes the Chances of Securing the Best Possible Price for the Property

22. The SISP is designed to secure the best possible price for the Property. In particular, the Pre-Marketing Stage, Marketing Stage and Offer Submission and Evaluation Stage of the

[12] Second Report at Appendix "A" – SISP at para. 33.

SISP allow for the marketing, advertising, solicitation and evaluation of bids to secure the best possible bid.[13]

23. Further, the proposed SISP contemplates Investment Proposals which to preserve OGEN's licence issued under the *Cannabis Act*, SC 2018, c 16, which, given the specialized nature of OGEN's property, will help secure the best return for stakeholders.

24. Courts have consistently held that a receiver is accorded a high level of deference for their decisions and opinions. Within the context of approving a similar SISP, the Court in *iSpan* stated that:

> *I am satisfied that the proposed process here satisfies the CCM factors. In my view, it is not, in most cases, necessary or desirable for the Court to micro-manage the intricacies of every step of a proposed sales process. The Court cannot and should not do that, and indeed that is why the qualified and experienced Receiver is appointed to conduct the process in the first place. The Court needs to be satisfied that the process is fair, transparent and will be conducted with integrity. The objective is to maximize recovery for stakeholders, and to do so following a process that is conducted such that all stakeholders will have confidence in the outcome which results from confidence in the process by which that outcome was achieved.*[14]

25. The Receiver respectfully submits that it is supportive of the SISP and that its opinion should be provided deference.

26. The above analysis demonstrates the support of the *CCM* Criteria to the within Application, and the Applicants respectfully request that this Honourable Court approve the SISP.

B. The Confidential Appendices should be Sealed

27. The Receiver is seeking an Order sealing the Confidential Appendices.

28. The Court has authority to seal materials on the court record pursuant to Rule 6.28(b) and Division 4 of Part 6 of the *Alberta Rules of Court*.[15]

[13] Second Report at Appendix "A" – SISP at para. 11.
[14] *iSpan*, at para 45, at **TAB I**.
[15] *Alberta Rules of Court*, Alta Reg 124/2010, r 6.28(b) at **TAB J**.

29. In *Sherman Estate v Donovan* ("***Sherman Estate***"),[16] the Supreme Court of Canada modified the Sierra Club test for a sealing order, reframing the previous two-step inquiry into three steps. In order for the Court to grant a sealing order, it must be established that:

(a) court openness poses a serious risk to an important public interest;

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

(c) as a matter of proportionality, the benefits of the order outweigh its negative effects.[17]

30. In its recent decision in *Yukon (Government of) v Yukon Zinc Corporation*,[18] the Yukon Supreme Court stated that, in the insolvency context, it is standard practice to keep all aspects of the bidding confidential and that Courts have found that doing so appropriately satisfies the Sierra Club test, as modified by *Sherman Estate*. The Court found that sealing this information ensures the integrity of the sales and marketing process, and avoids the misuse of information by bidders in a subsequent process to obtain an unfair advantage.[19]

31. In *Yukon*, the important public interest at stake was found to be the commercial interests of the receiver, bidders, creditors and stakeholders in maintaining the integrity of the sales process. In that case, the receiver had represented to bidders that the process would be confidential until completion and the bidders all signed non- disclosure agreements before receiving access to the data. These interests were found to outweigh the negative effects of the sealing order.[20]

32. In this case, the Receiver submits that all three requirements of the *Sherman Estate* test have been met in the circumstances.

33. First, as in *Yukon*, the important public interest is the commercial interests of the Receiver, bidders, creditors, and stakeholders in maintaining the integrity of the sales and marketing process. In particular: (i) Confidential Appendix 1 contains the IP Bid Package, as defined

[16] *Sherman Estate v Donovan*, 2021 SCC 25 ("***Sherman Estate***"), at para 38, at **TAB K**.
[17] *Sherman Estate*, at para 38, at **TAB K**.
[18] *Yukon (Government of) v Yukon Zinc Corporation*, 2022 YKSC 2 ("***Yukon***"), at **TAB L**.
[19] *Yukon*, at para 39, at **TAB L**.
[20] *Yukon*, at para 44, at **TAB L**.

in the Second Report, that was sent to the interest parties after executing an NDA;[21] (ii) Confidential Appendix 2 summarize the initial offers received in the Initial IP Asset Bid Deadline, as defined in the Second Report; [22] and (iii) Confidential Appendix 3 summarizes the proposals submitted by the Brokers, as defined in the Second Report, outlining their professional and independent views of the market and potential realizations of Property, including any alternative development strategies that may increase potential realizations for the estate.[23]

34. Second, public disclosure of the IP Bid Package, as defined in the Second Report, the value of the initial offers received in the Initial IP Asset Bid Deadline, also as defined in the Second Report and the Proposals, also as defined in the Second Report, contained in the Confidential Appendices would undermine this important public interest.

35. The ability of the Receiver to obtain the highest and best price for the IP Assets, as defined in the Second Report, would be fundamentally and irreparably compromised if the content of Confidential Appendix 1 and Confidential Appendix 2 entered the public domain.

36. With respect to Confidential Appendix 3, if the information contained in the Proposals, as defined in the Second Report, is disclosed to third parties prior to of the marketing of the Property, the disclosure would materially jeopardize the potential realizations. If the sale does not close, such disclosure could materially jeopardize the value that the Receiver could subsequently obtain from a subsequent sale of the Property.

37. Third, as a matter of proportionality, the benefit of sealing the Confidential Appendices in order to protect the integrity of sale of the Intellectual Property, as defined in the Second Report, and the SISP, outweighs the potential negative effect of sealing them.

C. The Professional Fees should be approved

38. It is well established in Canadian law that a receiver has a *prima facie* right to be paid its fees and disbursements, including the fees and disbursements of its legal counsel.[24]

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[21] Second Report, at para 29.
[22] Second Report, at para 32.
[23] Second Report, at para 40.
[24] *Avant Enterprises Inc., (Re)*, 2013 BCSC 993,at para 33, at **TAB M**; see also *Polish Alliance of Canada v Polish Assn. of Toronto Ltd.*, 2015 ONSC 6458, at **TAB N**.

39. The principles governing the approval of the fees and disbursements of a court appointed receiver and its counsel are well established.[25] In seeking such approval, the Receiver must satisfy this court that the amount claimed is fair and reasonable having regard to:

(a) the nature, extent and value of the case;

(b) the complications and difficulties encountered;

(c) the degree of assistance provided by the parties;

(d) the time spent by the receiver;

(e) the receiver's knowledge, skill and experience;

(f) the receiver's diligence and thoroughness;

(g) the responsibilities assumed;

(h) the results achieved;

(i) the cost of comparable services; and

(j) any agreement as to fees between the parties.[26]

40. These factors are non-exhaustive.[27]

41. In the present case, the aforementioned considerations support the approval of the Professional Fees. Since the granting of the Receivership Order, the Receiver, with the assistance of its counsel, has acted in good faith and with due diligence to, among other things, conduct a security review of OGEN, correspond with various stakeholders and prepare the First Report, Second Report and the SISP. The Receiver also carried out various administrative and marketing activities in relation to the Property, including managing employment issues, communicating with suppliers, coordinating sales of Excluded Assets with the Alberta Gaming, Liquor and Cannabis Commission and the Debtors, and coordinating sales related to certain intellectual property assets. The

[25] *Servus Credit Union Ltd v Trimove Inc.*, 2015 ABQB 745 ("***Trimove***"), at para 6, at **TAB O**.
[26] *Trimove*, at paras 26-28, at **TAB O**; *Bank of Nova Scotia v Diemer*, 2014 ONCA 851 ("***Diemer***"), at paras 33 & 35, at **TAB P**.
[27] *Diemer*, at para 33, at **TAB P**.

circumstances surrounding this proceeding are extremely complex. The fees and disbursements of the Receiver and its counsel are commensurate with the complexity of these proceedings, the cost of comparable services, and the diligence, expertise and efforts of the Receiver and its counsel.

IV. RELIEF REQUESTED

42. The Receiver respectfully requests this Honourable Court grant:

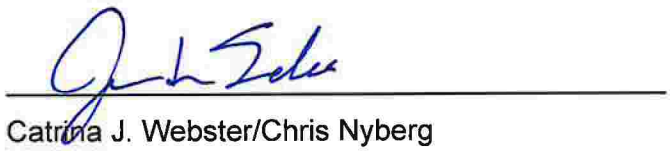
(a) the SISP Order;

(b) the Sealing Order with respect to the Confidential Appendices; and

(c) an Order approving the Professional Fees.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 8th day of February 2024.

MLT AIKINS LLP



for Catrina J. Webster/Chris Nyberg
Counsel for Alvarez & Marsal Canada Inc., in its capacity as Receiver of OGEN Holdings Ltd. and OGEN LTD.

LIST OF AUTHORITIES

TAB A

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

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province, if this Part is in force in the province immediately before that subsection comes into force, this Part applies in respect of the province.

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

s'appliquer à la province en cause, la présente partie s'applique à toute province dans laquelle elle était en vigueur à l'entrée en vigueur de ce paragraphe.

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

PART XI

Secured Creditors and Receivers

Court may appoint receiver

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

(a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;

(b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or

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

Restriction on appointment of receiver

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

(a) the insolvent person consents to an earlier enforcement under subsection 244(2); or

(b) the court considers it appropriate to appoint a receiver before then.

Definition of *receiver*

(2) Subject to subsections (3) and (4), in this Part, ***receiver*** means a person who

(a) is appointed under subsection (1); or

(b) is appointed to take or takes possession or control — of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a

PARTIE XI

Créanciers garantis et séquestres

Nomination d'un séquestre

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

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

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

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

Restriction relative à la nomination d'un séquestre

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

a) que la personne insolvable ne consente, aux termes du paragraphe 244(2), à l'exécution de la garantie à une date plus rapprochée;

b) qu'il soit indiqué, selon lui, de nommer un séquestre à une date plus rapprochée.

Définition de *séquestre*

(2) Dans la présente partie, mais sous réserve des paragraphes (3) et (4), ***séquestre*** s'entend de toute personne qui :

a) soit est nommée en vertu du paragraphe (1);

b) soit est nommément habilitée à prendre — ou a pris — en sa possession ou sous sa responsabilité, aux termes d'un contrat créant une garantie sur des biens, appelé « contrat de garantie » dans la présente partie,

business carried on by the insolvent person or bankrupt — under

(i) an agreement under which property becomes subject to a security (in this Part referred to as a "security agreement"), or

(ii) a court order made under another Act of Parliament, or an Act of a legislature of a province, that provides for or authorizes the appointment of a receiver or receiver-manager.

ou aux termes d'une ordonnance rendue sous le régime de toute autre loi fédérale ou provinciale prévoyant ou autorisant la nomination d'un séquestre ou d'un séquestre-gérant, la totalité ou la quasi-totalité des biens — notamment des stocks et comptes à recevoir — qu'une personne insolvable ou un failli a acquis ou utilisés dans le cadre de ses affaires.

Definition of *receiver* — subsection 248(2)

(3) For the purposes of subsection 248(2), the definition ***receiver*** in subsection (2) is to be read without reference to paragraph (a) or subparagraph (b)(ii).

Définition de *séquestre* — paragraphe 248(2)

(3) Pour l'application du paragraphe 248(2), la définition de ***séquestre***, au paragraphe (2), s'interprète sans égard à l'alinéa a) et aux mots « ou aux termes d'une ordonnance rendue sous le régime de toute autre loi fédérale ou provinciale prévoyant ou autorisant la nomination d'un séquestre ou d'un séquestre-gérant ».

Trustee to be appointed

(4) Only a trustee may be appointed under subsection (1) or under an agreement or order referred to in paragraph (2)(b).

Syndic

(4) Seul un syndic peut être nommé en vertu du paragraphe (1) ou être habilité aux termes d'un contrat ou d'une ordonnance mentionné à l'alinéa (2)b).

Place of filing

(5) The application is to be filed in a court having jurisdiction in the judicial district of the locality of the debtor.

Lieu du dépôt

(5) La demande de nomination est déposée auprès du tribunal compétent dans le district judiciaire de la localité du débiteur.

Orders respecting fees and disbursements

(6) If a receiver is appointed under subsection (1), the court may make any order respecting the payment of fees and disbursements of the receiver that it considers proper, including one that gives the receiver a charge, ranking ahead of any or all of the secured creditors, over all or part of the property of the insolvent person or bankrupt in respect of the receiver's claim for fees or disbursements, but the court may not make the order unless it is satisfied that the secured creditors who would be materially affected by the order were given reasonable notice and an opportunity to make representations.

Ordonnances relatives aux honoraires et débours

(6) Le tribunal peut, relativement au paiement des honoraires et débours du séquestre nommé en vertu du paragraphe (1), rendre toute ordonnance qu'il estime indiquée, y compris une ordonnance portant que la réclamation de celui-ci à l'égard de ses honoraires et débours est garantie par une sûreté de premier rang sur tout ou partie des biens de la personne insolvable ou du failli, avec préséance sur les réclamations de tout créancier garanti; le tribunal ne peut toutefois déclarer que la réclamation du séquestre est ainsi garantie que s'il est convaincu que tous les créanciers garantis auxquels l'ordonnance pourrait sérieusement porter atteinte ont été avisés à cet égard suffisamment à l'avance et se sont vu accorder l'occasion de se faire entendre.

Meaning of *disbursements*

(7) In subsection (6), ***disbursements*** does not include payments made in the operation of a business of the insolvent person or bankrupt.

1992, c. 27, s. 89; 2005, c. 47, s. 115; 2007, c. 36, s. 58.

Sens de *débours*

(7) Pour l'application du paragraphe (6), ne sont pas comptés comme débours les paiements effectués dans le cadre des opérations propres aux affaires de la personne insolvable ou du failli.

1992, ch. 27, art. 89; 2005, ch. 47, art. 115; 2007, ch. 36, art. 58.

Advance notice

244 (1) A secured creditor who intends to enforce a security on all or substantially all of

(a) the inventory,

(b) the accounts receivable, or

(c) the other property

of an insolvent person that was acquired for, or is used in relation to, a business carried on by the insolvent person shall send to that insolvent person, in the prescribed form and manner, a notice of that intention.

Period of notice

(2) Where a notice is required to be sent under subsection (1), the secured creditor shall not enforce the security in respect of which the notice is required until the expiry of ten days after sending that notice, unless the insolvent person consents to an earlier enforcement of the security.

No advance consent

(2.1) For the purposes of subsection (2), consent to earlier enforcement of a security may not be obtained by a secured creditor prior to the sending of the notice referred to in subsection (1).

Exception

(3) This section does not apply, or ceases to apply, in respect of a secured creditor

(a) whose right to realize or otherwise deal with his security is protected by subsection 69.1(5) or (6); or

(b) in respect of whom a stay under sections 69 to 69.2 has been lifted pursuant to section 69.4.

Idem

(4) This section does not apply where there is a receiver in respect of the insolvent person.

1992, c. 27, s. 89; 1994, c. 26, s. 9(E).

Receiver to give notice

245 (1) A receiver shall, as soon as possible and not later than ten days after becoming a receiver, by appointment or otherwise, in respect of property of an insolvent person or a bankrupt, send a notice of that fact, in the prescribed form and manner, to the Superintendent, accompanied by the prescribed fee, and

(a) in the case of a bankrupt, to the trustee; or

Préavis

244 (1) Le créancier garanti qui se propose de mettre à exécution une garantie portant sur la totalité ou la quasi-totalité du stock, des comptes recevables ou des autres biens d'une personne insolvable acquis ou utilisés dans le cadre des affaires de cette dernière doit lui en donner préavis en la forme et de la manière prescrites.

Délai

(2) Dans les cas où un préavis est requis aux termes du paragraphe (1), le créancier garanti ne peut, avant l'expiration d'un délai de dix jours suivant l'envoi du préavis, mettre à exécution la garantie visée par le préavis, à moins que la personne insolvable ne consente à une exécution à une date plus rapprochée.

Préavis

(2.1) Pour l'application du paragraphe (2), le créancier garanti ne peut obtenir le consentement visé par le paragraphe avant l'envoi du préavis visé au paragraphe (1).

Non-application du présent article

(3) Le présent article ne s'applique pas, ou cesse de s'appliquer, au créancier garanti dont le droit de réaliser sa garantie ou d'effectuer toute autre opération, relativement à celle-ci est protégé aux termes du paragraphe 69.1(5) ou (6), ou à l'égard de qui a été levée, aux termes de l'article 69.4, la suspension prévue aux articles 69 à 69.2.

Idem

(4) Le présent article ne s'applique pas dans les cas où une personne agit, à titre de séquestre, à l'égard de la personne insolvable.

1992, ch. 27, art. 89; 1994, ch. 26, art. 9(A).

Avis du séquestre

245 (1) Le séquestre doit, dans les meilleurs délais et au plus tard dans les dix jours suivant la date où il devient, par nomination ou autrement, séquestre à l'égard de tout ou partie des biens d'une personne insolvable ou d'un failli, en donner avis, en la forme et de la manière prescrites, au surintendant — l'avis devant, dans ce cas, être accompagné des droits prescrits — et :

a) s'agissant d'un failli, au syndic;

(b) in the case of an insolvent person, to the insolvent person and to all creditors of the insolvent person that the receiver, after making reasonable efforts, has ascertained.

b) s'agissant d'une personne insolvable, à celle-ci, à tous ceux de ses créanciers dont il a pu, en y allant de ses meilleurs efforts, dresser la liste.

Idem

(2) A receiver in respect of property of an insolvent person shall forthwith send notice of his becoming a receiver to any creditor whose name and address he ascertains after sending the notice referred to in subsection (1).

Idem

(2) Le séquestre de tout ou partie des biens d'une personne insolvable est tenu de donner immédiatement avis de son entrée en fonctions à tout créancier dont il prend connaissance des nom et adresse après l'envoi de l'avis visé au paragraphe (1).

Names and addresses of creditors

(3) An insolvent person shall, forthwith after being notified that there is a receiver in respect of any of his property, provide the receiver with the names and addresses of all creditors.

1992, c. 27, s. 89.

Nom et adresse des créanciers

(3) La personne insolvable doit, dès qu'elle est avisée de l'entrée en fonctions d'un séquestre à l'égard de tout ou partie de ses biens, fournir à celui-ci la liste des noms et adresses de tous ses créanciers.

1992, ch. 27, art. 89.

Receiver's statement

246 (1) A receiver shall, forthwith after taking possession or control, whichever occurs first, of property of an insolvent person or a bankrupt, prepare a statement containing the prescribed information relating to the receivership, and shall forthwith provide a copy thereof to the Superintendent and

(a) to the insolvent person or the trustee (in the case of a bankrupt); and

(b) to any creditor of the insolvent person or the bankrupt who requests a copy at any time up to six months after the end of the receivership.

Déclaration

246 (1) Le séquestre doit, dès sa prise de possession ou, si elle survient plus tôt, sa prise de contrôle de tout ou partie des biens d'une personne insolvable ou d'un failli, établir une déclaration contenant les renseignements prescrits au sujet de l'exercice de ses attributions à l'égard de ces biens; il en transmet sans délai une copie au surintendant et :

a) à la personne insolvable ou, en cas de faillite, au syndic;

b) à tout créancier de la personne insolvable ou du failli qui en fait la demande au plus tard six mois après que le séquestre a complété l'exercice de ses attributions en l'espèce.

Receiver's interim reports

(2) A receiver shall, in accordance with the General Rules, prepare further interim reports relating to the receivership, and shall provide copies thereof to the Superintendent and

(a) to the insolvent person or the trustee (in the case of a bankrupt); and

(b) to any creditor of the insolvent person or the bankrupt who requests a copy at any time up to six months after the end of the receivership.

Rapports provisoires

(2) Le séquestre doit, conformément aux Règles générales, établir des rapports provisoires supplémentaires portant sur son mandat et en fournir un exemplaire au surintendant, à la personne insolvable ou, dans le cas d'un failli, au syndic et à tout créancier de la personne insolvable ou du failli qui en demande un exemplaire dans les six mois suivant la fin du mandat du séquestre.

Receiver's final report and statement of accounts

(3) A receiver shall, forthwith after completion of duties as receiver, prepare a final report and a statement of accounts, in the prescribed form and containing the prescribed information relating to the receivership, and shall

Rapport définitif et état de comptes

(3) Dès qu'il cesse d'occuper ses fonctions, le séquestre établit, en la forme prescrite, un rapport définitif et un état de comptes contenant les renseignements prescrits relativement à l'exercice de ses attributions; il en transmet sans délai une copie au surintendant et :

forthwith provide a copy thereof to the Superintendent and

(a) to the insolvent person or the trustee (in the case of a bankrupt); and

(b) to any creditor of the insolvent person or the bankrupt who requests a copy at any time up to six months after the end of the receivership.

1992, c. 27, s. 89.

a) à la personne insolvable ou, en cas de faillite, au syndic;

b) à tout créancier de la personne insolvable ou du failli qui en fait la demande au plus tard six mois après que le séquestre a complété l'exercice de ses attributions en l'espèce.

1992, ch. 27, art. 89.

Intellectual property — sale or disposition

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

Propriété intellectuelle — disposition

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

Intellectual property — disclaimer or resiliation

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

2018, c. 27, s. 268.

Propriété intellectuelle — résiliation

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

2018, ch. 27, art. 268.

Good faith, etc.

247 A receiver shall

(a) act honestly and in good faith; and

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

1992, c. 27, s. 89.

Obligation de diligence

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

1992, ch. 27, art. 89.

Powers of court

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

Pouvoirs du tribunal

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

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

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

or both.

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

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

Idem

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

1992, c. 27, s. 89.

Idem

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

1992, ch. 27, art. 89.

Receiver may apply to court for directions

249 A receiver may apply to the court for directions in relation to any provision of this Part, and the court shall give, in writing, such directions, if any, as it considers proper in the circumstances.

1992, c. 27, s. 89.

Instructions du tribunal

249 Le tribunal donne au séquestre qui lui en fait la demande les instructions écrites qu'il estime indiquées sur toute disposition de la présente partie.

1992, ch. 27, art. 89.

Right to apply to court

250 (1) An application may be made under section 248 or 249 notwithstanding any order of a court as defined in subsection 243(1).

Ordonnance d'un autre tribunal

250 (1) Une demande peut être présentée aux termes des articles 248 ou 249 indépendamment de toute ordonnance qu'aurait pu rendre un tribunal au sens du paragraphe 243(1).

Where inconsistency

(2) Where there is any inconsistency between an order made under section 248, or a direction given under section 249, and

(a) the security agreement or court order under which the receiver acts or was appointed, or

(b) any other order of the court that appointed the receiver,

the order made under section 248 or the direction given under section 249, as the case may be, prevails to the extent of the inconsistency.

1992, c. 27, s. 89.

Incompatibilité

(2) Les dispositions d'une ordonnance rendue aux termes de l'article 248 ou d'une instruction donnée aux termes de l'article 249 l'emportent sur les dispositions incompatibles du contrat de garantie ou de l'ordonnance du tribunal portant nomination du séquestre, de même que sur les dispositions incompatibles de toute autre ordonnance rendue par le même tribunal.

1992, ch. 27, art. 89.

Protection of receivers

251 No action lies against a receiver for loss or damage arising from the sending or providing by the receiver of a

Protection du séquestre

251 Le séquestre est à l'abri de toute poursuite pour le préjudice ou les pertes résultant de l'envoi ou de la

TAB B

Province of Alberta

JUDICATURE ACT

Revised Statutes of Alberta 2000
Chapter J-2

Current as of April 1, 2023

Office Consolidation

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General jurisdiction

8 The Court in the exercise of its jurisdiction in every proceeding pending before it has power to grant and shall grant, either absolutely or on any reasonable terms and conditions that seem just to the Court, all remedies whatsoever to which any of the parties to the proceeding may appear to be entitled in respect of any and every legal or equitable claim properly brought forward by them in the proceeding, so that as far as possible all matters in controversy between the parties can be completely determined and all multiplicity of legal proceedings concerning those matters avoided.

RSA 1980 cJ-1 s8

Province-wide jurisdiction

9 Each judge of the Court has jurisdiction throughout Alberta, and in all causes, matters and proceedings, other than those of the Court of Appeal, has and shall exercise all the powers, authorities and jurisdiction of the Court.

RSA 1980 cJ-1 s9

Part 2
Powers of the Court

Relief against forfeiture

10 Subject to appeal as in other cases, the Court has power to relieve against all penalties and forfeitures and, in granting relief, to impose any terms as to costs, expenses, damages, compensation and all other matters that the Court sees fit.

RSA 1980 cJ-1 s10

Declaration judgment

11 No proceeding is open to objection on the ground that a judgment or order sought is declaratory only, and the Court may make binding declarations of right whether or not any consequential relief is or could be claimed.

RSA 1980 cJ-1 s11

Canadian law

12 When in a proceeding in the Court the law of any province or territory is in question, evidence of that law may be given, but in the absence of or in addition to that evidence the Court may take judicial cognizance of that law in the same manner as of any law of Alberta.

RSA 1980 cJ-1 s12

Part performance

13(1) Part performance of an obligation either before or after a breach thereof shall be held to extinguish the obligation

(a) when expressly accepted by a creditor in satisfaction, or

(b) when rendered pursuant to an agreement for that purpose though without any new consideration.

(2) An order in the nature of a mandamus or injunction may be granted or a receiver appointed by an interlocutory order of the Court in all cases in which it appears to the Court to be just or convenient that the order should be made, and the order may be made either unconditionally or on any terms and conditions the Court thinks just.

RSA 1980 cJ-1 s13

Interest

14(1) In addition to the cases in which interest is payable by law or may be allowed by law, when in the opinion of the Court the payment of a just debt has been improperly withheld and it seems to the Court fair and equitable that the party in default should make compensation by the payment of interest, the Court may allow interest for the time and at the rate the Court thinks proper.

(2) Subsection (1) does not apply in respect of a cause of action that arises after March 31, 1984.

RSA 1980 cJ-1 s15;1984 cJ-0.5 s10

Equity prevails

15 In all matters in which there is any conflict or variance between the rules of equity and common law with reference to the same matter, the rules of equity prevail.

RSA 1980 cJ-1 s16

Equitable relief

16(1) If a plaintiff claims to be entitled

(a) to an equitable estate or right,

(b) to relief on an equitable ground

(i) against a deed, instrument or contract, or

(ii) against a right, title or claim whatsoever asserted by a defendant or respondent in the proceeding,

or

(c) to any relief founded on a legal right,

the Court shall give to the plaintiff the same relief that would be given by the High Court of Justice in England in a proceeding for the same or a like purpose.

(2) If a defendant claims to be entitled

(a) to an equitable estate or right, or

(b) to relief on an equitable ground

(i) against a deed, instrument or contract, or

(ii) against a right, title or claim asserted by a plaintiff in the proceeding,

the Court shall give to each equitable defence so alleged the same effect by way of defence against the claim of the plaintiff that the High Court of Justice in England would give if the same or like matters had been relied on by way of defence in a proceeding for the same or like purpose.

(3) The Court may grant to a defendant respecting an equitable estate or right or other matter of equity and also respecting a legal estate, right or title claimed or asserted by the defendant, all such relief against a plaintiff that the defendant has properly claimed by the defendant's pleading.

(4) The Court shall recognize and take notice

(a) of all equitable estates, titles and rights, and

(b) of equitable duties and liabilities,

appearing incidentally in the course of a proceeding, in the same manner in which the High Court of Justice in England would recognize and take notice of them in a proceeding instituted in that Court.

RSA 1980 cJ-1 s17;1991 c21 s15

Stay of proceedings

17(1) In a proceeding

(a) for the recovery of a debt or liquidated demand,

(b) for the enforcement of a security or charge on land,

(c) for the determination or specific performance of an agreement for the sale of land, or

(d) for the possession of land,

the Court in its discretion may at any stage of the proceeding grant a stay of proceedings on any terms that the Court may prescribe, and in like manner the Court in its discretion may with or without imposing terms, after final judgment in any proceeding whatsoever, grant a stay of execution of an order for sale or of other similar

process, including a stay of an order for possession of land, and may by an order granting the stay extend the time for payment of a judgment debt or the time for doing any act or making any payment prescribed by a previous order of the Court.

(2) In a proceeding

(a) for the enforcement of a security or charge on farm land,

(b) for the determination or specific performance of an agreement for the sale of farm land, or

(c) for the possession of farm land,

the Court, notwithstanding the terms of an order or judgment previously made, shall grant a stay of proceedings when it appears that the default of the mortgagor, purchaser or other person is in whole or in part caused by the inability of the mortgagor, purchaser or other person to market grain by reason of lack of elevator space or by reason of the restrictions as to delivery of grain imposed under the *Canadian Wheat Board Act* (Canada) and the regulations under that Act.

(3) A stay granted under subsection (2) remains in force until set aside by the Court, but shall be set aside only on application after notice and on the Court being satisfied that the conditions existing at the time of the granting of the stay and by reason of which it was granted no longer exist.

(4) Nothing in this section limits the authority of the Court, at or after the time that a judgment is granted, to stay the enforcement of the judgment or to remove or extend any stay already granted in respect of the judgment.

RSA 2000 cJ-2 s17;2009 c53 s1

Restraint by prohibition, injunction

18(1) No proceeding at any time pending in the Court shall be restrained by prohibition or injunction, but each matter of equity on which an injunction against the prosecution of the proceeding might formerly have been obtained either unconditionally or on any terms or conditions may be relied on by way of defence in the proceeding.

(2) Nothing in subsection (1) disables the Court from directing, if it thinks fit, a stay of proceedings in a proceeding pending before it, and any person, whether a party or not to any proceeding at any time pending in the Court

TAB C

Province of Alberta

PERSONAL PROPERTY SECURITY ACT

Revised Statutes of Alberta 2000
Chapter P-7

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(b) more than twice in each year, if the security agreement or any agreement modifying the security agreement provides for payment by the debtor during a period of time in excess of one year after the day value was given by the secured party.

1988 cP-4.05 s63

Application to Court

64 On application by a debtor, a creditor of a debtor, a secured party or a sheriff, civil enforcement agency or a person with an interest in the collateral, the Court may

(a) make any order, including a binding declaration of right and injunctive relief, that is necessary to ensure compliance with this Part or section 17, 36, 37 or 38,

(b) give directions to any person regarding the exercise of the person's rights or discharge of the person's obligations under this Part or section 17, 36, 37 or 38,

(c) relieve any person from compliance with the requirements of this Part or section 17, 36, 37 or 38,

(d) stay enforcement of rights provided in this Part or section 17, 36, 37 or 38, or

(e) make any order, including a binding declaration of right and injunctive relief, that is necessary to ensure protection of the interests of any person in the collateral.

1988 cP-4.05 s64;1990 c31 s51;1994 cC-10.5 s148

Receiver

65(1) A security agreement may provide for the appointment of a receiver and, except as provided in this or any other Act, the receiver's rights and duties.

(2) A receiver shall

(a) take the collateral into the receiver's custody and control in accordance with the security agreement or order under which the receiver is appointed, but unless appointed a receiver-manager or unless the Court orders otherwise, shall not carry on the business of the debtor,

(b) where the debtor is a corporation, immediately notify the Registrar of Corporations of the receiver's appointment or discharge,

(c) open and maintain a bank account in the receiver's name as receiver for the deposit of all money coming under the receiver's control as a receiver,

(d) keep detailed records, in accordance with accepted accounting practices, of all receipts, expenditures and transactions involving collateral or other property of the debtor,

(e) prepare at least once in every 6-month period after the date of the receiver's appointment financial statements of the receiver's administration that, as far as is practical, are in the form required by section 155 of the *Business Corporations Act,* and

(f) on completion of the receiver's duties, render a final account of the receiver's administration in the form referred to in clause (e), and, where the debtor is a corporation, send copies of the final account to the debtor, the directors of the debtor and to the Registrar of Corporations.

(3) The debtor, and where the debtor is a corporation, a director of the debtor, or the authorized representative of any of them, may, by a demand in writing given to the receiver, require the receiver to make available for inspection the records referred to in subsection (2)(d) during regular business hours at the place of business of the receiver in the Province.

(4) The debtor, and where the debtor is a corporation, a director of the debtor, a sheriff, civil enforcement agency, a person with an interest in the collateral in the custody or control of the receiver, or the authorized representative of any of them, may, by a demand in writing given to the receiver, require the receiver to provide copies of the financial statements referred to in subsection (2)(e) or the final account referred to in subsection (2)(f) or make available those financial statements or that final account for inspection during regular business hours at the place of business of the receiver in the Province.

(5) The receiver shall comply with the demands referred to in subsection (3) or (4) not later than 10 days from the date of receipt of the demand.

(6) The receiver may require the payment in advance of a fee in the amount prescribed for each demand made under subsection (4), but the sheriff and the debtor, or in the case of an incorporated debtor, a director of the debtor, are entitled to inspect or to receive a copy of the financial statements and final account without charge.

(7) On the application of any interested person, the Court may

(a) appoint a receiver;

(b) remove, replace or discharge a receiver whether appointed by the Court or pursuant to a security agreement;

(c) give directions on any matter relating to the duties of a receiver;

(d) approve the accounts and fix the remuneration of a receiver;

(e) exercise with respect to a receiver appointed under a security agreement the jurisdiction it has with respect to a receiver appointed by the Court;

(f) notwithstanding anything contained in a security agreement or other document providing for the appointment of a receiver, make an order requiring a receiver or a person by or on behalf of whom the receiver is appointed, to make good any default in connection with the receiver's custody, management or disposition of the collateral of the debtor or to relieve that person from any default or failure to comply with this Part.

(8) The powers referred to in subsection (7) and in section 64 are in addition to any other powers the Court may exercise in its jurisdiction over receivers.

(9) Unless the Court orders otherwise, a receiver is required to comply with sections 60 and 61 only when the receiver disposes of collateral other than in the course of carrying on the business of the debtor.

1988 cP-4.05 s65;1990 c31 s52;1994 cC-10.5 s148

Part 6
Miscellaneous

Proper exercise of rights, duties and obligations

66(1) All rights, duties or obligations arising under a security agreement, under this Act or under any other applicable law shall be exercised or discharged in good faith and in a commercially reasonable manner.

(2) A person does not act in bad faith merely because the person acts with knowledge of the interest of some other person.

(3) The principles of the common law, equity and the law merchant, except insofar as they are inconsistent with the express provisions of this Act, supplement this Act and continue to apply.

1988 cP-4.05 s66;1990 c31 s53

Deemed damages

67(1) If a person fails, without reasonable excuse, to discharge any duties or obligations imposed on the person by this Act, the person to whom the duty or obligation is owed has a right to recover loss or damage that was reasonably foreseeable as liable to result from the failure.

(2) Where a secured party, without reasonable excuse, fails to comply with obligations or limitations

(a) in section 43(11), 49 or 50, or

(b) in section 17, 18, 60, 61 or 62 and the collateral is consumer goods,

the debtor or, in a case of non-compliance with section 43(11), 49 or 50, the person disclosed as the debtor in a registration, is deemed to have suffered damages not less than the amount prescribed.

(3) In an action for a deficiency, the defendant may raise as a defence the failure on the part of the secured party to comply with obligations in section 17, 18, 60 or 61, but non-compliance shall limit the right to the deficiency only to the extent that it has affected the right of the defendant to protect the defendant's interest in the collateral or has made the accurate determination of the deficiency impracticable.

(4) Where a secured party fails to comply with obligations in section 17, 18, 60 or 61, the onus is on the secured party to show that the failure,

(a) where the collateral is consumer goods, did not affect the debtor's ability to protect the debtor's interest in the collateral by redemption or reinstatement of the security agreement, or otherwise, or

(b) did not make the accurate determination of the deficiency impracticable.

(5) Except as otherwise provided in this Act, a provision in a security agreement or any other agreement that purports to exclude a duty or onus imposed by this Act, or that purports to limit the liability of or the amount of damages recoverable from a person

who has failed to discharge a duty or obligation imposed on the person by this Act is void.

1988 cP-4.05 s67;1990 c31 s54

Unauthorized discharge or amendment

68 A person who signs a financing change statement to discharge or amend a registration and who is not authorized to do so by the secured party, section 49 or 50, the regulations or an order of the Court is liable to the secured party for loss or damage suffered by the secured party.

1990 c31 s55

Order of the Court

69 On application of an interested person, the Court may

(a) make an order determining questions of priority or entitlement to collateral;

(b) direct an action to be brought or an issue to be tried.

1988 cP-4.05 s68

Application to Court

70(1) An application to the Court under this Act must be made in accordance with the *Alberta Rules of Court*.

(2) Where a provision of this Act providing for an application to the Court does not specify the persons to whom notice is to be given, unless the Court otherwise directs notice shall be given to all persons whose rights may be affected.

(3) Repealed 2009 c53 s129.

RSA 2000 cP-7 s70;2009 c53 s129

Extension of time

71 Where in Part 5 or in sections 11, 36(13), 38(13) and 43(11) a time is prescribed not later than or before which an act or thing must be done, the Court, on application made before or after the time has expired, may extend or abridge, conditionally or otherwise, the time for compliance.

1988 cP-4.05 s69;1990 c31 s57

Service of notices and demands

72(1) A notice or demand, other than a demand under section 18, or a copy of a financing statement or statement used by the Registry to confirm a registration referred to in section 43(11), required or permitted to be given under this Act may be given as follows:

(a) to an individual by leaving it with the individual or by registered mail addressed by indicating the individual's

name and residence, or the name and place of any business of the person;

(b) to a partnership

(i) by leaving it with

(A) one or more of the general partners, or

(B) a person having at the time the notice is given control or management of the partnership business, or

(ii) by registered mail addressed to

(A) the partnership,

(B) any one or more of the general partners, or

(C) any person having at the time the notice is given control or management of the partnership business

at the address of the partnership business;

(c) to a corporation, other than a municipality or Metis settlement,

(i) by leaving it with an officer or director of the corporation or person in charge of any office or place of business of the corporation,

(ii) by leaving it with, or by registered mail addressed to, the registered or head office of the corporation, and

(iii) where the corporation has its registered or head office outside the Province, by leaving it with, or by registered mail addressed to, the attorney for service for the corporation appointed under Part 21 of the *Business Corporations Act;*

(d) to a municipal corporation by leaving it with, or by registered mail addressed to, the principal office of the corporation or to the chief administrative officer of the corporation;

(e) to a Metis settlement by leaving it with, or by registered mail addressed to, the permanent office of the settlement or to the settlement administrator;

(f) to an association

(i) by leaving it with an officer of the association, or

(ii) by registered mail addressed to an officer of the association at the address of the officer;

(g) to a cooperative

(i) by leaving it with an officer or director of the cooperative or a person in charge of any office or place of business of the cooperative,

(ii) by leaving it with or by registered mail addressed to the registered or head office of the cooperative, and

(iii) where the cooperative has its registered or head office outside the Province, by leaving it with, or by registered mail addressed to, the attorney for service for the cooperative appointed under Part 17 of the *Cooperatives Act*.

(2) A document referred to in subsection (1) that is sent by registered mail is deemed to be given when it is actually received by the addressee or on the expiry of 10 days after the mail is registered, whichever is earlier.

RSA 2000 cP-7 s72;2001 cC-28.1 s462

Regulations

73(1) The Lieutenant Governor in Council may make regulations

(a) respecting the kinds of goods the leases of which are not within the scope of this Act;

(b) respecting the Registry and the duties of the Registrar, including the transition from a prior registry system to the system established by this Act;

(c) respecting fees;

(d) respecting the registration of financing statements or other writings;

(e) respecting

(i) the form, contents and manner of use of financing statements and other writings,

(ii) the form, contents and manner of use of notices referred to in this Act, including notices registered under section 49 in a land titles office or at another place determined in accordance with clause (s)(ii),

(iii) the manner in which collateral, including proceeds collateral, is described in financing statements and other writings, and

(iv) what kinds of goods may be or shall be described in part by serial number and the requirements of a description by serial number;

(f) permitting the registration in the Registry of any interest, right or claim relating to property;

(g) respecting the manner in which any registration may be made in the Registry under this Act or any other enactment;

(h) respecting the application of Part 4 to interests that are permitted or required to be registered in the Registry;

(i) respecting searches of the Registry, the meaning of "search result" and the method of disclosure of registered information, including the form of a search result;

(j) requiring or permitting the use of statements to confirm the registration of information on financing statements and other writings;

(j.1) governing the examination of collateral and information to be provided by persons for the purposes of determining or verifying the location of collateral;

(k) respecting the Registrar's power to amend a registration that contains an error caused by the act of the Registrar or Registry employees;

(l) respecting abbreviations, expansions or symbols that may be used in a financing statement or other form, notice or document used in connection with the registration of security interests or the disclosure of information in the Registry;

(m) respecting any matter required or authorized by this Act to be prescribed;

(n) respecting the retention and disposition of Registry records;

(o) respecting the period of time during which a registration in the Registry or under section 49 is effective;

(p) authorizing the Registrar to enter into agreements whereby fees may be charged on account;

(q) respecting agreements under clause (p);

(r) respecting the grounds on which the Registrar may refuse to register a financing statement or other writing;

(s) respecting

(i) the application of all or part of sections 36 and 37 to any land for which a certificate of title has not been issued under the *Land Titles Act,* and

(ii) the place at which a registration is to be made and the manner of registration;

(t) respecting the circumstances in which a financing statement registered prior to October 1, 1990 is deemed to continue the perfected status of an interest referred to in section 77(4).

(2) A regulation under this section may be made in respect of different persons or transactions or classes of persons or transactions.

RSA 2000 cP-7 s73;2009 c53 s129

Conflict with other legislation

74(1) If there is a conflict between this Act and a provision for the protection of consumers in any Act, the provision of that Act prevails.

(2) Except as otherwise provided in this or any other Act, if there is a conflict between this Act and any Act other than those referred to in subsection (1), this Act prevails.

1988 cP-4.05 s72

References

75(1) A reference in an Act, regulation, agreement or document to the *Assignment of Book Debts Act*, RSA 1980 cA-47, the *Bills of Sale Act*, RSA 1980 cB-5, the *Business Corporations Act*, the *Chattel Security Registries Act*, SA 1983 cC-7.1, or the *Conditional Sales Act*, RSA 1980 cC-21, that relates to a security interest in personal property or fixtures is deemed to be a reference to this Act or to the corresponding provisions of this Act.

(2) A reference in an Act, regulation, agreement or document to a chattel mortgage, lien note, conditional sales contract, floating charge, pledge or assignment of book debts, or any derivative of those terms, or to any transaction which under this Act is a security agreement, is deemed to be a reference to the corresponding kind of security agreement under this Act.

TAB D

2016 ABQB 257
Alberta Court of Queen's Bench

Sanjel Corp., Re

2016 CarswellAlta 900, 2016 ABQB 257, [2016] A.W.L.D. 2474, 266 A.C.W.S. (3d) 542, 36 C.B.R. (6th) 239

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended

In the Matter of the Compromise or Arrangement of Sanjel Corporation, Sanjel Canada Ltd., Terracor Group Ltd., Suretech Group Ltd., Suretech Completions Canada Ltd., Sanjel Energy Services (USA) Inc., Sanjel (USA) Inc., Suretech Completions (USA) Inc., Sanjel Capital (USA) Inc., Terracor (USA) Inc., Terracor Resources (USA) Inc., Terracor Logistics (USA) Inc., Sanjel Middle East Ltd., Sanjel Latin America Limited and Sanjel Energy Services DMCC

B.E. Romaine J.

Heard: April 28, 2016
Judgment: May 16, 2016
Docket: Calgary 1601-03143

Counsel: Chris Simard, Alexis Teasdale, for Sanjel Group

***B.E. Romaine J.*:**

I. Introduction

1 The Sanjel debtors seek orders approving certain sales of assets generated through a SISP that was conducted prior to the debtors filing under the *Companies' Creditors Arrangement Act*. The proceeds of the sales will be insufficient to fully payout the secured creditor, and will generate no return to unsecured creditors, including the holders of unsecured Bonds.

2 The Trustee of the Bonds challenged the process under which the SISP was conducted, and the use of what he characterized as a liquidating CCAA in this situation. He alleged that the use of the CCAA to effect a pre-packaged sale of the debtors' assets for the benefit of the secured creditor was an abuse of the letter and spirit of the CCAA. He also alleged that bad faith and collusion tainted the integrity of the SISP.

3 After reviewing extensive evidence and hearing submissions from interested parties, I decided to allow the application to approve the sales, and dismiss the application of the Trustee. These are my reasons.

II. Facts

4 On April 4, 2016, the Sanjel Corporation and its affiliates were granted an Initial Order under the Companies' Creditors Arrangement Act, R.S.C. 1985, c.C-36, as amended. PricewaterhouseCoopers Inc., ("PWC") was appointed as Monitor of the applicants.

5 Sanjel and its affiliates (the "Sanjel Group" or "Sanjel") provide fracturing, cementing, coiled tubing and reservoir services to the oil and gas industry in Canada, the United States and Saudi Arabia. Sanjel Corporation, the parent company, is a private corporation, the shares of which are owned by the MacDonald Group Ltd. It was incorporated under the Alberta Business Corporations Act in 1980, and its principal executive and registered office is located in Calgary. Four of the other members of the group were incorporated in Alberta, seven in various American states and three in offshore jurisdictions.

6 The sole director of all Canadian and US Sanjel companies resides in Calgary, as do all of the officers of these companies. The affidavit in support of the Initial Order sets out a number of factors relevant to the Sanjel Group's ability to file under the CCAA and that would be relevant to a determination of a Centre of Main Interest ("COMI") of the Sanjel Group. In subsequent Chapter 15 proceedings in the United States, the US Court declared COMI to be located in Canada and the CCAA proceedings to be a "foreign main proceeding." It is clear that the Sanjel Group is a fully integrated business centralized in Calgary.

7 Sanjel Corporation and Sanjel (USA) Inc. are borrowers under a credit agreement (the "Bank Credit Facility") dated April 21, 2015 with a banking syndicate (the "Syndicate") led by Alberta Treasury Branches as agent. The total amount outstanding under the Bank Credit Facility at the time of the CCAA filing was approximately $415.5 million. The Syndicate has perfected security interests over substantially all of the assets of the Sanjel Group, and is the principal secured creditor of the Sanjel Group in these CCAA proceedings.

8 On June 18, 2014, Sanjel Corporation issued US $300 million 7.5% Callable Bonds due June 19, 2019. Interest is payable on the Bonds semi-annually on June 19 and December 19. The Bonds are unsecured. Nordic Trust ASA (the "Trustee") is the trustee under the Bond Agreement.

9 The Sanjel Group has been severely impacted by the catastrophic drop in global oil and gas prices since mid-2014. Over the last 18 months, the Sanjel Group has taken aggressive steps to cut costs, including by reducing staffing levels by more than half. However, by late October, 2015, Sanjel Corporation was in breach of certain covenants under the Bank Credit Facility. By late December, 2016, the Syndicate was in a position to exercise enforcement rights. In addition, an interest payment of USD $11,250,000 was due on the Bonds on December 19, 2015. Since late 2015, the Sanjel Group has been in negotiations with both the Syndicate and two bondholders, Ascribe Capital LLC and Clearlake Capital Group L.P., (the "Ad Hoc Bondholders"). The Ad Hoc Bondholders hold over 45% of the Bonds.

10 In the fall of 2015, Sanjel Corporation engaged Bank of America Merrill Lynch ("BAML") to identify strategic partners and attempt to raise additional capital for the Sanjel Group. BAML contacted 28 private equity firms; 19 non-disclosure agreements were executed and 9 management presentations were made. However, the BAML process did not result in a successful transaction.

11 In December, 2015, the Ad Hoc Bondholders retained a New York law firm, Fried Frank, as their legal advisor and Moelis & Company as their financial advisor.

12 On December 10, 2015, Fried Frank conveyed a proposal from the Ad Hoc Bondholders to Sanjel. Under this proposal, Sanjel would be required to pay the USD $11,250,000 interest payment. Provided that the interest payment was made, the bondholders would agree to a standstill agreement for the same period as may be agreed with the Syndicate. In return, the Ad Hoc Bondholders would lend back their pro rata share of that interest payment to Sanjel in return for secured notes ranking *pari passu* with the Bank Credit Facility, bearing interest at the same rate as the Bank Credit Facility plus 2%. The new notes would not be repaid until the Bank Credit Facility was repaid.

13 The Ad Hoc Bondholders indicated that they would consider acting as standby lenders to Sanjel for the remainder of the interest payment and would offer the other bondholders the option of lending back their pro-rata share to Sanjel on the same basis. If they agreed to be standby lenders, the Ad Hoc Bondholders would receive a commitment fee equal to 10% of their standby commitment, payable in new notes.

14 The proposal letter indicated that the Ad Hoc Bondholders were aware that Sanjel had been engaged in a process to address liquidity and leverage issues over the past few months, including attempting to raise equity to sell assets. In their view, Sanjel had exhausted those efforts, and the only remaining option was a deal negotiated with the bondholders. However, the Ad Hoc Bondholders would only embark on such a process if the December 19, 2015 interest payment was made.

15 Sanjel rejected the proposal on December 14, 2015. It is noteworthy that the Bank Credit Facility includes a negative covenant prohibiting Sanjel from granting a security interest over its assets. The Syndicate advised Sanjel that the Ad Hoc

Bondholders' proposal to have their existing unsecured position elevated to rank *pari passu* with the Bank Credit Facility was unacceptable, and that it would not provide its consent.

16 On December 15, 2015, the Ad Hoc Bondholders advised counsel to the Syndicate that they wished to work towards a restructuring, which they envisaged would involve paying down a portion of the Syndicate's debt "in an amount to be mutually agreed on". They also suggested that Sanjel would implement a rights offering to holders of Bonds and then to existing equity, with a conversion of the Bonds into new debt and equity.

17 On or about December 15, 2015, the Ad Hoc Bondholders sent Sanjel a draft waiver and standstill agreement, which required the payment of part of the December 19 interest payment by December 23, 2015 and the payment of the fees and disbursements of Fried Frank and Moelis in return for arranging for a bondholder meeting to be called to consider a period of forbearance to March 31, 2016.

18 Fried Frank and Moelis executed Non-Disclosure Agreements ("NDAs") on December 24, 2015, but the Ad Hoc Bondholders did not, thus not restricting their right to trade the Bonds. Fried Frank and Moelis were granted access to a Sanjel virtual database ("VDR") on January 9, 2016.

19 By January, 2016, given the prolonged downturn in oil and gas prices, Sanjel's liquidity was limited. Events of default under the Bank Credit Facility that had occurred as of October 31, 2015 were exacerbated by a cross-default based on the non-payment of interest under the Bond Agreement. As of January 31, 2016, the Sanjel Group had total consolidated liabilities of approximately $1.064 billion.

20 Sanjel was facing very significant negative cash flow projections over the next few months. As of early January, 2016, Sanjel's projected cash flows showed that its cash position would deteriorate by more than half as of the first week of April, 2016, and would be further reduced by anticipated forbearance payments.

21 In the circumstances, Sanjel agreed with the Syndicate to implement a Sales and Investment Solicitation Process ("SISP"). Sanjel states that it hoped that if a SISP was implemented, it might find a transaction that preserved the business as a going concern, which would maximize stakeholder value and preserve goodwill and jobs.

22 In mid-January, 2016, Sanjel engaged PWC as a proposed Monitor in the event it would become necessary to file under the CCAA.

23 The SISP was commenced on behalf of Sanjel by its financial advisors, PJT Partners Inc. ("PJT") and Credit Suisse Securities (CANADA), Inc. ("CS") on January 17, 2016. The advisors contacted prospective bidders, many of whom had already been identified through the BAML process of late 2015.

24 The process of soliciting non-bidding indications of interest ran from January 17, 2016 to February 22, 2016. On January 26, 2016, the advisers updated and opened a VDR available to anyone who had signed a NDA. A teaser letter was distributed and meetings and conference calls were held with bidders. A process letter was distributed on January 28, 2016. Nine indications of interest were submitted on or about February 22, 2016.

25 Before and during the SISP process, Sanjel was negotiating with both the Syndicate and the Ad Hoc Bondholders with respect to separate forbearance agreements, and with the Ad Hoc Bondholders with respect to NDAs to be signed by the Ad Hoc Bondholders. The Ad Hoc Bondholders complain that there was a delay of almost a month before Sanjel's counsel responded to a mark-up of a NDA provided by Fried Frank, but negotiations were stymied by the Ad Hoc Bondholders' insistence that the December interest payment be paid. Until this issue was settled, there was no reason to finalize the NDAs. In addition, it was not until January 29, 2016 that representatives of the Ad Hoc Bondholders advised Sanjel that they were prepared to be restricted from trading and therefore able to receive confidential information. During this period of time, the Ad Hoc Bondholders refused to meet with Sanjel management when they travelled to New York on January 20, 2016.

26 On February 1, 2016, counsel to Sanjel sent counsel to the Ad Hoc Bondholders a copy of the draft forbearance agreement between the Syndicate and Sanjel, which set out the key dates of the SISP, including the completion of definitive purchase and sales agreements by March 24, 2016. It would have been clear to the Ad Hoc Bondholders from this draft that Sanjel was proceeding on a dual track basis, considering both a potential stand-alone restructuring of the company and a sales process.

27 The Ad Hoc Bondholders made a second proposal to Sanjel on February 2, 2016, very shortly after the NDAs were signed. This proposal involved the Syndicate recovering a portion of its loan from Sanjel's existing cash reserves and a rights offering backstopped by the Ad Hoc Bondholders. A portion of the Bonds would be converted into equity. The December interest payment would have to be paid. Sanjel's management team met with the Ad Hoc Bondholders and their advisors in New York on February 3, 2016 and Sanjel's team, the Syndicate and its advisors and the Ad Hoc Bondholders met on February 8, 2016.

28 Sanjel delivered an indicative restructuring term sheet to the Ad Hoc Bondholders on February 12, 2016, as required by the forbearance agreement that the parties were negotiating. The restructuring term sheet emphasized that a bondholder-led restructuring would require significant new money, a significant capital commitment and ongoing capital, with a significant pay-down of the Syndicate's debt.

29 Commencing on February 15, 2016, Sanjel allowed representatives of Alverez and Marsal ("A&M"), advisors to the Ad Hoc Bondholders, to attend in Calgary and conduct due diligence.

30 On February 18, 2016, Sanjel uploaded to its VDR the final, unsigned versions of the Syndicate Amending and Forbearance Agreement and the Bondholders Forbearance Agreement.

31 Under the SISP, preliminary, non-binding indications of interest were delivered to the advisors and the company by February 22, 2016. Six such indications of interest were received, all of which were materially superior to the Ad Hoc Bondholders proposal of February 2, 2016. The Ad Hoc Bondholders have admitted that they were aware of the milestones under the SISP and the Bank Forbearance Agreement by mid-February, 2016, although it is clear that their advisors would have been aware of these milestones from February 1, 2016.

32 As part of finalizing the form of Bond Forbearance Agreement, counsel for Sanjel and for the Ad Hoc Bondholders had negotiated a form of summons that would be used to call a bondholder meeting to consider the agreement. The only item for consideration to be considered at the meeting was to be the Bond Forbearance Agreement. The plan was to have 2/3 of the bondholders approve and execute the Bond Forbearance Agreement, and then to hold a bondholders meeting.

33 Instead, on February 25, 2016, the Ad Hoc Bondholders caused the Trustee to issue a summons for a meeting on March 10, 2016 to consider and vote on a) whether to declare the Bonds in default, accelerate them and exercise remedies, including commencing involuntary bankruptcy proceedings against Sanjel under Chapter 11 of the United States Bankruptcy Code, including claims against the MacDonald family and MacBain Properties Ltd., which owns the business premises that are leased by the Sanjel Group or b) approve the Bond Forbearance Agreement.

34 On March 2, 2016, the Ad Hoc Bondholders submitted a restructuring proposal to Sanjel. This proposal provided no cash recovery to the Syndicate. Instead, a portion of the debt owed to the Syndicate would be converted to a new loan and the remainder extinguished, with the Syndicate receiving warrants in a reorganized company. There would be a Chapter 11 filing and the bondholders would provide a debtor-in-possession ("DIP") facility to rank *pari passu* with the Syndicate debt. Bondholders who contributed to the DIP would receive new 2nd lien notes for part of their previous notes, the remainder being extinguished. The DIP facility would be converted into 100% of the equity of the reorganized company. Sanjel would be required to appoint a Chief Restructuring Officer ("CRO") designated by the Ad Hoc Bondholders.

35 On March 4, 2016, in a follow-up letter to a telephone meeting on March 3, 2016, US counsel to the Syndicate wrote to Fried Frank requesting that the March 10 bondholders meeting be adjourned to March 31, 2016. Canadian counsel to Sanjel made the same request of the Trustee.

36 Also on March 4, 2016, a template Asset Purchase Agreement ("APA") for SISP bidders was posted on the VDRs, which disclosed a CCAA/Chapter 15 filing with PWC as designated Monitor. This template agreement was available to the Ad Hoc Bondholders and their advisors.

37 Counsel for the Ad Hoc Bondholders replied on March 5, 2016 that they would advise the Trustee to postpone the March 10 meeting subject to:

a) a response to their March 2 proposal by March 10, 2016;

b) full disclosure of company records for A&M's representative, "so that [that representative] is ready and best positioned to commence his duties as Chief Restructuring Officer for the Company".

c) payment by March 7, 2016 of roughly USD $2.2 million in fees and disbursements for the Ad Hoc Bondholders' legal and financial advisors.

38 After some negotiation, Sanjel agreed to these terms for an adjournment, other than with respect to a small deduction in fees and disbursements. Sanjel made it clear that it reserved all rights with respect to the appointment of a CRO and a filing under Chapter 11, which it would not agree to at that time. On March 8, 2016 the Trustee confirmed that the meeting would be postponed to March 31.

39 On March 9, 2016, second round bids under the SISP were received. Five bids were received, all of which were materially superior to the Ad Hoc Bondholders' March 2, 2016 proposal in terms of cash recovery for the Syndicate.

40 An information update conference for bondholders was scheduled to be held on March 11, 2016, at which Sanjel, the Trustee and the Ad Hoc Bondholders would provide an update to any bondholder that wished to call in. This was rescheduled by the Trustee to March 31, 2016.

41 On March 11, 2016, the Syndicate sent the counter-offer required by the postponement of meeting agreement to the Ad Hoc Bondholders. This counter-proposal made it clear that there would be a CCAA/Chapter 15 process, rather than a Chapter 11 process. While this counter-proposal is confidential, it is fair to say that the parties were far apart in their negotiations, particularly with respect to treatment of the Syndicate indebtedness.

42 Also on March 11, 2016, a representative of Sanjel met with A&M's representative and discussed Sanjel's intention to disclaim certain leases in the anticipated CCAA proceedings.

43 Following receipt of the second round bids, Sanjel and its advisors identified the top three bidders and began negotiations with them with the goal of finalizing due diligence and being in a position to execute final APAs on March 24, 2016, as indicated in the Bank Forbearance Agreement.

44 In the meantime, Sanjel continued meetings with the A&M representative, who asked for, and was provided with:

a) access to the newly created VDR for second stage bidders/investors in the SISP on March 12, 2016.

b) draft materials relating to the CCAA filing, including current drafts of cash flow projections and drafts of stakeholder communication regarding the CCAA, on March 21, 2016.

45 On March 20, 2016, the Ad Hoc Bondholders provided Sanjel and the Syndicate with a third restructuring proposal. This one provided for some paydown of the Syndicate's debt, but involved less than half of that recovery in new money, about the same amount in debt secured by accounts receivable and a substantial amount of bank debt rolled over into a new loan. It also provided for a DIP facility to rank *pari passu* with a new bank credit facility in the event of a liquidation and the conversion of some bondholder debt into secured notes.

46 On March 23, 2016, counsel for Sanjel requested that the Trustee postpone the bondholder meeting scheduled for March 31, 2016 to April 14, 2016. He also proposed to set up the requested informational update on March 31, 2016. On March 25, 2016, counsel for the Trustee consented to this request.

47 In the SISP, final bids were received from the three top bidders on March 24, 2016, with negotiations to continue on final APAs. On the same day, Sanjel and its advisors hosted a call with A&M and Moelis, during which they walked through a 13 week cash forecast.

48 On March 31, 2016 the Syndicate and the Ad Hoc Bondholders had discussions with respect to the Ad Hoc Bondholders' March 20 proposal. In previous correspondence, the Syndicate's counsel had questioned the adequacy of the proposed DIP financing in the proposal and noted Sanjel's significant cash needs following exit from an insolvency proceeding, as opposed to the proposal's assumption that there would be better cash flow. At the conclusion of the call, the Ad Hoc Bondholders indicated that they would provide further modelling with respect to their proposal.

49 On April 3, 2016, Sanjel entered into final APAs with the proposed purchasers, STEP and Liberty. On April 4, 2016, the Sanjel Group filed for CCAA protection. Counsel for Sanjel Group disclosed that the application was made without notice to the Ad Hoc Bondholders He submitted that notice would imperil the CCAA proceedings as the bondholders may, with notice, have pre-empted the CCAA filing by an involuntary filing under Chapter 11. There is no requirement to give notice to unsecured creditors of a CCAA filing. There are circumstances, and this was one of them, where it is appropriate to seek an initial order on an ex parte basis:

> This may be an appropriate — even necessary — step in order to prevent "creditors from moving to realize on their claims, essentially a 'stampede to the assets' once creditors learn of the debtor's financial distress": J.P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at p. 55 ("Rescue!"); see also *Algoma Steel Inc., Re* (2001), 25 C.B.R. (4th) 194 (Ont. C.A.), at para. 7

50 On April 11, 2016, the Ad Hoc Bondholders presented their fourth proposal for restructuring, not to Sanjel but to the Syndicate. This proposal increases the amount the bondholders would contribute to Sanjel for new equity, which would be used to repay a portion of the Syndicate's loan.

51 According to Fried Frank, the Syndicate's counsel responded on April 13, 2016 advising that while they appreciated the work done by the Ad Hoc Bondholders, the Syndicate preferred the sale route. The Syndicate proposed alternatives that it might consider involving a higher pay-out of the Syndicate's debt than offered by the April 11, 2016 proposal. The Ad Hoc Bondholders have not responded.

52 The Sanjel Group apply for an order approving the sales transactions generated through the SISP, being a sales agreement between Sanjel and STEP Energy Services Ltd., including an assignment of the sale of the debtor's cementing assets in favour of 1961531 Alberta Ltd., and a sales agreement between Sanjel and Liberty.

53 The Trustee applied for an order dismissing the application for approval of these transactions, allowing the Ad Hoc Bondholders to propose a plan of arrangement, lifting the stay to allow the Trustee to commence a Chapter 11 filing and directing a new Court-monitored SISP, among other applications

III. Applicable Law

54 Section 36(3) of the CCAA sets out six non-exhaustive factors that must be considered in approving a sale by a CCAA debtor of assets outside the ordinary course of business. They are:

(a) whether the process leading to the proposed sale was reasonable in the circumstances;

(b) whether the Monitor approved the process leading to the proposed sale;

(c) whether the Monitor filed with the court a report stating that in its opinion the sale would be more beneficial to creditors than a sale or disposition under a bankruptcy;

(d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale on creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

55 In this case, the Monitor was not in place at the time of the process leading to the proposed sales, nor at the time the SISP was commenced. However, the Monitor has given an opinion on the process, which I will consider as part of my review.

56 Prior to the enactment of section 36, CCAA courts considered what are known as the Soundair principles in considering approval application, and they are still useful guidelines:

a) Was there a sufficient effort made to get the price at issue? Did the debtor company act improvidently?

b) Were the interests of all parties considered?

c) Are there any questions about the efficacy and integrity of the process by which offers were obtained?

d) Was there unfairness in the working out of the process?

Royal Bank v. Soundair Corp., 1991 CarswellOnt 205 (Ont. C.A.) at para 20.

57 Gascon, J. (as he then was) suggested in *AbitibiBowater inc., Re*, 2010 QCCS 1742 (C.S. Que.) at paras 70-72 that a court should give due consideration to two further factors:

a) the business judgment rule, in that a court will not lightly interfere with the exercise of the commercial and business judgment of the debtor company and the monitor in the context of an asset sale where the marketing and sale process was fair, reasonable, transparent and efficient; and

b) the weight to be given to the recommendation of the monitor.

58 As noted by Gascon, J., it is not desirable for a bidder to wait to the last minute, even up to a court approval stage, to submit its best offer. However, a court can consider such an offer, if it is evidence that the debtor company did not properly carry out its duty to obtain the best price for creditors.

IV. Analysis

59 The Trustee has raised a number of objections to the proposed sales, many of which relate to the factors and principles set out in section 36 of the CCAA, the Soundair principles and the AbitibiBowater factors:

A. The Trustee submits that the CCAA can only be used to liquidate the assets of a debtor company and distribute the proceeds where such use is uncontested or where there is clear evidence that the CCAA provides scope for greater recoveries than would be available on a bankruptcy.

60 Most of the cases relied upon by the Trustee with respect to this submission predate the 2009 enactment of section 36 of the CCAA. While prior to this change to the CCAA, there was some authority that questioned whether the CCAA should be used to carry out a liquidation of a debtors' assets, there was also authority that accepted this as a proper use of the statute.

61 An analysis of the pre-section 36 state of the law on this issue, and support for the latter view, is well summarized in *Nortel Networks Corp., Re*, [2009] O.J. No. 3169 (Ont. S.C.J. [Commercial List]). As noted by Morawetz, J. at para 28 of

that decision, the CCAA is a flexible statute, particularly useful in complex insolvency cases in which the court is required to balance numerous constituents and myriad interests. This is such a case.

62 Section 36 now provides that a CCAA court may authorize the sale or disposition of assets outside the ordinary course of business if authorized to do so by court order. There is thus no jurisdictional impediment to the sale of assets where such sales meet the requisite tests, even in the absence of a plan of arrangement.

63 Morawetz, J in *Target Canada Co., Re*, 2015 ONSC 303 (Ont. S.C.J.) at paras 32 and 33, describes the change brought about by section 36:

> Prior to the 2009 amendments to the CCAA, Canadian courts accepted that, in appropriate circumstances, debtor companies were entitled to seek the protection of the CCAA where the outcome was not going to be a going concern restructuring, but instead, a "liquidation" or wind-down of the debtor companies' assets or business.
>
> The 2009 amendments did not expressly address whether the CCAA could be used generally to wind-down the business of a debtor company. However, I am satisfied that the enactment of section 36 of the CCAA, which establishes a process for a debtor company to sell assets outside the ordinary course of business while under CCAA protection, is consistent with the principle that the CCAA can be a vehicle to downsize or wind-down a debtor company's business.
>
> See also *Re Brainhunter Inc.*, 2009 CarswellOnt 8207 at para 15.

64 Whether before or after the enactment of section 36, Canadian courts have approved en bloc sales of a debtor company, recognizing that such sales are consistent with the broad remedial purpose and flexibility of the CCAA.

65 What the provisions of the CCAA can provide in situations such as those facing the Sanjel Group is a court-supervised process of the execution of the sales, with provision for liquidity and the continuation of the business through the process provided by interim financing, a Key Employee Retention Plan that attempts to ensure that key employees are given an incentive to ensure a seamless transition, critical supplier relief that keeps operations functioning pending the closing of the sales and a process whereby a company with operations in Canada, the United States and internationally is able to invoke the aid of both Canadian and US courts during the process. It is true that the actual SISP process preceded the CCAA filing, and I will address that factor later in this decision.

66 As counsel to the Sanjel Group notes, this type of insolvency proceeding is well-suited to the current catastrophic downturn of the economy in Alberta, with companies at the limit of their liquidity. It allows a business to be kept together and sold as a going concern to the extent possible. There have been a number of recent similar filings in this jurisdiction: the filing in Southern Pacific and Quicksilver are examples.

67 The Monitor supports the sales, and is of the view, supported by investigation into the likely range of forced sale liquidation recoveries with financial advisors and others with industry knowledge, that a liquidation of assets would not generate a better result than the consideration contemplated by the proposed sales. The Monitor's investigations were hampered by the lack of recent sales of similar businesses, but I am satisfied by its thorough report that the Monitor's investigation of likely recoveries is the best estimate available. A CS estimate provided a different analysis, but I am satisfied by the evidence that it has little probative value.

68 In summary, this is not an inappropriate use of the CCAA arising from the nature of the proposed sales.

B. The Trustee submits that the proposed sales are the product of a defective SISP conducted outside of the CCAA.

69 It is true that the SISP, and the restructuring negotiations with the Ad Hoc Bondholders, took place prior to the filing under the CCAA, that this was a "pre-pack" filing.

70 A pre-filing SISP is not of itself abusive of the CCAA. Nothing in the statute precludes it. Of course, a pre-filing SISP must meet the principles and requirements of section 36 of the CCAA and must be considered against the Soundair principles.

The Trustee submits that such a SISP should be subject to heightened scrutiny. It may well be correct that a pre-filing SISP will be subject to greater challenges from stakeholders, and that it may be more difficult for the debtor company to establish that it was conducted in a fair and effective manner, given the lack of supervision by the Court and the Monitor, who as a court officer has statutory duties.

71 Without prior court approval of the process, conducting a SISP outside of the CCAA means that both the procedure and the execution of the SISP are open to attack by aggrieved stakeholders and bitter bidders, as has been the case here. Any evidence or reasonable allegations of impropriety would have to be investigated carefully, whereas in a court-approved process, comfort can be obtained through the Monitor's review and the Court's approval of the process in advance. However, in the end, it is the specific details of the SISP as conducted that will be scrutinized.

72 Similar issues were considered in *Nelson Education Ltd., Re*, 2015 ONSC 5557 (Ont. S.C.J. [Commercial List]) at paras 31-32, and in *Bloom Lake, g.p.l., Re*, 2015 QCCS 1920 (C.S. Que.) at para 21.

73 The Trustee submits that the SISP was defective in that its timelines were truncated and that it was destined not to generate offers that maximized value for all stakeholders. The Trustee filed an affidavit of a representative of Moelis indicating that it would be typical in a SISP to establish a deadline for non-binding offers one or two months following commencement of the process, while in this SISP, participants had only 12 to 25 days to evaluate the business and provide non-binding indications of interest. This opinion did not address the previous BAML process that identified likely purchasers and thus lengthened the review process for these parties who participated in the first process. The Trustee's advisor was also critical that the SISP provided only 16 days for final offers, suggesting that it is more typical to provide two months.

74 While likely correct for normal-course SISP's, this analysis does not take into account the high cash burn situation of these debtors, nor the deteriorating market. The Moelis opinion suggests that potential purchaser would have a heightened diligence requirement in the current unfavourable market conditions, requiring extra time for due diligence. However, despite the speed of the SISP, it appears to have generated a range of bids significantly above liquidation value. The process was not limited to the SISP, but included the previous BAML process and the negotiations with the Ad Hoc Bondholders.

75 The evidence discloses a thorough and comprehensive canvassing of the relevant markets for the debtors and their assets despite the aggressive timelines. The BAML process identified some interested parties and Sanjel's financial advisors built on that process by re-engaging with 28 private equity firms that had already expressed interest in these unique assets as well as identifying new potential purchasers, reaching out to 85 potential buyers.

76 Of those 85 parties, 37 executed NDAs, 25 conducted due diligence and 17 met with the management team. Eight submitted non-binding indications of interest, five were invited to submit second-round bids and finally the top three were chosen for the continuation of negotiations to final agreements.

77 While some interested parties may have found the time limits challenging, a reasonable number were able to meet them and submit bids. I am satisfied from the evidence that, despite a challenging economic environment, the process was competitive and robust.

78 I also note the comments of the Monitor in its First Report dated April 12, 2016. While it was not directly involved in the SISP, the Monitor reports that the financial advisors advised the Monitor, that given the size and complexity of the Sanjel Group's operations and the time frames involved, all strategic and financial sponsors known to the advisors were contacted during the SISP and that it is unlikely that extending the SISP time frames in the current market would have resulted in materially better offers.

79 Based on this advice and the Monitor's observations since its involvement in the SISP from mid-February 2016, the Monitor is of the opinion that it is highly improbable that another post-filing sales process would yield offers materially in excess of those received.

80 Finally, I note that the Ad Hoc Bondholders' own March 20 proposal envisaged a pre-packaged CCAA proceedings. A sales process is only required to be reasonable, not perfect. I am satisfied that this SISP was run appropriately and reasonably, and that it adequately canvassed the relevant market for the Sanjel Group and its assets.

C. The Ad Hoc Bondholders submit that negotiations among them, the Sanjel Group and the Syndicate were a sham conducted by Sanjel to delay the Ad Hoc Bondholders from taking action under Chapter 11 while it finalized the APAs. The Trustee alleges that the SISP has been conducted and the CCAA filing occurred in an atmosphere tainted by manoeuvring for advantage, bad faith, deception, secrecy, artificial haste and excessive deference by the Sanjel Group to the Syndicate.

81 These are serious allegations, but they are not supported by the evidence.

82 As the somewhat lengthy history of negotiations establishes, the Ad Hoc Bondholders had almost three months to present and negotiate restructuring proposals, with access to confidential information afforded to their advisors from January 9, 2016, weeks before the SISP participants. They presented four proposals, the last one after final bids had been received in the SISP. Although the final proposal breached the timelines of the SISP process, and could potentially raise an issue with respect to the integrity of the SISP process, Sanjel, the Syndicate and the prospective purchasers are not pressing that argument, as they take the position that the final offer is inferior at any rate.

83 These proposals received responses from Sanjel and the Syndicate, and counter proposals were received. The evidence discloses that, in all proposals and counter proposals, the parties were far apart on a major issue: the extent to which the Syndicate's debt was to be paid down and how far it was willing to allow a portion to remain at risk.

84 The Ad Hoc Bondholders were aware of the SISP from its commencement, and aware of the timing of the process. Throughout the SISP, the financial advisors had regular contact with Moelis and Fried Frank and directly with the Ad Hoc Bondholders. Michael Genereux, the lead partner at PJT with respect to the SISP, has sworn that he believes the Ad Hoc Bondholders were aware of the SISP and that it was progressing at a rapid pace. He says that he urged the Ad Hoc Bondholders to accelerate the pace at which they were advancing their restructuring negotiations.

85 The Ad Hoc Bondholders were aware, or should have been aware, that the Sanjel Group intended a CCAA/Chapter 15 process from at the latest mid-March, 2016. Their representative from A&M was aware of the possibility of a CCAA filing from March 4, 2016. Reference to PWC as Monitor under the CCAA was available through the template APAs from March 4, 2016

86 The Trustee and the Ad Hoc Bondholders submit that the Ad Hoc Bondholders' April 11, 2016 proposal provides superior recovery to the proposed sales generated by the SISP, that it "implies" a purchase price significantly in excess of the values generated by the APAs. The proposal, which was made directly to the Syndicate, was rejected by the Syndicate. It provides less immediate recovery to the Syndicate, and leaves a substantial portion of the Syndicate debt outstanding in a difficult and highly uncertain economic environment. It fails to address previously-expressed concerns about the need for capital going forward. The implied value of the proposal appears to rest on assumptions about improved economic recovery that the Syndicate does not accept or share.

87 In addition, the proposal would require at least six months to execute and leaves a number of questions outstanding, not the least being whether a plan that raises some and not all unsecured debt to secured status would pass muster. The proposal was rejected by the Syndicate for reasonable and defendable justifications.

88 The Ad Hoc Bondholders describe their proposal as a "germ" of a viable plan. While a germ of a viable plan may be sufficient to justify the commencement of a CCAA proceeding, it is not comparable to the proposed sales generated by a reasonably-run and thorough SISP.

89 The Trustee also submits that the Court should not be deterred by the Syndicate's rejection of the proposal, insisting on its value and citing cases where a creditor's stated intention not to accept a plan did not prevent a CCAA filing from proceeding.

This is a different situation: the Ad Hoc Bondholder's proposals are specific proposals with clear risks of timing and certainty. It is not up to this Court to second guess the Syndicate's rejection of such a plan, even if inclined to do so.

90 The Trustee submits that Sanjel did not act in good faith towards the Ad Hoc Bondholders in the period leading up to the filing. The Trustee notes that, contrary to the terms of the Bond Agreement, Sanjel failed to disclose to the bondholders that the Syndicate had issued a demand for payment acceleration and a notice of intention to enforce security pursuant to the terms of the Bankruptcy and Insolvency Act (the "Demand Acceleration and NOI") on March 18, 2016. While this was a contractual breach, the Ad Hoc Bondholders were well aware that Sanjel was in breach of the Bank Credit Facility, and that the Syndicate was taking steps to enforce its rights in negotiations with Sanjel and the Ad Hoc Bondholders. The Syndicate, and the Ad Hoc Bondholders, were both careful to preserve their rights of enforcement in proposals and counter-proposals. In fact, the Syndicate did not exercise its right to set-off, and has allowed Sanjel to continue to have access to liquidity going into the CCAA process.

91 This failure by Sanjel to advise the Trustee, (and other unsecured creditors that had similar provisions in their contracts), of this further step by the Syndicate does not constitute a reason to refuse to approve that APAs.

92 The Trustee submits that Sanjel failed to make full and plain disclosure during the initial hearing because it failed to disclose that in 2015, 62 % of the Sanjel Group's revenue was generated in the United States. Sanjel made extensive disclosure of its corporate structure and the integration of its business in its initial filing, including the fact that the Sanjel Group's "nerve centre", management team and treasury and financial functions are largely based in Calgary. The factors disclosed were more than sufficient to establish jurisdiction for a CCAA filing. The US Court in the Chapter 15 filing found the Sanjel Group's COMI to be in Calgary. The single statistic of 2015 revenue would not have changed the outcome of the Initial Order.

93 The Trustee's most serious allegation, given its implications for the professional reputations of those involved, is that Sanjel and its counsel and the Syndicate and its counsel misled the Trustee and the Ad Hoc Bondholders in their requests for adjournment of the bondholders' meeting, that the correspondence relating to the requests for adjournment created an obligation to negotiate in good faith, and that Sanjel and the Syndicate failed to do so. The Trustee and the Ad Hoc Bondholders allege that Sanjel and the Syndicate were negotiating with the Ad Hoc Bondholders only to gain time to finalize the APAs and file under the CCAA.

94 Again, this serious allegation is not supported by the evidence. The correspondence relating to the adjournment requests discloses no promises to hold off proceedings. The letter of request for the first adjournment for counsel to the Syndicate, while it refers to engaging with the Ad Hoc Bondholders with respect to the March 2, 2016 proposal, stipulates that in requesting the postponement of the meeting, counsel is not promising any course of action and reserves all rights.

95 The request from counsel to Sanjel refers to the dual track of negotiating a financial restructuring and/or sale of assets. It speaks of focusing on negotiations for the balance of the month, instead of "prospective enforcement action as proposed for consideration at the scheduled bondholders meeting," as was threatened by the notice of meeting. The Ad Hoc Bondholders were well-compensated financially for this adjournment.

96 The second request to adjourn the meeting to April 14, 2016 was similarly without any promise to forbear and the acceptance of the request by the Trustee did not impose any conditions nor give any reasons for the acceptance. The representatives of the Ad Hoc Bondholders are knowledgeable and sophisticated with respect to financing and insolvency matters. They cannot be said to have been misled by the language used in the adjournment requests.

97 The Trustee submits that the CCAA process to date has been engineered to effect a foreclosure in favour of the Syndicate "to the serious and material prejudice of the Bondholders" and other unsecured creditors.

98 The SISP did not disclose any possibility that, in the current economic climate, the disposition of the assets would generate even enough to cover the debt owed to the secured creditors. The proposals made by the Ad Hoc Bondholders did not offer nearly enough to pay out that debt.

99 The views of the Syndicate and its priority rights must be given due consideration: *Windsor Machine & Stamping Ltd., Re*, 2009 CarswellOnt 4471 (Ont. S.C.J. [Commercial List]) at para 43.

100 Section 6 of the CCAA requires that any compromise of creditors' rights must be supported by a double majority of the affected creditors. The Syndicate (as the principal secured creditor group) and the Ad Hoc Bondholders (as unsecured creditors with other unsecured creditors) would form separate voting classes for the purposes of a vote on any plan of arrangement. Each class must have a double majority of creditors, representing both two-thirds in value and a majority of number, voting in support of the plan as a condition precedent to court approval. Thus, the Syndicate holds an effective "veto" over the approval of any plan proposed by the Ad Hoc Bondholders: *SemCanada Crude Co., Re*, 2009 ABQB 490 (Alta. Q.B.) at para 22.

101 A noted by the Syndicate, the Ad Hoc Bondholders proposals, including the April 11, 2016 proposal, pose substantial risk to the Syndicate, and it is under no obligation to support them. There is no evidence that the Syndicate is acting unreasonably or unfairly in asserting that it would exercise the statutory protection afforded to a secured creditor under the CCAA; in fact, the evidence is that the Syndicate was willing to consider a less than 100% payout in negotiations with the Ad Hoc Bondholders. There was however no, agreement as to the extent of the payout and the extent to which the Syndicate would agree to remain at risk.

102 The prejudice to the bondholders is that they were unable to persuade the secured creditors to compromise or put its financial interests at risk in order to provide the bondholders with some chance that an improved economic climate may save this enterprise. As noted, the Syndicate had doubts that the Ad Hoc Bondholder's proposals would even provide sufficient operating capital to keep the Sanjel Group operating for the months it would take to implement their proposals.

103 The prejudice, if any, to the Ad Hoc Bondholders is that they were not able to pre-empt the CCAA filing with a filing under Chapter 11 of the United States Bankruptcy Code, with an automatic stay that, according to US bankruptcy law, has worldwide effect. A subsequent CCAA filing could be considered a breach of the stay, and provoke a jurisdictional issue that would delay proceedings and prove expensive to the Syndicate, improving the Ad Hoc Bondholders' bargaining position.

104 While there is only hearsay opinion before me with respect to the advantages of a Chapter 11 filing, the Trustee suggests that under such a filing:

(a) the Liberty and Step APAs would have been subject to market test and to higher and better offers;

(b) Sanjel could confirm a plan without the consent of the Syndicate; and

(c) parties in interest and estate fiduciaries could pursue claims and causes of action against Sanjel, the Syndicate, Sanjel's equity holders and MacBain.

105 Sanjel cites academic commentary that the cram-down provisions of Chapter 11 require strict compliance so as not to override the protections and elections available to secured creditors in opposition to a plan that they do not support. Specifically, if a class of creditors is impaired, the plan must be fair and equitable with respect to that class.

106 This is an issue for the US Courts. However, even if the Chapter 15 filing was replaced by a Chapter 11 filing, the current CCAA proceedings would not be terminated and any restructuring in the United States would necessarily have to be coordinated with these CCAA proceedings. Accordingly, the voting requirements for any plan of arrangement or the requirements for approval of a sale under the CCAA could not be avoided.

D. The Ad Hoc Bondholders were prejudiced in that they were not provided with information regarding the process and the bids received.

107 The Ad Hoc Bondholders had access to the same information afforded to bidders under the SISP and more. They were able to make proposals both before and after that process. Their financial advisors were afforded an opportunity for due diligence, and exercised it.

108 What they did not receive was disclosure of the details of the bids. There was a dispute about whether or not the Ad Hoc Bondholders could be considered "bidders". While they were not part of the SISP, they certainly had interests in conflict with the SISP bidders. Had the bids been disclosed to them, there would indeed have been concern over the integrity of the process, as such disclosure would allow them to tailor their proposals in such a way as to undermine the bids.

109 The Ad Hoc Bondholders were aware that they would not be given copies of the bids by mid-February, 2016 when the Bondholders Forbearance Agreement was settled, as it included a provision clarifying that they were not entitled to any pricing or bidder information from the SISP.

110 The Bond Forbearance Agreement also recognized that, while Sanjel would negotiate in good faith with the Ad Hoc Bondholders, nothing restricted its ability to enter into or conduct negotiations with respect to potential sales or other transactions. It was only on March 14, 2016 that the Ad Hoc Bondholders requested third party bid information.

111 The Ad Hoc Bondholders were not improperly denied access to information, and would not have been entitled to know details of the third party bids.

V. Conclusion

112 I am satisfied by the evidence before me that the factors set out in section 36(3) of the CCAA and Soundair favour the approval of the proposed sales. Specifically:

(a) the process, while not conducted under the CCAA, was nevertheless reasonable in the circumstances, as established by the evidence. It was brief, but not unreasonably brief, given the previous BAML process, current economic climate and the deteriorating financial position of the Sanjel Group;

(b) while the Monitor was not directly involved and did not actively participate in the SISP process prior to February 24, 2016, the Monitor has reviewed the process and is of the opinion that the SISP was a robust process run fairly and reasonably, and that sufficient efforts were made to obtain the best price possible for the Sanjel Group's assets in that process. I agree with the Monitor's assessment from my review of the evidence.

It is the Monitor's view, based on (i) the advice of CS and PJT, (ii) the nature of the Sanjel Group's operations and assets, (iii) the market conditions over the past year, (iv) the proposals received in the context of the SISP and from the Ad Hoc Bondholders, (v) the current ongoing depressed condition of the market and (vi) the underlying value of the Sanjel Group's assets, it is highly improbably that another post-filing sales process would yield offers for the Canadian and U.S. operations materially in excess of the values contained in the STEP and Liberty APAs.

I accept the Monitor's opinion in that regard, and nothing in my review of the evidence and the submissions of interested parties causes me to doubt that opinion.

(c) The Monitor has provided an opinion that the proposed sales are more beneficial to creditors than a sale or disposition under bankruptcy.

(d) Creditors, other than trade creditors, were consulted and involved in the process.

(e) While the sales provide no return to any creditor other than the Syndicate, I am satisfied that all other viable or reasonable options were considered. While there is no guarantee of further employment arising from the sale, there is the prospect that since the business will continue to operate until the sale, there will be an opportunity for employment for Sanjel employees with the new enterprises, and an opportunity for suppliers to continue to supply them.

(f) I am satisfied from the evidence that the consideration to be received for the assets is reasonable and fair.

I therefore approve the sale approval and vesting orders sought by the Sanjel Group.

VI. Postscript

113 On May 9, 2016, before these reasons were released, I received a copy of a letter dated May 5, 2016 from Fried Frank on behalf of the Ad Hoc Bondholders addressed to Canadian and US counsel for the Sanjel Group, the Monitor, the Syndicate and the prospective purchasers. In extravagant language, the Ad Hoc Bondholders state that they have become aware of information that the addressees are "duty bound" to bring to the attention of the Courts as officers of the Courts. That information is that Shane Hooker has been designated to lead the Canadian cementing operations when the STEP sale closes, according to a STEP press release. Evidently, Mr. Hooker is married to the daughter of Dan MacDonald, the chairman of Sanjel's board, and is the sister of Darin MacDonald, who was Chief Executive Officer of Sanjel and head of the restructuring committee.

114 The letter asserts the following:

a) There are "substantial and material" connections between STEP and the MacDonald family. It appears that the basis for this statement is that Mr. Hooker is married to Mr. MacDonald's daughter and an employee and "executive in residence" of ARC Financial Corp., STEP's financial sponsor in the sale;

b) Mr. Hooker is "an intimate beneficiary of all that is and all that belongs to the MacDonald family." In subsequent correspondence with the Monitor, it appears that the Ad Hoc Bondholders have no evidence to support this allegation;

c) Mr. Hooker is "the loyal son-in-law and brother-in-law" of the MacDonald family. Again, the Ad Hoc Bondholders admit that they have no information to support this allegation;

d) By reason of Mr. Hooker's relationship with the "MacDonald family", the proposed STEP transaction and the entirety of the SISP process "is tainted and worse". "(O)ur clients have every reason to believe the substance, of self-dealing and deception of the highest order";

e) "Mr. Hooker's personal and professional ties to the MacDonald family raise the spectre that all at hand is and has been a thinly-veiled scheme between the Company and the Syndicate and their advisors to deliver, on the one hand, an adequate recovery to the Syndicate and, on the other hand, Sanjel's Canadian assets back into the hands of the MacDonald family thereby working a substantial forfeiture of value to the Bondholders and all other unsecured creditors of the Company".

115 The letter repeats previous allegations that the SISP was "driven by self-interest and self-dealing", "riddled with conflicts of interest," "inappropriate and flawed in every respect", "chilled, inadequate" and "not conducted in good faith and efforts were undertaken to mislead and misdirect the company's stakeholders". It alleges:

a) "That none of this has been brought to the attention of the Courts and all parties in interest is reprehensible at best and has all indicia of fraudulent intent and purpose."

b) "Be advised that with respect to each and all of you and each and all of your respective clients as well as with respect to STEP, Liberty and any and all funding sources and sponsors for each, our clients herby reserve all of their rights and remedies with respect to any and all claims and causes of action of every kind and nature whatsoever whether such claims and causes of action are grounded in contract, tort, equity, statute and otherwise including, but not limited to, any and all breach of fiduciary duties, civil conspiracy, tortious interference and lender liability."

c) "... the efforts to continue with malfeasance wrapped in the cloak of SISP and CCAA by each and all of you and your clients must stop now. As above, the Courts and others should and must be informed, the failure to do so is and will be a misrepresentation and fraud on the Courts."

116 The letter comments that "(w)hen Justice Romaine is in receipt of the information, she will have reason and basis and we believe that Her Ladyship will be constrained, to vacate the order."

117 The Monitor took immediate action to investigate these serious allegations of fraud, misrepresentation, conspiracy and collusion, requesting urgent responses from counsel for Sanjel, the Syndicate, Mr. MacDonald, PJT and CS. Relevant witnesses were contacted and follow-up questions directed. The Monitor was also in contact with Fried Frank to determine the source of the allegations, and what investigation had been undertaken by Fried Frank or the Ad Hoc Bondholders to verify or support their allegations.

118 On Saturday, May 7, 2016, Fried Frank made the further allegation that potential bidders in the SISP were provided with forecasts that were far worse than actual results in order to facilitate the alleged fraud and conspiracy. The Monitor added this allegation to its investigation.

119 The Monitor was satisfied by its rapid but thorough investigations that:

a) Mr. Hooker and Mr. MacDonald have been estranged for the last two and a half-years, and have had no communication on any personal or business matters;

b) Mr. Hooker left Sanjel in March, 2014 and began working for ARC Financial in the fall of 2015 to assist ARC in an unrelated transaction. ARC is a large private investor focussed on energy, which provides financing through a number of funds financed by from third party investors. ARC is the primary financial stakeholder in the STEP acquisition. No one from the MacDonald family has an ownership position in ARC, nor are any of them investors in any ARC funds. Mr. Hooker has no involvement in ARC's fundraising efforts or fund deployment and he has no ownership interest in ARC;

c) Mr. MacDonald had no involvement in the negotiation of the STEP APA, other than attendance as a Sanjel representative at three meetings between November 2015 and January 2016, before the SISP was commenced;

d) Mr. Crilly as CFO of Sanjel (and later CRO) led the SISP process for Sanjel, while Mr. MacDonald concentrated on attempting to find a buyer for the whole company;

e) The senior Mr. MacDonald has not had an active role in Sanjel's management for years, was not involved in the SISP and does not own shares in STEP or ARC;

f) Mr. Hooker's involvement with the SISP and negotiations with STEP was limited to conducting on-site diligence on behalf of STEP;

g) Sanjel has no direct or indirect ownership interest or other financial interest in ARC, STEP, the newly formed company that will be purchasing the cementing assets or any other entity owned or controlled by ARC;

h) No consideration was provided to Mr. Hooker or either Mr. MacDonald in connection with the STEP APA;

i) In the opinion of many of those who provided responses, the relationship between Mr. Hooker and Mr. MacDonald had an adverse effect, if anything, on the merits of the STEP bid. The advisors and the Syndicate repeat their previous position that the STEP offer, in combination with the Liberty offer, was materially superior to any en bloc bid or combination of bids, and was supported on the basis of its economic merits.

120 This information was largely confirmed by a number of sources. The Monitor did not obtain sworn statements, nor conduct any kind of discovery process. It did not present the information in its Sixth Report to the Court as evidence, but as a report on its investigation to determine whether there was any probative value to the Ad Hoc Bondholders' allegations.

121 When the Monitor was unable to find any real evidence to support the allegations, other than the bare fact that Mr. Hooker is an employee of ARC and is married to Mr. MacDonald's sister, it asked the Ad Hoc Bondholders if they had any supporting evidence. The substance of counsel to the Ad Hoc Bondholders' response is that there is an appearance of inappropriate dealing (arising from the relationship), and that it was up to the Monitor to investigate this.

122 The Ad Hoc Bondholders instead provided the Monitor with a list of additional questions that they wish the Monitor to investigate through sworn statements subject to cross-examination. These questions appear designed to elicit some evidence that may support the Ad Hoc Bondholder's speculations.

123 The Monitor cannot be faulted for failing to obtain sworn evidence from relevant parties. The allegations were made after approval of the APAs in the context of tight timelines to the closing of the transactions and the risk of losing the recommended sales transactions. If the Monitor had discovered anything that would give any legitimacy to the allegations, or raise any doubt about the integrity of the SISP, it may have been appropriate to direct further investigation, including sworn evidence. However, mere speculation resting on a family relationship is insufficient to require the Monitor to undertake further expensive investigation or to conduct a fishing expedition. This is particularly the case as there is no real evidence that Mr. Hooker's prospective employment will benefit either Mr. MacDonald or Sanjel in any way, or Mr. Hooker himself, other than the offer of employment.

124 This is not a case where evidence that should be presented in affidavit form has been incorporated improperly into a Monitor's report. The Monitor decided, quite properly, that at this stage of the process, a quick investigation to determine whether there was any real basis for the Ad Hoc Bondholders complaint was warranted. This investigation has satisfied the Monitor that, other than the fact that Mr. Hooker is indeed Mr. MacDonald's brother-in-law, there is no evidence of collusion between them, Mr. MacDonald was not involved in the STEP APA, Mr. Hooker was in no position to influence that STEP APA and no evidence that Mr. Hooker or the "MacDonald family" will profit in any way from the STEP APA, other than Mr. Hooker's offer of employment.

125 Given the lack of any indicia that there is any basis for the Ad Hoc Bondholders' speculations of fraud or conspiracy, there is no reason for this Court to require the Monitor to take further steps to investigate the allegations, which appear to be thinly veiled and reckless attempts to delay and obfuscate the process.

126 With respect to the allegations that potential bidders were provided with forecasts far worse than actual results in order to facilitate the alleged fraud and conspiracy, the Monitor has reviewed the forecasts and the variances from the forecasts provided during the SISP to actuals. The Monitor reports that these relate to collection of accounts receivable and payment of accounts payable. The actual collection of receivables was better than forecasted for the months of March and April. However, the Monitor understands that is a temporary timing variance based on earlier collection of receivables and does not represent a permanent improvement in Sanjel's actual cash position.

127 Thus, the Monitor is of the view that the allegations by the Ad Hoc Bondholders with respect to forecasts being far worse than actual results lack merit.

128 I accept the Monitor's advice on this issue.

129 With respect to disclosure, the Monitor was not aware of the connection between STEP and the company alleged in the Fried Frank letter. The Monitor has reported that it did not become aware of anything that would support or substantiate the allegations since its involvement in the SISP process after February 24, 2016.

130 The Ad Hoc Bondholders' allegations are in essence that the SISP was structured to achieve a preferential outcome for the MacDonald family through the familial connections between Mr. Hooker and the MacDonald family. If a sale of assets of a debtor company is to be made to a person related to the debtor, the Court may only approve the sale if it is satisfied that:

> (a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the debtor company; and
>
> (b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale: CCAA section 36(4).

131 A related party pursuant to section 36(5) is defined to include certain categories of persons, and neither Mr. Hooker, his wife or either Mr. MacDonald fall into these categories.

132 There is no evidence or indication that any member of the "MacDonald family" will benefit from the STEP APA, other than Mr. Hooker's offer of employment. I am therefore satisfied that section 36(3) is not applicable to the STEP or the Liberty transactions and that no disclosure of any relationship was necessary before the APAs were approved.

133 Even if disclosure had been made, given the evidence before me with respect to the SISP process and the offers received, I would have been satisfied the requirements of section 36(3) were met.

134 In conclusion, the allegations of the Ad Hoc Bondholders do not change my decision with respect to approval of the APAs. I see no reason why the Monitor should continue its investigation.

135 The issue of who should bear the cost of the investigation into these allegations is reserved.

Debtors' application granted; trustee's application dismissed.

TAB E

Most Negative Treatment: Distinguished
Most Recent Distinguished: PCAS Patient Care Automation Services Inc., Re | 2012 ONSC 3367, 2012 CarswellOnt 7248, 91 C.B.R. (5th) 285, 216 A.C.W.S. (3d) 551 | (Ont. S.C.J. [Commercial List], Jun 9, 2012)

1991 CarswellOnt 205
Ontario Court of Appeal

Royal Bank v. Soundair Corp.

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

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

Goodman, McKinlay and Galligan JJ.A.

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

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

Related Abridgment Classifications
Debtors and creditors
VII Receivers
VII.6 Conduct and liability of receiver
VII.6.a General conduct of receiver

Headnote
Receivers --- Conduct and liability of receiver — General conduct of receiver
Court considering its position when approving sale recommended by receiver.
S Corp., which engaged in the air transport business, had a division known as AT. When S Corp. experienced financial difficulties, one of the secured creditors, who had an interest in the assets of AT, brought a motion for the appointment of a receiver. The receiver was ordered to operate AT and to sell it as a going concern. The receiver had two offers. It accepted the offer made by OEL and rejected an offer by 922 which contained an unacceptable condition. Subsequently, 922 obtained an order allowing it to make a second offer removing the condition. The secured creditors supported acceptance of the 922 offer. The court approved the sale to OEL and dismissed the motion to approve the 922 offer. An appeal was brought from this order.
Held:
The appeal was dismissed.
Per Galligan J.A.: When a court appoints a receiver to use its commercial expertise to sell an airline, it is inescapable that it intends to rely upon the receiver's expertise and not upon its own. The court should be reluctant to second-guess, with the benefit of hindsight, the considered business decisions made by its receiver.

The conduct of the receiver should be reviewed in the light of the specific mandate given to him by the court. The order appointing the receiver did not say how the receiver was to negotiate the sale. The order obviously intended, because of the unusual nature of the asset being sold, to leave the method of sale substantially to the discretion of the receiver.

To determine whether a receiver has acted providently, the conduct of the receiver should be examined in light of the information the receiver had when it agreed to accept an offer. On the date the receiver accepted the OEL offer, it had only two offers: that of OEL, which was acceptable, and that of 922, which contained an unacceptable condition. The decision made was a sound one in the circumstances. The receiver made a sufficient effort to obtain the best price, and did not act improvidently.

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

Per McKinlay J.A. (concurring in the result): It is most important that the integrity of procedures followed by court-appointed receivers be protected in the interests of both commercial morality and the future confidence of business persons in their dealings with receivers. In all cases, the court should carefully scrutinize the procedure followed by the receiver. While the procedure carried out by the receiver in this case was appropriate, given the unfolding of events and the unique nature of the asset involved, it may not be a procedure that is likely to be appropriate in many receivership sales.

Per Goodman J.A. (dissenting): It was imprudent and unfair on the part of the receiver to ignore an offer from an interested party which offered approximately triple the cash down payment without giving a chance to the offeror to remove the conditions or other terms which made the offer unacceptable to the receiver. The offer accepted by the receiver was improvident and unfair insofar as two creditors were concerned.

Table of Authorities

Cases considered:

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

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

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

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

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

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

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

Statutes considered:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

13 I will deal with the two issues separately.

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

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

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

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

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

2. It should consider the interests of all parties.

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

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

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

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

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

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

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

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

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

[Emphasis added.]

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

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

[Emphasis added.]

23 On March 8, 1991, the receiver had two offers. One was the OEL offer, which it considered satisfactory but which could be withdrawn by OEL at any time before it was accepted. The receiver also had the 922 offer, which contained a condition that was totally unacceptable. It had no other offers. It was faced with the dilemma of whether it should decline to accept the OEL offer and run the risk of it being withdrawn, in the hope that an acceptable offer would be forthcoming from 922. An affidavit filed by the president of the receiver describes the dilemma which the receiver faced, and the judgment made in the light of that dilemma:

> 24. An asset purchase agreement was received by Ernst & Young on March 7, 1991 which was dated March 6, 1991. This agreement was received from CCFL in respect of their offer to purchase the assets and undertaking of Air Toronto. Apart from financial considerations, which will be considered in a subsequent affidavit, the *Receiver determined that it would not be prudent to delay acceptance of the OEL agreement to negotiate a highly uncertain arrangement with Air Canada and CCFL* . Air Canada had the benefit of an 'exclusive' in negotiations for Air Toronto and had clearly indicated its intention take itself out of the running while ensuring that no other party could seek to purchase Air Toronto and maintain the Air Canada connector arrangement vital to its survival. The CCFL offer represented a radical reversal of this position by Air

> Canada at the eleventh hour. However, it contained a significant number of conditions to closing which were entirely beyond the control of the Receiver. As well, the CCFL offer came less than 24 hours before signing of the agreement with OEL which had been negotiated over a period of months, at great time and expense.

[Emphasis added.] I am convinced that the decision made was a sound one in the circumstances faced by the receiver on March 8, 1991.

24 I now turn to consider whether the price contained in the OEL offer was one which it was provident to accept. At the outset, I think that the fact that the OEL offer was the only acceptable one available to the receiver on March 8, 1991, after 10 months of trying to sell the airline, is strong evidence that the price in it was reasonable. In a deteriorating economy, I doubt that it would have been wise to wait any longer.

25 I mentioned earlier that, pursuant to an order, 922 was permitted to present a second offer. During the hearing of the appeal, counsel compared at great length the price contained in the second 922 offer with the price contained in the OEL offer. Counsel put forth various hypotheses supporting their contentions that one offer was better than the other.

26 It is my opinion that the price contained in the 922 offer is relevant only if it shows that the price obtained by the receiver in the OEL offer was not a reasonable one. In *Crown Trust Co. v. Rosenberg* , supra, Anderson J., at p. 113 [O.R.], discussed the comparison of offers in the following way:

> No doubt, as the cases have indicated, situations might arise where the disparity was so great as to call in question the adequacy of the mechanism which had produced the offers. It is not so here, and in my view that is substantially an end of the matter.

27 In two judgments, Saunders J. considered the circumstances in which an offer submitted after the receiver had agreed to a sale should be considered by the court. The first is *Re Selkirk* (1986), 58 C.B.R. (N.S.) 245 (Ont. S.C.) , at p. 247:

> If, for example, in this case there had been a second offer of a substantially higher amount, then the court would have to take that offer into consideration in assessing whether the receiver had properly carried out his function of endeavouring to obtain the best price for the property.

28 The second is *Re Beauty Counsellors of Canada Ltd.* (1986), 58 C.B.R. (N.S.) 237 (Ont. S.C.) , at p. 243:

> If a substantially higher bid turns up at the approval stage, the court should consider it. Such a bid may indicate, for example, that the trustee has not properly carried out its duty to endeavour to obtain the best price for the estate.

29 In *Re Selkirk* (1987), 64 C.B.R. (N.S.) 140 (Ont. S.C.) , at p. 142, McRae J. expressed a similar view:

> The court will not lightly withhold approval of a sale by the receiver, particularly in a case such as this where the receiver is given rather wide discretionary authority as per the order of Mr. Justice Trainor and, of course, where the receiver is an officer of this court. Only in a case where there seems to be some unfairness in the process of the sale or *where there are substantially higher offers which would tend to show that the sale was improvident* will the court withhold approval. It is important that the court recognize the commercial exigencies that would flow if prospective purchasers are allowed to wait until the sale is in court for approval before submitting their final offer. This is something that must be discouraged.

[Emphasis added.]

30 What those cases show is that the prices in other offers have relevance only if they show that the price contained in the offer accepted by the receiver was so unreasonably low as to demonstrate that the receiver was improvident in accepting it. I am of the opinion, therefore, that if they do not tend to show that the receiver was improvident, they should not be considered upon a motion to confirm a sale recommended by a court-appointed receiver. If they were, the process would be changed from a sale by a receiver, subject to court approval, into an auction conducted by the court at the time approval is sought. In my

opinion, the latter course is unfair to the person who has entered bona fide into an agreement with the receiver, can only lead to chaos, and must be discouraged.

31 If, however, the subsequent offer is so substantially higher than the sale recommended by the receiver, then it may be that the receiver has not conducted the sale properly. In such circumstances, the court would be justified itself in entering into the sale process by considering competitive bids. However, I think that that process should be entered into only if the court is satisfied that the receiver has not properly conducted the sale which it has recommended to the court.

32 It is necessary to consider the two offers. Rosenberg J. held that the 922 offer was slightly better or marginally better than the OEL offer. He concluded that the difference in the two offers did not show that the sale process adopted by the receiver was inadequate or improvident.

33 Counsel for the appellants complained about the manner in which Rosenberg J. conducted the hearing of the motion to confirm the OEL sale. The complaint was that when they began to discuss a comparison of the two offers, Rosenberg J. said that he considered the 922 offer to be better than the OEL offer. Counsel said that when that comment was made, they did not think it necessary to argue further the question of the difference in value between the two offers. They complain that the finding that the 922 offer was only marginally better or slightly better than the OEL offer was made without them having had the opportunity to argue that the 922 offer was substantially better or significantly better than the OEL offer. I cannot understand how counsel could have thought that by expressing the opinion that the 922 offer was better, Rosenberg J. was saying that it was a significantly or substantially better one. Nor can I comprehend how counsel took the comment to mean that they were foreclosed from arguing that the offer was significantly or substantially better. If there was some misunderstanding on the part of counsel, it should have been raised before Rosenberg J. at the time. I am sure that if it had been, the misunderstanding would have been cleared up quickly. Nevertheless, this court permitted extensive argument dealing with the comparison of the two offers.

34 The 922 offer provided for $6 million cash to be paid on closing with a royalty based upon a percentage of Air Toronto profits over a period of 5 years up to a maximum of $3 million. The OEL offer provided for a payment of $2 million on closing with a royalty paid on gross revenues over a 5-year period. In the short term, the 922 offer is obviously better because there is substantially more cash up front. The chances of future returns are substantially greater in the OEL offer because royalties are paid on gross revenues, while the royalties under the 922 offer are paid only on profits. There is an element of risk involved in each offer.

35 The receiver studied the two offers. It compared them and took into account the risks, the advantages and the disadvantages of each. It considered the appropriate contingencies. It is not necessary to outline the factors which were taken into account by the receiver because the manager of its insolvency practice filed an affidavit outlining the considerations which were weighed in its evaluation of the two offers. They seem to me to be reasonable ones. That affidavit concluded with the following paragraph:

> 24. On the basis of these considerations the Receiver has approved the OEL offer and has concluded that it represents the achievement of the highest possible value at this time for the Air Toronto division of SoundAir.

36 The court appointed the receiver to conduct the sale of Air Toronto, and entrusted it with the responsibility of deciding what is the best offer. I put great weight upon the opinion of the receiver. It swore to the court which appointed it that the OEL offer represents the achievement of the highest possible value at this time for Air Toronto. I have not been convinced that the receiver was wrong when he made that assessment. I am, therefore, of the opinion that the 922 offer does not demonstrate any failure upon the part of the receiver to act properly and providently.

37 It follows that if Rosenberg J. was correct when he found that the 922 offer was in fact better, I agree with him that it could only have been slightly or marginally better. The 922 offer does not lead to an inference that the disposition strategy of the receiver was inadequate, unsuccessful or improvident, nor that the price was unreasonable.

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

2. Consideration of the Interests of all Parties

39 It is well established that the primary interest is that of the creditors of the debtor: see *Crown Trust Co. v. Rosenberg* , supra, and *Re Selkirk* , supra (Saunders J.). However, as Saunders J. pointed out in *Re Beauty Counsellors* , supra at p. 244 [C.B.R.], "it is not the only or overriding consideration."

40 In my opinion, there are other persons whose interests require consideration. In an appropriate case, the interests of the debtor must be taken into account. I think also, in a case such as this, where a purchaser has bargained at some length and doubtless at considerable expense with the receiver, the interests of the purchaser ought to be taken into account. While it is not explicitly stated in such cases as *Crown Trust Co. v. Rosenberg* , supra, *Re Selkirk* (1986), supra, *Re Beauty Counsellors* , supra, *Re Selkirk* (1987), supra, and (*Cameron*), supra, I think they clearly imply that the interests of a person who has negotiated an agreement with a court-appointed receiver are very important.

41 In this case, the interests of all parties who would have an interest in the process were considered by the receiver and by Rosenberg J.

3. Consideration of the Efficacy and Integrity of the Process by which the Offer was Obtained

42 While it is accepted that the primary concern of a receiver is the protecting of the interests of the creditors, there is a secondary but very important consideration, and that is the integrity of the process by which the sale is effected. This is particularly so in the case of a sale of such a unique asset as an airline as a going concern.

43 The importance of a court protecting the integrity of the process has been stated in a number of cases. First, I refer to *Re Selkirk* , supra, where Saunders J. said at p. 246 [C.B.R.]:

> In dealing with the request for approval, the court has to be concerned primarily with protecting the interest of the creditors of the former bankrupt. A secondary but important considera tion is that the process under which the sale agreement is arrived at should be consistent with commercial efficacy and integrity.
>
> In that connection I adopt the principles stated by Macdonald J.A. of the Nova Scotia Supreme Court (Appeal Division) in *Cameron v. Bank of N.S.* (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303, 86 A.P.R. 303 (C.A.) , where he said at p. 11:
>
> > In my opinion if the decision of the receiver to enter into an agreement of sale, subject to court approval, with respect to certain assets is reasonable and sound under the circumstances at the time existing it should not be set aside simply because a later and higher bid is made. To do so would literally create chaos in the commercial world and receivers and purchasers would never be sure they had a binding agreement. On the contrary, they would know that other bids could be received and considered up until the application for court approval is heard — this would be an intolerable situation.
>
> While those remarks may have been made in the context of a bidding situation rather than a private sale, I consider them to be equally applicable to a negotiation process leading to a private sale. Where the court is concerned with the disposition of property, the purpose of appointing a receiver is to have the receiver do the work that the court would otherwise have to do.

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

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

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

[Emphasis added.]

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

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

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

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

4. Was there unfairness in the process?

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

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

51 The offering memorandum had not been completed by February11, 1991. On that date, the receiver entered into the letter of intent to negotiate with OEL. The letter of intent contained a provision that during its currency the receiver would not negotiate with any other party. The letter of intent was renewed from time to time until the OEL offer was received on March 6, 1991.

52 The receiver did not proceed with the offering memorandum because to do so would violate the spirit, if not the letter, of its letter of intent with OEL.

53 I do not think that the conduct of the receiver shows any unfairness towards 922. When I speak of 922, I do so in the context that Air Canada and CCFL are identified with it. I start by saying that the receiver acted reasonably when it entered into exclusive negotiations with OEL. I find it strange that a company, with which Air Canada is closely and intimately involved, would say that it was unfair for the receiver to enter into a time-limited agreement to negotiate exclusively with OEL. That is precisely the arrangement which Air Canada insisted upon when it negotiated with the receiver in the spring and summer of 1990. If it was not unfair for Air Canada to have such an agreement, I do not understand why it was unfair for OEL to have a similar one. In fact, both Air Canada and OEL in its turn were acting reasonably when they required exclusive negotiating rights to prevent their negotiations from being used as a bargaining lever with other potential purchasers. The fact that Air Canada insisted upon an exclusive negotiating right while it was negotiating with the receiver demonstrates the commercial efficacy of

OEL being given the same right during its negotiations with the receiver. I see no unfairness on the part of the receiver when it honoured its letter of intent with OEL by not releasing the offering memorandum during the negotiations with OEL.

54 Moreover, I am not prepared to find that 922 was in any way prejudiced by the fact that it did not have an offering memorandum. It made an offer on March 7, 1991, which it contends to this day was a better offer than that of OEL. 922 has not convinced me that if it had an offering memorandum, its offer would have been any different or any better than it actually was. The fatal problem with the first 922 offer was that it contained a condition which was completely unacceptable to the receiver. The receiver, properly, in my opinion, rejected the offer out of hand because of that condition. That condition did not relate to any information which could have conceivably been in an offering memorandum prepared by the receiver. It was about the resolution of a dispute between CCFL and the Royal Bank, something the receiver knew nothing about.

55 Further evidence of the lack of prejudice which the absence of an offering memorandum has caused 922 is found in CCFL's stance before this court. During argument, its counsel suggested as a possible resolution of this appeal that this court should call for new bids, evaluate them and then order a sale to the party who put in the better bid. In such a case, counsel for CCFL said that 922 would be prepared to bid within 7 days of the court's decision. I would have thought that, if there were anything to CCFL's suggestion that the failure to provide an offering memorandum was unfair to 922, that it would have told the court that it needed more information before it would be able to make a bid.

56 I am satisfied that Air Canada and CCFL have, and at all times had, all of the information which they would have needed to make what to them would be a commercially viable offer to the receiver. I think that an offering memorandum was of no commercial consequence to them, but the absence of one has since become a valuable tactical weapon.

57 It is my opinion that there is no convincing proof that if an offering memorandum had been widely distributed among persons qualified to have purchased Air Toronto, a viable offer would have come forth from a party other than 922 or OEL. Therefore, the failure to provide an offering memorandum was neither unfair, nor did it prejudice the obtaining of a better price on March 8, 1991, than that contained in the OEL offer. I would not give effect to the contention that the process adopted by the receiver was an unfair one.

58 There are two statements by Anderson J. contained in *Crown Trust Co. v. Rosenberg* , supra, which I adopt as my own. The first is at p. 109 [O.R.]:

> The court should not proceed against the recommendations of its Receiver except in special circumstances and where the necessity and propriety of doing so are plain. Any other rule or approach would emasculate the role of the Receiver and make it almost inevitable that the final negotiation of every sale would take place on the motion for approval.

The second is at p. 111 [O.R.]:

> It is equally clear, in my view, though perhaps not so clearly enunciated, that it is only in an exceptional case that the court will intervene and proceed contrary to the Receiver's recommendations if satisfied, as I am, that the Receiver has acted reasonably, prudently and fairly and not arbitrarily.

In this case the receiver acted reasonably, prudently, fairly and not arbitrarily. I am of the opinion, therefore, that the process adopted by the receiver in reaching an agreement was a just one.

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

> They created a situation as of March 8th, where the Receiver was faced with two offers, one of which was in acceptable form and one of which could not possibly be accepted in its present form. The Receiver acted appropriately in accepting the OEL offer.

I agree.

60 The receiver made proper and sufficient efforts to get the best price that it could for the assets of Air Toronto. It adopted a reasonable and effective process to sell the airline which was fair to all persons who might be interested in purchasing it. It is my opinion, therefore, that the receiver properly carried out the mandate which was given to it by the order of O'Brien J. It follows that Rosenberg J. was correct when he confirmed the sale to OEL.

II. The effect of the support of the 922 offer by the two secured creditors.

61 As I noted earlier, the 922 offer was supported before Rosenberg J., and in this court, by CCFL and by the Royal Bank, the two secured creditors. It was argued that, because the interests of the creditors are primary, the court ought to give effect to their wish that the 922 offer be accepted. I would not accede to that suggestion for two reasons.

62 The first reason is related to the fact that the creditors chose to have a receiver appointed by the court. It was open to them to appoint a private receiver pursuant to the authority of their security documents. Had they done so, then they would have had control of the process and could have sold Air Toronto to whom they wished. However, acting privately and controlling the process involves some risks. The appointment of a receiver by the court insulates the creditors from those risks. But, insulation from those risks carries with it the loss of control over the process of disposition of the assets. As I have attempted to explain in these reasons, when a receiver's sale is before the court for confirmation, the only issues are the propriety of the conduct of the receiver and whether it acted providently. The function of the court at that stage is not to step in and do the receiver's work, or change the sale strategy adopted by the receiver. Creditors who asked the court to appoint a receiver to dispose of assets should not be allowed to take over control of the process by the simple expedient of supporting another purchaser if they do not agree with the sale made by the receiver. That would take away all respect for the process of sale by a court-appointed receiver.

63 There can be no doubt that the interests of the creditor are an important consideration in determining whether the receiver has properly conducted a sale. The opinion of the creditors as to which offer ought to be accepted is something to be taken into account. But if the court decides that the receiver has acted properly and providently, those views are not necessarily determinative. Because, in this case, the receiver acted properly and providently, I do not think that the views of the creditors should override the considered judgment of the receiver.

64 The second reason is that, in the particular circumstances of this case, I do not think the support of CCFL and the Royal Bank of the 922 offer is entitled to any weight. The support given by CCFL can be dealt with summarily. It is a co-owner of 922. It is hardly surprising and not very impressive to hear that it supports the offer which it is making for the debtor's assets.

65 The support by the Royal Bank requires more consideration and involves some reference to the circumstances. On March 6, 1991, when the first 922 offer was made, there was in existence an inter-lender agreement between the Royal Bank and CCFL. That agreement dealt with the share of the proceeds of the sale of Air Toronto which each creditor would receive. At the time, a dispute between the Royal Bank and CCFL about the interpretation of that agreement was pending in the courts. The unacceptable condition in the first 922 offer related to the settlement of the inter-lender dispute. The condition required that the dispute be resolved in a way which would substantially favour CCFL. It required that CCFL receive $3,375,000 of the $6 million cash payment and the balance, including the royalties, if any, be paid to the Royal Bank. The Royal Bank did not agree with that split of the sale proceeds.

66 On April 5, 1991, the Royal Bank and CCFL agreed to settle the inter-lender dispute. The settlement was that if the 922 offer was accepted by the court, CCFL would receive only $1 million, and the Royal Bank would receive $5 million plus any royalties which might be paid. It was only in consideration of that settlement that the Royal Bank agreed to support the 922 offer.

67 The Royal Bank's support of the 922 offer is so affected by the very substantial benefit which it wanted to obtain from the settlement of the inter-lender dispute that, in my opinion, its support is devoid of any objectivity. I think it has no weight.

68 While there may be circumstances where the unanimous support by the creditors of a particular offer could conceivably override the proper and provident conduct of a sale by a receiver, I do not think that this is such a case. This is a case where the receiver has acted properly and in a provident way. It would make a mockery out of the judicial process, under which a mandate

was given to this receiver to sell this airline if the support by these creditors of the 922 offer were permitted to carry the day. I give no weight to the support which they give to the 922 offer.

69 In its factum, the receiver pointed out that, because of greater liabilities imposed upon private receivers by various statutes such as the *Employment Standards Act* , R.S.O. 1980, c. 137, and the *Environmental Protection Act* , R.S.O. 1980, c. 141, it is likely that more and more the courts will be asked to appoint receivers in insolvencies. In those circumstances, I think that creditors who ask for court-appointed receivers and business people who choose to deal with those receivers should know that if those receivers act properly and providently, their decisions and judgments will be given great weight by the courts who appoint them. I have decided this appeal in the way I have in order to assure business people who deal with court-appointed receivers that they can have confidence that an agreement which they make with a court-appointed receiver will be far more than a platform upon which others may bargain at the court approval stage. I think that persons who enter into agreements with court-appointed receivers, following a disposition procedure that is appropriate given the nature of the assets involved, should expect that their bargain will be confirmed by the court.

70 The process is very important. It should be carefully protected so that the ability of court-appointed receivers to negotiate the best price possible is strengthened and supported. Because this receiver acted properly and providently in entering into the OEL agreement, I am of the opinion that Rosenberg J. was right when he approved the sale to OEL and dismissed the motion to approve the 922 offer.

71 I would, accordingly, dismiss the appeal. I would award the receiver, OEL and Frontier Airlines Limited their costs out of the Soundair estate, those of the receiver on a solicitor-client scale. I would make no order as to the costs of any of the other parties or intervenors.

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

72 I agree with Galligan J.A. in result, but wish to emphasize that I do so on the basis that the undertaking being sold in this case was of a very special and unusual nature. It is most important that the integrity of procedures followed by court-appointed receivers be protected in the interests of both commercial morality and the future confidence of business persons in their dealings with receivers. Consequently, in all cases, the court should carefully scrutinize the procedure followed by the receiver to determine whether it satisfies the tests set out by Anderson J. in *Crown Trust Co. v. Rosenberg* (1986), 67 C.B.R. (N.S.) 320n, 60 O.R. (2d) 87, 22 C.P.C. (2d) 131, 39 D.L.R. (4th) 526 (H.C.) . While the procedure carried out by the receiver in this case, as described by Galligan J.A., was appropriate, given the unfolding of events and the unique nature of the assets involved, it is not a procedure that is likely to be appropriate in many receivership sales.

73 I should like to add that where there is a small number of creditors who are the only parties with a real interest in the proceeds of the sale (i.e., where it is clear that the highest price attainable would result in recovery so low that no other creditors, shareholders, guarantors, etc., could possibly benefit therefore), the wishes of the interested creditors should be very seriously considered by the receiver. It is true, as Galligan J.A. points out, that in seeking the court appointment of a receiver, the moving parties also seek the protection of the court in carrying out the receiver's functions. However, it is also true that in utilizing the court process, the moving parties have opened the whole process to detailed scrutiny by all involved, and have probably added significantly to their costs and consequent shortfall as a result of so doing. The adoption of the court process should in no way diminish the rights of any party, and most certainly not the rights of the only parties with a real interest. Where a receiver asks for court approval of a sale which is opposed by the only parties in interest, the court should scrutinize with great care the procedure followed by the receiver. I agree with Galligan J.A. that in this case that was done. I am satisfied that the rights of all parties were properly considered by the receiver, by the learned motions court judge, and by Galligan J.A.

***Goodman J.A.* (dissenting):**

74 I have had the opportunity of reading the reasons for judgment herein of Galligan and McKinlay JJ.A. Respectfully, I am unable to agree with their conclusion.

75 The case at bar is an exceptional one in the sense that upon the application made for approval of the sale of the assets of Air Toronto, two competing offers were placed before Rosenberg J. Those two offers were that of OEL and that of 922, a company incorporated for the purpose of acquiring Air Toronto. Its shares were owned equally by CCFL and Air Canada. It was conceded by all parties to these proceedings that the only persons who had any interest in the proceeds of the sale were two secured creditors, viz., CCFL and the Royal Bank of Canada. Those two creditors were unanimous in their position that they desired the court to approve the sale to 922. We were not referred to, nor am I aware of, any case where a court has refused to abide by the unanimous wishes of the only interested creditors for the approval of a specific offer made in receivership proceedings.

76 In *British Columbia Developments Corp. v. Spun Cast Industries Ltd.* (1977), 26 C.B.R. (N.S.) 28, 5 B.C.L.R. 94 (S.C.) , Berger J. said at p. 30 [C.B.R.]:

> Here all of those with a financial stake in the plant have joined in seeking the court's approval of the sale to Fincas. This court does not have a roving commission to decide what is best for investors and businessmen when they have agreed among themselves what course of action they should follow. It is their money.

77 I agree with that statement. It is particularly apt to this case. The two secured creditors will suffer a shortfall of approximately $50 million. They have a tremendous interest in the sale of assets which form part of their security. I agree with the finding of Rosenberg J. that the offer of 922 is superior to that of OEL. He concluded that the 922 offer is marginally superior. If by that he meant that mathematically it was likely to provide slightly more in the way of proceeds, it is difficult to take issue with that finding. If, on the other hand, he meant that having regard to all considerations it was only marginally superior, I cannot agree. He said in his reasons:

> I have come to the conclusion that knowledgeable creditors such as the Royal Bank would prefer the 922 offer even if the other factors influencing their decision were not present. No matter what adjustments had to be made, the 922 offer results in more cash immediately. Creditors facing the type of loss the Royal Bank is taking in this case would not be anxious to rely on contingencies especially in the present circumstances surrounding the airline industry.

78 I agree with that statement completely. It is apparent that the difference between the two offers insofar as cash on closing is concerned amounts to approximately $3 million to $4 million. The bank submitted that it did not wish to gamble any further with respect to its investment, and that the acceptance and court approval of the OEL offer in effect supplanted its position as a secured creditor with respect to the amount owing over and above the down payment and placed it in the position of a joint entrepreneur, but one with no control. This results from the fact that the OEL offer did not provide for any security for any funds which might be forthcoming over and above the initial down payment on closing.

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

> Here we are dealing with a receiver appointed at the instance of one major creditor, who chose to insert in the contract of sale a provision making it subject to the approval of the court. This, in my opinion, shows an intention on behalf of the parties to invoke the normal equitable doctrines which place the court in the position of looking to the interests of all persons concerned before giving its blessing to a particular transaction submitted for approval. In these circumstances the court would not consider itself bound by the contract entered into in good faith by the receiver but would have to look to the broader picture to see that that contract was for the benefit of the creditors as a whole. When there was evidence that a higher price was readily available for the property the chambers judge was, in my opinion, justified in exercising his discretion as he did. Otherwise he could have deprived the creditors of a substantial sum of money.

80 This statement is apposite to the circumstances of the case at bar. I hasten to add that in my opinion it is not only price which is to be considered in the exercise of the judge's discretion. It may very well be, as I believe to be so in this case, that the amount of cash is the most important element in determining which of the two offers is for the benefit and in the best interest of the creditors.

81 It is my view, and the statement of Hart J.A. is consistent therewith, that the fact that a creditor has requested an order of the court appointing a receiver does not in any way diminish or derogate from his right to obtain the maximum benefit to be derived from any disposition of the debtor's assets. I agree completely with the views expressed by McKinlay J.A. in that regard in her reasons.

82 It is my further view that any negotiations which took place between the only two interested creditors in deciding to support the approval of the 922 offer were not relevant to the determination by the presiding judge of the issues involved in the motion for approval of either one of the two offers, nor are they relevant in determining the outcome of this appeal. It is sufficient that the two creditors have decided unanimously what is in their best interest, and the appeal must be considered in the light of that decision. It so happens, however, that there is ample evidence to support their conclusion that the approval of the 922 offer is in their best interests.

83 I am satisfied that the interests of the creditors are the prime consideration for both the receiver and the court. In *Re Beauty Counsellors of Canada Ltd.* (1986), 58 C.B.R. (N.S.) 237 (Ont. S.C.) , Saunders J. said at p. 243:

> This does not mean that a court should ignore a new and higher bid made after acceptance where there has been no unfairness in the process. The interests of the creditors, while not the only consideration, are the prime consideration.

84 I agree with that statement of the law. In *Re Selkirk* (1986), 58 C.B.R. (N.S.) 245 (Ont. S.C.) , Saunders J. heard an application for court approval of the sale by the sheriff of real property in bankruptcy proceedings. The sheriff had been previously ordered to list the property for sale subject to approval of the court. Saunders J. said at p. 246:

> In dealing with the request for approval, the court has to be concerned primarily with protecting the interests of the creditors of the former bankrupt. A secondary but important consideration is that the process under which the sale agreement is arrived at should be consistent with commercial efficacy and integrity.

85 I am in agreement with that statement as a matter of general principle. Saunders J. further stated that he adopted the principles stated by Macdonald J.A. in *Cameron* , supra, quoted by Galligan J.A. in his reasons. In *Cameron* , the remarks of Macdonald J.A. related to situations involving the calling of bids and fixing a time limit for the making of such bids. In those circumstances the process is so clear as a matter of commercial practice that an interference by the court in such process might have a deleterious effect on the efficacy of receivership proceedings in other cases. But Macdonald J.A. recognized that even in bid or tender cases where the offeror for whose bid approval is sought has complied with all requirements, a court might not approve the agreement of purchase and sale entered into by the receiver. He said at pp. 11-12 [C.B.R.]:

> There are, of course, many reasons why a court might not approve an agreement of purchase and sale, viz., where the offer accepted is so low in relation to the appraised value as to be unrealistic; or, where the circumstances indicate that insufficient time was allowed for the making of bids or that inadequate notice of sale by bid was given (where the receiver sells property by the bid method); or, where it can be said that the proposed sale is not in the best interest of either the creditors or the owner. Court approval must involve the delicate balancing of competing interests and not simply a consideration of the interests of the creditors.

86 The deficiency in the present case is so large that there has been no suggestion of a competing interest between the owner and the creditors.

87 I agree that the same reasoning may apply to a negotiation process leading to a private sale, but the procedure and process applicable to private sales of a wide variety of businesses and undertakings with the multiplicity of individual considerations applicable and perhaps peculiar to the particular business is not so clearly established that a departure by the court from the process adopted by the receiver in a particular case will result in commercial chaos to the detriment of future receivership proceedings. Each case must be decided on its own merits, and it is necessary to consider the process used by the receiver in the present proceedings and to determine whether it was unfair, improvident or inadequate.

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

> On March 8, 1991 the trustee accepted the OEL offer subject to court approval. The Receiver at that time had no other offer before it that was in final form or could possibly be accepted. The Receiver had at the time the knowledge that Air Canada with CCFL had not bargained in good faith and had not fulfilled the promise of its letter of March 1st. The Receiver was justified in assuming that Air Canada and CCFL's offer was a long way from being in an acceptable form and that Air Canada and CCFL's objective was to interrupt the finalizing of the OEL agreement and to retain as long as possible the Air Toronto connector traffic flowing into Terminal 2 for the benefit of Air Canada.

89 In my opinion there was no evidence before him or before this court to indicate that Air Canada, with CCFL, had not bargained in good faith, and that the receiver had knowledge of such lack of good faith. Indeed, on his appeal, counsel for the receiver stated that he was not alleging Air Canada and CCFL had not bargained in good faith. Air Canada had frankly stated at the time that it had made its offer to purchase, which was eventually refused by the receiver, that it would not become involved in an "auction" to purchase the undertaking of Air Canada and that, although it would fulfil its contractual obligations to provide connecting services to Air Toronto, it would do no more than it was legally required to do insofar as facilitating the purchase of Air Toronto by any other person. In so doing, Air Canada may have been playing "hardball," as its behaviour was characterized by some of the counsel for opposing parties. It was nevertheless merely openly asserting its legal position, as it was entitled to do.

90 Furthermore, there was no evidence before Rosenberg J. or this court that the receiver had assumed that Air Canada and CCFL's objective in making an offer was to interrupt the finalizing of the OEL agreement and to retain as long as possible the Air Toronto connector traffic flowing into Terminal 2 for the benefit of Air Canada. Indeed, there was no evidence to support such an assumption in any event, although it is clear that 922, and through it CCFL and Air Canada, were endeavouring to present an offer to purchase which would be accepted and/or approved by the court in preference to the offer made by OEL.

91 To the extent that approval of the OEL agreement by Rosenberg J. was based on the alleged lack of good faith in bargaining and improper motivation with respect to connector traffic on the part of Air Canada and CCFL, it cannot be supported.

92 I would also point out that rather than saying there was no other offer before it that was final in form, it would have been more accurate to have said that there was *no unconditional* offer before it.

93 In considering the material and evidence placed before the court, I am satisfied that the receiver was at all times acting in good faith. I have reached the conclusion, however, that the process which he used was unfair insofar as 922 is concerned, and improvident insofar as the two secured creditors are concerned.

94 Air Canada had been negotiating with Soundair Corporation for the purchase from it of Air Toronto for a considerable period of time prior to the appointment of a receiver by the court. It had given a letter of intent indicating a prospective sale price of $18 million. After the appointment of the receiver, by agreement dated April 30, 1990, Air Canada continued its negotiations for the purchase of Air Toronto with the receiver. Although this agreement contained a clause which provided that the receiver "shall not negotiate for the sale ... of Air Toronto with any person except Air Canada," it further provided that the receiver would not be in breach of that provision merely by receiving unsolicited offers for all or any of the assets of Air Toronto. In addition, the agreement, which had a term commencing on April 30, 1990, could be terminated on the fifth business day following the delivery of a written notice of termination by one party to the other. I point out this provision merely to indicate that the exclusivity privilege extended by the receiver to Air Canada was of short duration at the receiver's option.

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

96 By amending agreement dated June 19, 1990, the receiver was released from its covenant to refrain from negotiating for the sale of the Air Toronto business and assets to any person other than Air Canada. By virtue of this amending agreement, the receiver had put itself in the position of having a firm offer in hand, with the right to negotiate and accept offers from other

persons. Air Canada, in these circumstances, was in the subservient position. The receiver, in the exercise of its judgment and discretion, allowed the Air Canada offer to lapse. On July 20, 1990, Air Canada served a notice of termination of the April 30, 1990 agreement.

97 Apparently as a result of advice received from the receiver to the effect that the receiver intended to conduct an auction for the sale of the assets and business of the Air Toronto division of Soundair Corporation, the solicitors for Air Canada advised the receiver by letter dated July 20, 1990, in part as follows:

> Air Canada has instructed us to advise you that it does not intend to submit a further offer in the auction process.

98 This statement, together with other statements set forth in the letter, was sufficient to indicate that Air Canada was not interested in purchasing Air Toronto in the process apparently contemplated by the receiver at that time. It did not form a proper foundation for the receiver to conclude that there was no realistic possibility of selling Air Toronto [to] Air Canada, either alone or in conjunction with some other person, in different circumstances. In June 1990, the receiver was of the opinion that the fair value of Air Toronto was between $10 million and $12 million.

99 In August 1990, the receiver contacted a number of interested parties. A number of offers were received which were not deemed to be satisfactory. One such offer, received on August 20, 1990, came as a joint offer from OEL and Air Ontario (an Air Canada connector). It was for the sum of $3 million for the good will relating to certain Air Toronto routes, but did not include the purchase of any tangible assets or leasehold interests.

100 In December 1990, the receiver was approached by the management of Canadian Partner (operated by OEL) for the purpose of evaluating the benefits of an amalgamated Air Toronto/Air Partner operation. The negotiations continued from December of 1990 to February of 1991, culminating in the OEL agreement dated March 8, 1991.

101 On or before December 1990, CCFL advised the receiver that it intended to make a bid for the Air Toronto assets. The receiver, in August of 1990, for the purpose of facilitating the sale of Air Toronto assets, commenced the preparation of an operating memorandum. He prepared no less than six draft operating memoranda with dates from October 1990 through March 1, 1991. None of these were distributed to any prospective bidder despite requests having been received therefor, with the exception of an early draft provided to CCFL without the receiver's knowledge.

102 During the period December 1990 to the end of January 1991, the receiver advised CCFL that the offering memorandum was in the process of being prepared and would be ready soon for distribution. He further advised CCFL that it should await the receipt of the memorandum before submitting a formal offer to purchase the Air Toronto assets.

103 By late January, CCFL had become aware that the receiver was negotiating with OEL for the sale of Air Toronto. In fact, on February 11, 1991, the receiver signed a letter of intent with OEL wherein it had specifically agreed not to negotiate with any other potential bidders or solicit any offers from others.

104 By letter dated February 25, 1991, the solicitors for CCFL made a written request to the receiver for the offering memorandum. The receiver did not reply to the letter because he felt he was precluded from so doing by the provisions of the letter of intent dated February 11, 1991. Other prospective purchasers were also unsuccessful in obtaining the promised memorandum to assist them in preparing their bids. It should be noted that, exclusivity provision of the letter of intent expired on February 20, 1991. This provision was extended on three occasions, viz., February 19, 22 and March 5, 1991. It is clear that from a legal standpoint the receiver, by refusing to extend the time, could have dealt with other prospective purchasers, and specifically with 922.

105 It was not until March 1, 1991, that CCFL had obtained sufficient information to enable it to make a bid through 922. It succeeded in so doing through its own efforts through sources other than the receiver. By that time the receiver had already entered into the letter of intent with OEL. Notwithstanding the fact that the receiver knew since December of 1990 that CCFL wished to make a bid for the assets of Air Toronto (and there is no evidence to suggest that at that time such a bid would be in conjunction with Air Canada or that Air Canada was in any way connected with CCFL), it took no steps to provide CCFL

with information necessary to enable it to make an intelligent bid, and indeed suggested delaying the making of the bid until an offering memorandum had been prepared and provided. In the meantime, by entering into the letter of intent with OEL, it put itself in a position where it could not negotiate with CCFL or provide the information requested.

106 On February 28, 1991, the solicitors for CCFL telephoned the receiver and were advised for the first time that the receiver had made a business decision to negotiate solely with OEL and would not negotiate with anyone else in the interim.

107 By letter dated March 1, 1991, CCFL advised the receiver that it intended to submit a bid. It set forth the essential terms of the bid and stated that it would be subject to customary commercial provisions. On March 7, 1991 CCFL and Air Canada, jointly through 922, submitted an offer to purchase Air Toronto upon the terms set forth in the letter dated March 1, 1991. It included a provision that the offer was conditional upon the interpretation of an inter-lender agreement which set out the relative distribution of proceeds as between CCFL and the Royal Bank. It is common ground that it was a condition over which the receiver had no control, and accordingly would not have been acceptable on that ground alone. The receiver did not, however, contact CCFL in order to negotiate or request the removal of the condition, although it appears that its agreement with OEL not to negotiate with any person other than OEL expired on March 6, 1991.

108 The fact of the matter is that by March 7, 1991, the receiver had received the offer from OEL which was subsequently approved by Rosenberg J. That offer was accepted by the receiver on March 8, 1991. Notwithstanding the fact that OEL had been negotiating the purchase for a period of approximately 3 months, the offer contained a provision for the sole benefit of the purchaser that it was subject to the purchaser obtaining "a financing commitment within 45 days of the date hereof in an amount not less than the Purchase Price from the Royal Bank of Canada or other financial institution upon terms and conditions acceptable to them. In the event that such a financing commitment is not obtained within such 45 day period, the purchaser or OEL shall have the right to terminate this agreement upon giving written notice of termination to the vendor on the first Business Day following the expiry of the said period." The purchaser was also given the right to waive the condition.

109 In effect, the agreement was tantamount to a 45-day option to purchase, excluding the right of any other person to purchase Air Toronto during that period of time and thereafter if the condition was fulfilled or waived. The agreement was, of course, stated to be subject to court approval.

110 In my opinion, the process and procedure adopted by the receiver was unfair to CCFL. Although it was aware from December 1990 that CCFL was interested in making an offer, it effectively delayed the making of such offer by continually referring to the preparation of the offering memorandum. It did not endeavour during the period December 1990 to March 7, 1991, to negotiate with CCFL in any way the possible terms of purchase and sale agreement. In the result, no offer was sought from CCFL by the receiver prior to February 11, 1991, and thereafter it put itself in the position of being unable to negotiate with anyone other than OEL. The receiver then, on March 8, 1991, chose to accept an offer which was conditional in nature without prior consultation with CCFL (922) to see whether it was prepared to remove the condition in its offer.

111 I do not doubt that the receiver felt that it was more likely that the condition in the OEL offer would be fulfilled than the condition in the 922 offer. It may be that the receiver, having negotiated for a period of 3 months with OEL, was fearful that it might lose the offer if OEL discovered that it was negotiating with another person. Nevertheless, it seems to me that it was imprudent and unfair on the part of the receiver to ignore an offer from an interested party which offered approximately triple the cash down payment without giving a chance to the offeror to remove the conditions or other terms which made the offer unacceptable to it. The potential loss was that of an agreement which amounted to little more than an option in favour of the offeror.

112 In my opinion the procedure adopted by the receiver was unfair to CCFL in that, in effect, it gave OEL the opportunity of engaging in exclusive negotiations for a period of 3 months, notwithstanding the fact that it knew CCFL was interested in making an offer. The receiver did not indicate a deadline by which offers were to be submitted, and it did not at any time indicate the structure or nature of an offer which might be acceptable to it.

113 In his reasons, Rosenberg J. stated that as of March 1, CCFL and Air Canada had all the information that they needed, and any allegations of unfairness in the negotiating process by the receiver had disappeared. He said:

> They created a situation as of March 8, where the receiver was faced with two offers, one of which was acceptable in form and one of which could not possibly be accepted in its present form. The Receiver acted appropriately in accepting the OEL offer.

If he meant by "acceptable in form" that it was acceptable to the receiver, then obviously OEL had the unfair advantage of its lengthy negotiations with the receiver to ascertain what kind of an offer would be acceptable to the receiver. If, on the other hand, he meant that the 922 offer was unacceptable in its form because it was conditional, it can hardly be said that the OEL offer was more acceptable in this regard, as it contained a condition with respect to financing terms and conditions "*acceptable to them* ."

114 It should be noted that on March 13, 1991, the representatives of 922 first met with the receiver to review its offer of March 7, 1991, and at the request of the receiver, withdrew the inter-lender condition from its offer. On March 14, 1991, OEL removed the financing condition from its offer. By order of Rosenberg J. dated March 26, 1991, CCFL was given until April 5, 1991, to submit a bid, and on April 5, 1991, 922 submitted its offer with the inter-lender condition removed.

115 In my opinion, the offer accepted by the receiver is improvident and unfair insofar as the two creditors are concerned. It is not improvident in the sense that the price offered by 922 greatly exceeded that offered by OEL. In the final analysis it may not be greater at all. The salient fact is that the cash down payment in the 922 offer con stitutes proximately two thirds of the contemplated sale price, whereas the cash down payment in the OEL transaction constitutes approximately 20 to 25 per cent of the contemplated sale price. In terms of absolute dollars, the down payment in the 922 offer would likely exceed that provided for in the OEL agreement by approximately $3 million to $4 million.

116 In *Re Beauty Counsellors of Canada Ltd.* , supra, Saunders J. said at p. 243 [C.B.R.]:

> If a substantially higher bid turns up at the approval stage, the court should consider it. Such a bid may indicate, for example, that the trustee has not properly carried out its duty to endeavour to obtain the best price for the estate. In such a case the proper course might be to refuse approval and to ask the trustee to recommence the process.

117 I accept that statement as being an accurate statement of the law. I would add, however, as previously indicated, that in determining what is the best price for the estate, the receiver or court should not limit its consideration to which offer provides for the greater sale price. The amount of down payment and the provision or lack thereof to secure payment of the balance of the purchase price over and above the down payment may be the most important factor to be considered, and I am of the view that is so in the present case. It is clear that that was the view of the only creditors who can benefit from the sale of Air Toronto.

118 I note that in the case at bar the 922 offer in conditional form was presented to the receiver before it accepted the OEL offer. The receiver, in good faith, although I believe mistakenly, decided that the OEL offer was the better offer. At that time the receiver did not have the benefit of the views of the two secured creditors in that regard. At the time of the application for approval before Rosenberg J., the stated preference of the two interested creditors was made quite clear. He found as fact that knowledgeable creditors would not be anxious to rely on contingencies in the present circumstances surrounding the airline industry. It is reasonable to expect that a receiver would be no less knowledgeable in that regard, and it is his primary duty to protect the interests of the creditors. In my view, it was an improvident act on the part of the receiver to have accepted the conditional offer made by OEL, and Rosenberg J. erred in failing to dismiss the application of the receiver for approval of the OEL offer. It would be most inequitable to foist upon the two creditors, who have already been seriously hurt, more unnecessary contingencies.

119 Although in other circumstances it might be appropriate to ask the receiver to recommence the process, in my opinion, it would not be appropriate to do so in this case. The only two interested creditors support the acceptance of the 922 offer, and the court should so order.

120 Although I would be prepared to dispose of the case on the grounds stated above, some comment should be addressed to the question of interference by the court with the process and procedure adopted by the receiver.

121 I am in agreement with the view expressed by McKinlay J.A. in her reasons that the undertaking being sold in this case was of a very special and unusual nature. As a result, the procedure adopted by the receiver was somewhat unusual. At the outset, in accordance with the terms of the receiving order, it dealt solely with Air Canada. It then appears that the receiver contemplated a sale of the assets by way of auction, and still later contemplated the preparation and distribution of an offering memorandum inviting bids. At some point, without advice to CCFL, it abandoned that idea and reverted to exclusive negotiations with one interested party. This entire process is not one which is customary or widely accepted as a general practice in the commercial world. It was somewhat unique, having regard to the circumstances of this case. In my opinion, the refusal of the court to approve the offer accepted by the receiver would not reflect on the integrity of procedures followed by court-appointed receivers, and is not the type of refusal which will have a tendency to undermine the future confidence of business persons in dealing with receivers.

122 Rosenberg J. stated that the Royal Bank was aware of the process used and tacitly approved it. He said it knew the terms of the letter of intent in February 1991, and made no comment. The Royal Bank did, however, indicate to the receiver that it was not satisfied with the contemplated price, nor the amount of the down payment. It did not, however, tell the receiver to adopt a different process in endeavouring to sell the Air Toronto assets. It is not clear from the material filed that at the time it became aware of the letter of intent that it knew that CCFl was interested in purchasing Air Toronto.

123 I am further of the opinion that a prospective purchaser who has been given an opportunity to engage in exclusive negotiations with a receiver for relatively short periods of time which are extended from time to time by the receiver, and who then makes a conditional offer, the condition of which is for his sole benefit and must be fulfilled to his satisfaction unless waived by him, and which he knows is to be subject to court approval, cannot legitimately claim to have been unfairly dealt with if the court refuses to approve the offer and approves a substantially better one.

124 In conclusion, I feel that I must comment on the statement made by Galligan J.A. in his reasons to the effect that the suggestion made by counsel for 922 constitutes evidence of lack of prejudice resulting from the absence of an offering memorandum. It should be pointed out that the court invited counsel to indicate the manner in which the problem should be resolved in the event that the court concluded that the order approving the OEL offer should be set aside. There was no evidence before the court with respect to what additional information may have been acquired by CCFL since March 8, 1991, and no inquiry was made in that regard. Accordingly, I am of the view that no adverse inference should be drawn from the proposal made as a result of the court's invitation.

125 For the above reasons I would allow the appeal one set of costs to CCFL-922, set aside the order of Rosenberg J., dismiss the receiver's motion with one set of costs to CCFL-922 and order that the assets of Air Toronto be sold to numbered corporation 922246 on the terms set forth in its offer with appropriate adjustments to provide for the delay in its execution. Costs awarded shall be payable out of the estate of Soundair Corporation. The costs incurred by the receiver in making the application and responding to the appeal shall be paid to him out of the assets of the estate of Soundair Corporation on a solicitor-client basis. I would make no order as to costs of any of the other parties or intervenors.

Appeal dismissed.

TAB F

2020 ONSC 3517
Ontario Superior Court of Justice

Choice Properties Limited Partnership v. Penady (Barrie) Ltd.

2020 CarswellOnt 8329, 2020 ONSC 3517, 321 A.C.W.S. (3d) 220, 81 C.B.R. (6th) 302

CHOICE PROPERTIES LIMITED PARTNERSHIP, by its general partner, CHOICE PROPERTIES GP INC. (Applicant) and PENADY (BARRIE) LTD., PRC BARRIE CORP. and MADY (BARRIE) INC. (Respondents)

McEwen J.

Heard: June 2, 2020
Judgment: June 10, 2020
Docket: CV-20-00637682-00CL

Counsel: Michael De Lellis, Shawn Irving, for Applicant
Tim Duncan, Michael Citak, for Respondents
Eric Golden, Chad Kopach, for RSM Canada Limited, in its capacity as Court-appointed Receiver

Related Abridgment Classifications
Bankruptcy and insolvency
IV Receivers
IV.3 Powers, duties and liabilities
Headnote
Bankruptcy and insolvency --- Receivers — Powers, duties and liabilities
Receiver of respondents sought order approving sale procedure, related to sale of commercial rental property — Rental property was used as shopping centre — Sale procedure included asset purchase agreement by way of credit bid with applicant lender — Applicant supported sale procedure, while respondents opposed this procedure — Receiver moved for approval or sale procedure — Motion granted — Receiver had obtained proper estimate on property from commercial real estate company — Estimate was comprehensive and took into account conditions, including COVID-19 pandemic — Respondents' appraisals were not current, and did not reflect failure to sell property at higher value — Expense reimbursement was reasonable, and within range typically accepted by court — Required deposits and minimum overbids were also reasonable — Insolvency was not caused by pandemic — There was no certainty of economic improvement that would allow for sale, at price respondents sought — Sale procedure complied with applicable principles, addressing business value and setting realistic timetable.
Table of Authorities
Cases considered by *McEwen J.*:
CCM Master Qualified Fund Ltd. v. blutip Power Technologies Ltd. (2012), 2012 ONSC 1750, 2012 CarswellOnt 3158, 90 C.B.R. (5th) 74 (Ont. S.C.J. [Commercial List]) — considered
Royal Bank v. Soundair Corp. (1991), 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321, 4 O.R. (3d) 1, 1991 CarswellOnt 205 (Ont. C.A.) — considered
Sierra Club of Canada v. Canada (Minister of Finance) (2002), 2002 SCC 41, 2002 CarswellNat 822, 2002 CarswellNat 823, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 211 D.L.R. (4th) 193, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, 287 N.R. 203, 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 93 C.R.R. (2d) 219, 223 F.T.R. 137 (note), [2002] 2 S.C.R. 522, 2002 CSC 41 (S.C.C.) — considered
Rules considered:
Rules of Civil Procedure, R.R.O. 1990, Reg. 194
R. 53 — considered

***McEwen J.*:**

1 This motion is brought by RSM Canada Limited (the "Receiver"), in its capacity as the Court-appointed Receiver of all of the rights, title and interest of Penady (Barrie) Ltd. ("Penady"), PRC Barrie Corp. ("PRC") and Mady (Barrie) Inc. ("MBI") (collectively, the "Respondents") for an order, amongst other things, approving the Sale Procedure outlined in the First Report of the Receiver which features an asset purchase agreement by way of a credit bid (the "Stalking Horse Agreement") with the Applicant.

2 The Applicant, Choice Properties Limited Partnership ("CHP"), by its general partner, Choice Properties GP Inc. ("Choice GP"), supports the Receiver's motion. The Respondents oppose.

3 The asset in question primarily consists of commercial rental property known as the North Barrie Crossing Shopping Centre (the "Barrie Property"). Penady is the registered owner of the Barrie Property. PRC and MBI are the beneficial owners. The Barrie Property essentially consists of a shopping centre with 27 tenants.

4 Due to the COVID-19 crisis, the motion proceeded by way of Zoom video conference. It was held in accordance with the Notices to Profession issued by Morawetz C.J. and the Commercial List Advisory.

INTRODUCTION

5 Choice GP is the general partner of CHP. CHP is the senior secured lender to Penady. PRC and MBI provided a limited recourse guarantee, limited to their beneficial interest in the Barrie Property.

6 CHP advanced funding to Penady to assist with the development of the Barrie Property. It subsequently assumed Penady's indebtedness to the Equitable Bank, which previously held a first mortgage over the Barrie Property.

7 Currently, Penady is indebted to CHP in the amount of approximately $70 million with interest accruing monthly at the rate of approximately $550,000.

8 As a result of the foregoing, as noted, the Receiver brings this motion seeking approval of the Stalking Horse Agreement and Sale Procedure along with other related relief.

9 I heard the motion on June 2, 2020 and granted, primarily, the relief sought by the Receiver. I incorporated some changes into the Order, with respect to the Sale Procedure, and approved a Sale Procedure, Stalking Horse Agreement, Receiver's Reports and inserted a Sealing Order. At that time, I indicated that reasons would follow. I am now providing those reasons.

PRELIMINARY ISSUES

10 I begin by noting that I granted the Sealing Order sought by the Receiver, on an unopposed basis, with respect to the Unredacted Receiver's Factum dated May 29, 2020 and Respondents' Factum dated June 1, 2020, as well as the Respondents' Confidential Application Record dated March 20, 2020 and the Supplemental Evaluation Information of Cameron Lewis dated March 23, 2020. The test for a sealing order is set out in the well-known decision of *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522 (S.C.C.), at para. 53. The test is met in this case since the Sealing Order relates to appraisals concerning the Barrie Property and thus it is important that they remain confidential during the Sale Procedure.

11 I also wish to deal with the issue of the affidavit filed by the Respondents that was prepared by Mr. Josh Thiessen. Mr. Thiessen is a Vice-President, in client management, at MarshallZehr Mortgage Brokerage. As I noted at the motion, the Respondents, in my view, were putting forward Mr. Thiessen as an expert witness to provide evidence on the issue of the Sale Procedure. The Respondents failed, however, to provide a curriculum vitae so that I could determine whether Mr. Thiessen had any experience in sale procedures in distress situations or insolvency proceedings. Further, no attempt was made to comply with the requirements of r. 53 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, concerning experts' reports. Mr. Thiessen

was also involved in a previous attempt to sell the Barrie Property and had a financial interest in that potential transaction. The Applicant submits that Mr. Thiessen's involvement makes him a partial witness.

12 In all of the circumstances I advised the parties that while I had reviewed Mr. Thiessen's affidavit, I was giving it very limited weight. In short, however, I do not believe that much turns on Mr. Thiessen's affidavit since I granted relief to the Respondents with respect to most of Mr. Thiessen's concerns, for my own reasons.

13 Last, the Respondents, in support of their position, sought to draw comparisons between the Barrie Property and a Brampton Property in which CHP has a 70 percent controlling interest. I accept the Receiver's argument that such a comparison is of little, if any, use given that the Brampton Property is vacant land, currently zoned as commercial, but being marketed with a potential to rezone for residential use. Further, it bears noting, that CHP has a sales process well underway with respect to the Brampton Property, which refutes the Respondents' submission that CHP has meaningfully delayed that sale.

THE LAW

14 The issue on this motion is whether the Sale Procedure is fair and reasonable.

15 The parties agree that the criteria to be applied are set out in the well-known case of *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (Ont. C.A.), as follows:

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

16 As further explained by D. Brown J. (as he then was) in *CCM Master Qualified Fund Ltd. v. blutip Power Technologies Ltd.*, 2012 ONSC 1750, 90 C.B.R. (5th) 74 (Ont. S.C.J. [Commercial List]), the approval of a particular form of Sale Procedure must keep the *Soundair* principles in mind and assess:

> (a) the fairness, transparency and integrity of the proposed process;
>
> (b) the commercial efficacy of the proposed process in light of the specific circumstances facing the receiver; and
>
> (c) whether the sales process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale.

ANALYSIS

Introduction

17 Before I begin my review of the Sale Procedure, it bears noting that the Sale Procedure is being contemplated during the COVID-19 crisis. In this regard, however, it further bears noting that the financial difficulties encountered by Penady pre-date the COVID-19 pandemic. Prior to the Receivership Order being granted, Penady had been attempting to sell or refinance the Barrie Property for approximately 16 months. It was in default on its indebtedness to CHP. There were also substantial unpaid realty taxes on the Barrie Property from late 2018 up until the time of the Receivership.

18 At the time the COVID-19 crisis hit, there were 27 tenants at the Barrie Property. Since COVID-19, 16 tenants have temporarily suspended operations, with another 6 tenants offering limited services. The major Barrie Property tenants include TD, Tim Hortons, McDonalds, Dollarama, Cineplex, LA Fitness, and State & Main.

19 It also bears noting that Penady had previously retained Mr. Cameron Lewis of Avison Young Commercial Real Estate (Ontario) Inc. ("AY") to market and sell the Barrie Property. The Receiver agreed to retain Mr. Lewis to continue to market the Barrie Property. Mr. Lewis is well experienced in the area and his previous involvement will allow him to utilize the information he has gathered, including potential bidders. Similarly, the Receiver has retained the existing property manager, Penn Equity, to continue to manage the Barrie Property during the Receivership.

The Disputes Between the Parties

20 I will now deal with the various disputes between the parties, first dealing with the objections that the Respondents have with respect to the Stalking Horse Agreement and then with the Respondents' complaints concerning the Sale Procedure.

The Stalking Horse Agreement

21 The first complaint of the Respondents concerns the credit bid contained in the Stalking Horse Agreement as being significantly below appraisals obtained for the Barrie Property by the Respondents (all amounts are subject to the Sealing Order).

22 I do not accept this argument. The Receiver has obtained an estimate on the Barrie Property from a reputable commercial real estate company, Cushman & Wakefield ULC ("CW"). The valuation was prepared by CW on March 25, 2020. It is comprehensive and expressly factors into the valuation difficulties in collecting rental income due to the COVID-19 crisis, which rent collection issues have now materialized. Further, the credit bid contained in the Stalking Horse Agreement will be paid during the Sale Procedure while the valuation placed upon the Barrie Property by CW anticipates a marketing process which will culminate in a sale in approximately 12-18 months. Thus, there is the obvious benefit of having the quicker Sale Procedure undertaken, without the continued, approximately $550,000 per month interest being incurred for another 12-18 months.

23 The Respondents rely upon the two appraisals that they have received which place higher valuations on the Barrie Property. The difficulty with those appraisals is that neither deals with the ramifications of the COVID-19 crisis. Furthermore, it bears noting that Penady was unable to sell the Barrie Property over a protracted period of time leading up to the Receivership, which suggests, partially at least, that the price it was asking was too high.

24 It also strikes me that if CW's valuation is, in fact, on the low-side, it could generate an auction in which the Applicant and others can bid, thus, driving up the price.

25 The second issue that the Respondents have with the Stalking Horse Agreement is the $400,000 Expense Reimbursement payable to the Applicant if it is unsuccessful, while an unsuccessful third-party bidder will receive no reimbursement for participating in the process.

26 In my view, the Expense Reimbursement is very reasonable. It constitutes just 0.8 percent of the purchase price, which is well within the range that is typically accepted by this court. The Respondents submit that they require a breakdown of exactly what the Expense Reimbursement would cover. In light of the modest amount of the Expense Reimbursement and the opinion of the Receiver, it is my view that such an accounting is not required in this case. Expense reimbursement payments compensate Stalking Horse Agreement purchasers for the time, resources and risk taken in developing a Stalking Horse Agreement. In addition to the time spent, the payments also represent the price of stability and thus some premium over simply providing for expenses may be expected. Thus, the Expense Reimbursement claim of 0.8 percent is, in my view, justifiable.

27 Third, the Respondents object to the required deposits of 3 percent and 7 percent at Phase I and II, respectively. They also object to a requirement that potential bidders secure financing at the end of Phase I. In my view, these are entirely reasonable requirements so that only legitimate would-be purchasers are engaged.

28 Fourth, the Respondents object to the Minimum Overbid of $250,000. In my view, the $250,000 Minimum Overbid is reasonable and within the range that is typically allowed by this court concerning properties of significant value. I can see no detriment of having a modest overbid amount in place given the amount of the Applicant's credit bid. It is supported by the Receiver and will generate a sensible bidding process.

29 Last, the Respondents object to the Applicant being involved in the proposed auction if a superior bid is obtained. Again, I disagree. Such auctions are commonplace and ensure a robust bidding process. In this regard, the Respondents also make vague complaints about the auction process. I do not accept these arguments. The auction process proposed is in keeping with those generally put before this court.

The Sale Procedure

30 First, the Respondents complain that the Receiver is prepared to undertake the Sale Procedure without obtaining a valid environmental report, a valid building condition assessment report or any tenant estoppel certificates.

31 The Receiver responds by submitting that there is an existing environmental report that is approximately one and one-half years old, the Barrie Property was recently constructed (2016), and that tenant estoppel certificates will be very difficult to obtain, given the current economic climate and the fact that some tenants are not operating and are seeking rent abatements. The Receiver further points out that Penady had neither an environmental report or building condition assessment when it attempted to sell the Barrie Property.

32 While there is some merit in the submissions of the Receiver, it is my view that it would be preferable to obtain an environmental report, valid building condition assessment and tenant estoppel certificates from the seven major tenants. The Receiver, in an alternative submission, agreed to obtain the environmental report and building condition assessment report. It has recently determined that the environmental assessment report can be obtained in three to four weeks and the building condition assessment report in two to three weeks. Both can be obtained at a very modest cost. Normally such reports may not be necessary, given what I have outlined above. It is my view, however, that given the current economic condition, it is best to err on the side of caution and ensure that this information, which may enhance the Sale Procedure, is available to bidders. These reports can be obtained for a modest price, in short order.

33 Similarly, it is reasonable to obtain tenant estoppel certificates from the seven major tenants. Bidders would likely be interested in this information. I accept that it would be more difficult to obtain the certificates from the minor tenants, many of whom are not fully operating at this time. The Receiver shall therefore use best efforts to obtain the tenant estoppel certificates from the seven major tenants as soon as reasonably possible.

34 Second, the Respondents submit that a Sale Procedure should not be undertaken at this time given the COVID-19 crisis. While I have sympathy with the situation the Respondents now face, I do not agree.

35 As noted above, this insolvency was not generated by the COVID-19 crisis. Penady was in financial difficulty for several months preceding the pandemic and had been unsuccessfully attempting to sell the Barrie Property for some time. I do not accept the argument that we should adopt a "wait and see" approach to determine if and when the economic crisis abates. The Applicant continues to see interest accrue, as noted, at approximately $550,000 per month. There is no certainty that the economic situation will improve in any given period of time and it may continue to ebb and flow before it gets better. The Respondents did not adduce any evidence to suggest when the economy may improve, nor likely could they, given the uncertainty surrounding the COVID-19 crisis.

36 In fairness, the Respondents did not propose an indefinite period, but perhaps a 2-3 month pause. Without some certainty, however, I do not agree that this is reasonable given the accruing interest and the risk that the economy may not improve and could worsen.

37 Alternatively, the Respondents seek to extend the timeline in the Sale Procedure. In my view, the timeline proposed by the Receiver for the Sale Procedure is a reasonable one and superior to the timeline Penady had in place when it attempted to sell the Barrie Property before the Receivership. The Receiver Sale Procedure includes a quicker ramp-up, a robust process, including the creation of a data room (which has been done), and overall provides for a longer marketing period than was included in the previous Penady sales process.

38 In light of the fact, however, that I have ordered production of the aforementioned environmental and building condition assessment reports, as well as the tenant estoppel certificates, and in order to ensure that a fair timeline is put in place so as to maximize the chances of competitive bids being obtained (including bidders having an opportunity to secure financing), I am extending the Sale Procedure by two weeks. It is my view, though, that obtaining the aforementioned documentation will result in little, if any, delay in implementing the marketing process.

39 It also bears repeating that the Receiver has acted reasonably in retaining Mr. Lewis of AY. Mr. Lewis has been in contact with prospective bidders given his previous retainer by Penady. The Receiver's retainer of Mr. Lewis allows him to continue on with his work as opposed to having a new commercial real estate agent embark on a learning process with respect to the Barrie Property. Further, Mr. Lewis's commission structure is designed so that he earns a larger commission if a buyer, other than the Applicant, is successful, thus incentivizing Mr. Lewis to ensure that a robust Sale Procedure is undertaken.

40 The extension of the Phase I Bid Deadline to August 12, 2020 and the extension of the Phase II Bid Deadline to August 26, 2020, constitutes a fair and reasonable timetable which is longer than those usually sought and granted by this court. Further, and in any event, the Receiver can and should reappear before the court, if necessary.

DISPOSITION

41 It is my view that the above Sale Procedure complies with the principles set out in both *Soundair* and *CCM Master*. The Stalking Horse Agreement and Sale Procedure strike the necessary balance to move quickly and to address the deterioration of the value of the business, while at the same time setting a realistic timetable that will support the process.

42 Based on the foregoing, at the conclusion of the hearing, with the above noted amendments, I granted the Receiver's Order authorizing the Stalking Horse Agreement and the Sale Procedure, and authorizing the Receiver to enter into the proposed listing agreement. Furthermore, I approved the First Report and the Supplementary First Report, the Receiver's conduct and activities described, as well as granted the Sealing Order.

43 The parties approved the form and content of the Order which I signed on June 3, 2020.

Motion granted.

TAB G

Most Negative Treatment: Recently added (treatment not yet designated)
Most Recent Recently added (treatment not yet designated): iSpan Systems LP | 2023 ONSC 6212, 2023 CarswellOnt 16935 | (Ont. S.C.J. [Commercial List], Nov 1, 2023)

2012 ONSC 1750
Ontario Superior Court of Justice [Commercial List]

CCM Master Qualified Fund Ltd. v. blutip Power Technologies Ltd.

2012 CarswellOnt 3158, 2012 ONSC 1750, 213 A.C.W.S. (3d) 12, 90 C.B.R. (5th) 74

CCM Master Qualified Fund, Ltd. (Applicant) and blutip Power Technologies Ltd. (Respondent)

D.M. Brown J.

Heard: March 15, 2012
Judgment: March 15, 2012
Docket: CV-12-9622-00CL

Counsel: L. Rogers, C. Burr for Receiver, Duff & Phelps Canada Restructuring Inc.
A. Cobb, A. Lockhart for Applicant

Related Abridgment Classifications
Bankruptcy and insolvency
IV Receivers
IV.4 Miscellaneous
Headnote
Bankruptcy and insolvency --- Receivers — Miscellaneous
Receiver was appointed over debtor company — Debtor was in development phase with no significant sources of revenue and was dependant on external sources of equity and debt funding to operate — Receiver brought motion for orders approving sales process and bidding procedures, including use of stalking horse credit bid; priority of Receiver's Charge and Receiver's Borrowings Charge; and activities reported in Receiver's First Report — Motion granted — Receiver lacked access to sufficient funding to support debtor's operations during lengthy sales process — Quick sales process was required — Marketing, bid solicitation and bidding procedures proposed by Receiver would result in fair, transparent and commercially efficacious process, and were approved — Stalking horse agreement was approved for purposes requested by Receiver — Receiver was granted priority over existing perfected security interests and statutory encumbrances — Debtor did not maintain any pension plans — Activities in Receiver's First Report were approved.
Table of Authorities
Cases considered by *D.M. Brown J.*:

Brainhunter Inc., Re (2009), 62 C.B.R. (5th) 41, 2009 CarswellOnt 8207 (Ont. S.C.J. [Commercial List]) — referred to

First Leaside Wealth Management Inc., Re (2012), 2012 CarswellOnt 2559, 2012 ONSC 1299 (Ont. S.C.J. [Commercial List]) — followed

Graceway Canada Co., Re (2011), 2011 ONSC 6403, 2011 CarswellOnt 11687, 85 C.B.R. (5th) 252 (Ont. S.C.J. [Commercial List]) — referred to

Indalex Ltd., Re (2009), 2009 CarswellOnt 4262, 79 C.C.P.B. 101 (Ont. S.C.J. [Commercial List]) — referred to

Nortel Networks Corp., Re (2009), 2009 CarswellOnt 4467, 55 C.B.R. (5th) 229 (Ont. S.C.J. [Commercial List]) — referred to

Nortel Networks Corp., Re (2009), 56 C.B.R. (5th) 74, 2009 CarswellOnt 4839 (Ont. S.C.J. [Commercial List]) — referred to

Parlay Entertainment Inc., Re (2011), 81 C.B.R. (5th) 58, 2011 ONSC 3492, 2011 CarswellOnt 5929 (Ont. S.C.J.) — referred to

Royal Bank v. Soundair Corp. (1991), 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321, 4 O.R. (3d) 1, 1991 CarswellOnt 205 (Ont. C.A.) — followed

White Birch Paper Holding Co., Re (2010), 2010 QCCS 4382, 2010 CarswellQue 9720 (C.S. Que.) — referred to

White Birch Paper Holding Co., Re (2010), 2010 CarswellQue 10954, 2010 QCCS 4915, 72 C.B.R. (5th) 49 (C.S. Que.) — referred to

Statutes considered:

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

Generally — referred to

s. 243(6) — considered

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

Generally — referred to

Criminal Code, R.S.C. 1985, c. C-46

Generally — referred to

Personal Property Security Act, R.S.O. 1990, c. P.10

Generally — referred to

***D.M. Brown J.*:**

I. Receiver's motion for directions: sales/auction process & priority of receiver's charges

1 By Appointment Order made February 28, 2012, Duff & Phelps Canada Restructuring Inc. ("D&P") was appointed receiver of blutip Power Technologies Ltd. ("Blutip"), a publicly listed technology company based in Mississauga which engages in the research, development and sale of hydrogen generating systems and combustion controls. Blutip employs 10 people and, as the Receiver stressed several times in its materials, the company does not maintain any pension plans.

2 D&P moves for orders approving (i) a sales process and bidding procedures, including the use of a stalking horse credit bid, (ii) the priority of a Receiver's Charge and Receiver's Borrowings Charge, and (iii) the activities reported in its First Report. Notice of this motion was given to affected persons. No one appeared to oppose the order sought. At the hearing today I granted the requested Bidding Procedures Order; these are my Reasons for so doing.

II. Background to this motion

3 The Applicant, CCM Master Qualified Fund, Ltd. ("CCM"), is the senior secured lender to Blutip. At present Blutip owes CCM approximately $3.7 million consisting of (i) two convertible senior secured promissory notes (October 21, 2011: $2.6 million and December 29, 2011: $800,000), (ii) $65,000 advanced last month pursuant to a Receiver's Certificate, and (iii) $47,500 on account of costs of appointing the Receiver (as per para. 30 of the Appointment Order). Receiver's counsel has opined that the security granted by Blutip in favour of CCM creates a valid and perfected security interest in the company's business and assets.

4 At the time of the appointment of the Receiver Blutip was in a development phase with no significant sources of revenue and was dependant on external sources of equity and debt funding to operate. As noted by Morawetz J. in his February 28, 2012 endorsement:

> In making this determination [to appoint a receiver] I have taken into account that there is no liquidity in the debtor and that it is unable to make payroll and it currently has no board. Stability in the circumstances is required and this can be accomplished by the appointment of a receiver.

5 As the Receiver reported, it does not have access to sufficient funding to support the company's operations during a lengthy sales process.

III. Sales process/bidding procedures

A. General principles

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. [1] 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, [2] *BIA* proposals, [3] and *CCAA* proceedings. [4]

8 Perhaps the most well-known recent example of the use of a stalking horse credit bid was that employed in the Canwest Publishing Corp. *CCAA* proceedings where, as part of a sale and investor solicitation process, Canwest's senior lenders put forward a stalking horse credit bid. Ultimately a superior offer was approved by the court. I accept, as an apt description of the considerations which a court should take into account when deciding whether to approve the use of a stalking horse credit bid, the following observations made by one set of commentators on the Canwest *CCAA* process:

> To be effective for such stakeholders, the credit bid had to be put forward in a process that would allow a sufficient opportunity for interested parties to come forward with a superior offer, recognizing that a timetable for the sale of a business in distress is a fast track ride that requires interested parties to move quickly or miss the opportunity. The court has to balance the need to move quickly, to address the real or perceived deterioration of value of the business during a sale process or the limited availability of restructuring financing, with a realistic timetable that encourages and does not chill the auction process. [5]

B. The proposed bidding process

B.1 The bid solicitation/auction process

9 The bidding process proposed by the Receiver would use a Stalking Horse Offer submitted by CCM to the Receiver, and subsequently amended pursuant to negotiations, as a baseline offer and a qualified bid in an auction process. D&P intends to distribute to prospective purchasers an interest solicitation letter, make available a confidential information memorandum to those who sign a confidentiality agreement, allow due diligence, and provide interested parties with a copy of the Stalking Horse Offer.

10 Bids filed by the April 16, 2012 deadline which meet certain qualifications stipulated by the Receiver may participate in an auction scheduled for April 20, 2012. One qualification is that the minimum consideration in a bid must be an overbid of $100,000 as compared to the Stalking Horse Offer. The proposed auction process is a standard, multi-round one designed to result in a Successful Bid and a Back-Up Bid. The rounds will be conducted using minimum incremental overbids of $100,000, subject to reduction at the discretion of the Receiver.

B.2 Stalking horse credit bid

11 The CCM Stalking Horse Offer, or Agreement, negotiated with the Receiver contemplates the acquisition of substantially all the company's business and assets on an "as is where is" basis. The purchase price is equal to: (i) Assumed Liabilities, as defined in the Stalking Horse Offer, plus (ii) a credit bid of CCM's secured debt outstanding under the two Notes, the Appointment Costs and the advance under the Receiver's Certificate. The purchase price is estimated to be approximately $3.744 million before the value of Assumed Liabilities which will include the continuation of the employment of employees, if the offer is accepted.

12 The Receiver reviewed at length, in its Report and in counsel's factum, the calculation of the value of the credit bid. Interest under both Notes was fixed at 15% per annum and was prepaid in full. The Receiver reported that if both Notes were repaid on May 3, 2012, the anticipated closing date, the effective annual rate of interest (taking into account all costs which could be categorized as "interest") would be significantly higher than 15% per annum - 57.6% on the October Note and 97.4% on the December Note. In order that the interest on the Notes considered for purposes of calculating the value of the credit bid complied with the interest rate provisions of the *Criminal Code*, the Receiver informed CCM that the amount of the secured indebtedness under the Notes eligible for the credit bid would have to be $103,500 less than the face value of the Notes. As explained in detail in paragraphs 32 through to 39 of its factum, the Receiver is of the view that such a reduction would result in a permissible effective annual interest rate under the December Note. The resulting Stalking Horse Agreement reflected such a reduction.

13 The Stalking Horse Offer does not contain a break-fee, but it does contain a term that in the event the credit bid is not the Successful Bid, then CCM will be entitled to reimbursement of its expenses up to a maximum of $75,000, or approximately 2% of the value of the estimated purchase price. Such an amount, according to the Receiver, would fall within the range of reasonable break fees and expense reimbursements approved in other cases, which have ranged from 1.8% to 5% of the value of the bid. [6]

C. Analysis

14 Given the financial circumstances of Blutip and the lack of funding available to the Receiver to support the company's operations during a lengthy sales process, I accept the Receiver's recommendation that a quick sales process is required in order to optimize the prospects of securing the best price for the assets. Accordingly, the timeframe proposed by the Receiver for the submission of qualifying bids and the conduct of the auction is reasonable. The marketing, bid solicitation and bidding procedures proposed by the Receiver are likely to result in a fair, transparent and commercially efficacious process in the circumstances.

15 In light of the reduction in the face value of the Notes required by the Receiver for the purposes of calculating the value of the credit bid and the reasonable amount of the Expense Reimbursement, I approved the Stalking Horse Agreement for the purposes requested by the Receiver. I accept the Receiver's assessment that in the circumstances the terms of the Stalking Horse Offer, including the Expense Reimbursement, will not discourage a third party from submitting an offer superior to the Stalking Horse Offer.

16 Also, as made clear in paragraphs 7 and 8 of the Bidding Procedures Order, the Stalking Horse Agreement is deemed to be a Qualified Bid and is accepted solely for the purposes of CCM's right to participate in the auction. My order did not approve the sale of Blutip's assets on the terms set out in the Stalking Horse Agreement. As the Receiver indicated, the approval of the sale of Blutip's assets, whether to CCM or some other successful bidder, will be the subject of a future motion to this Court. Such an approach is consistent with the practice of this Court. [7]

17 For those reasons I approved the bidding procedures recommended by the Receiver.

IV. Priority of receiver's charges

18 Paragraphs 17 and 20 of the Appointment Order granted some priority for the Receiver's Charge and Receiver's Borrowings Charge. However, as noted by the Receiver in section 3.1 of its First Report, because that hearing was brought on an urgent,

ex parte basis, priority over existing perfected security interests and statutory encumbrances was not sought at that time. The Receiver now seeks such priority.

19 As previously noted, the Receiver reported that Blutip does not maintain any pension plans. In section 3.1 of its Report the Receiver identified the persons served with notice of this motion: (i) parties with registered security interests pursuant to the *PPSA*; (ii) those who have commenced legal proceedings against the Company; (iii) those who have asserted claims in respect of intellectual property against the Company; (iv) the Company's landlord, and (v) standard government agencies. Proof of such service was filed with the motion record. No person appeared on the return of the motion to oppose the priority sought by the Receiver for its charges.

20 Although the Receiver gave notice to affected parties six days in advance of this motion, not seven days as specified in paragraph 31 of the Appointment Order, I was satisfied that secured creditors who would be materially affected by the order had been given reasonable notice and an opportunity to make representations, as required by section 243(6) of the *BIA*, that abridging the notice period by one day, as permitted by paragraph 31 of the Appointment Order, was appropriate and fair in the circumstances, and I granted the priority charges sought by the Receiver.

21 I should note that the Appointment Order contains a standard "come-back clause" (para. 31). Recently, in *First Leaside Wealth Management Inc., Re*, a proceeding under the *CCAA*, I wrote:

> [49] In his recent decision in *Timminco Limited (Re)* ("Timminco I") Morawetz J. described the commercial reality underpinning requests for Administration and D&O Charges in *CCAA* proceedings:
>
> > In my view, in the absence of the court granting the requested super priority and protection, the objectives of the CCAA would be frustrated. It is not reasonable to expect that professionals will take the risk of not being paid for their services, and that directors and officers will remain if placed in a compromised position should the Timminco Entities continue *CCAA* proceedings without the requested protection. The outcome of the failure to provide these respective groups with the requested protection would, in my view, result in the overwhelming likelihood that the *CCAA* proceedings would come to an abrupt halt, followed, in all likelihood, by bankruptcy proceedings.
>
> . . .
>
> [51] In my view, absent an express order to the contrary by the initial order applications judge, the issue of the priorities enjoyed by administration, D&O and DIP lending charges should be finalized at the commencement of a *CCAA* proceeding. Professional services are provided, and DIP funding is advanced, in reliance on super-priorities contained in initial orders. To ensure the integrity, predictability and fairness of the *CCAA* process, certainty must accompany the granting of such super-priority charges. When those important objectives of the *CCAA* process are coupled with the Court of Appeal's holding that parties affected by such priority orders be given an opportunity to raise any paramountcy issue, it strikes me that a judge hearing an initial order application should directly raise with the parties the issue of the priority of the charges sought, including any possible issue of paramountcy in respect of competing claims on the debtor's property based on provincial legislation. [8]

22 In my view those comments regarding the need for certainty about the priority of charges for professional fees or borrowings apply, with equal force, to priority charges sought by a receiver pursuant to section 243(6) of the *BIA*. Certainty regarding the priority of administrative and borrowing charges is required as much in a receivership as in proceedings under the *CCAA* or the proposal provisions of the *BIA*.

23 In the present case the issues of the priority of the Receiver's Charge and Receiver's Borrowings Charge were deferred from the return of the initial application until notice could be given to affected parties. I have noted that Blutip did not maintain pension plans. I have found that reasonable notice now has been given and no affected person appeared to oppose the granting of the priority charges. Consequently, it is my intention that the Bidding Procedures Order constitutes a final disposition of the issue of the priority of those charges (subject, of course, to any rights to appeal the Bidding Procedures Order). I do not

regard the presence of a "come-back clause" in the Appointment Order as leaving the door open a crack for some subsequent challenge to the priorities granted by this order.

V. Approval of the Receiver's activities

24 The activities described by the Receiver in its First Report were reasonable and fell within its mandate, so I approved them.

25 May I conclude by thanking Receiver's counsel for a most helpful factum.

Motion granted.

Footnotes

1 (1991), 7 C.B.R. (3d) 1 (Ont. C.A.).

2 *Graceway Canada Co., Re*, 2011 ONSC 6403 (Ont. S.C.J. [Commercial List]), para. 2.

3 *Parlay Entertainment Inc., Re*, 2011 ONSC 3492 (Ont. S.C.J.), para. 15.

4 *Brainhunter Inc., Re* (2009), 62 C.B.R. (5th) 41 (Ont. S.C.J. [Commercial List]), para. 13; *White Birch Paper Holding Co., Re*, 2010 QCCS 4382 (C.S. Que.), para. 3; *Nortel Networks Corp., Re* (2009), 55 C.B.R. (5th) 229 (Ont. S.C.J. [Commercial List]), para. 2, and *Nortel Networks Corp., Re* (2009), 56 C.B.R. (5th) 74 (Ont. S.C.J. [Commercial List]); *Indalex Ltd., Re*, 2009 CarswellOnt 4262 (Ont. S.C.J. [Commercial List]).

5 Pamela Huff, Linc Rogers, Douglas Bartner and Craig Culbert, "Credit Bidding — Recent Canadian and U.S. Themes", in Janis P. Sarra (ed.), *2010 Annual Review of Insolvency Law* (Toronto: Carswell, 2011), p. 16.

6 *Parlay Entertainment Inc., Re*, 2011 ONSC 3492 (Ont. S.C.J.), para. 12; *White Birch Paper Holding Co., Re*, 2010 QCCS 4915 (C.S. Que.), paras. 4 to 7; *Nortel Networks Corp., Re* (2009), 56 C.B.R. (5th) 74 (Ont. S.C.J. [Commercial List]), para. 12.

7 *Indalex Ltd., Re*, 2009 CarswellOnt 4262 (Ont. S.C.J. [Commercial List]), para. 7; *Graceway Canada Co., Re*, 2011 ONSC 6403 (Ont. S.C.J. [Commercial List]), para. 5; *Parlay Entertainment Inc., Re*, 2011 ONSC 3492 (Ont. S.C.J.), para. 58.

8 2012 ONSC 1299 (Ont. S.C.J. [Commercial List]) (CanLII).

TAB H

2021 ONSC 5338
Ontario Superior Court of Justice

Ontario Securities Commission v. Bridging Finance Inc.

2021 CarswellOnt 13546, 2021 ONSC 5338, 336 A.C.W.S. (3d) 23, 95 C.B.R. (6th) 322

IN THE MATTER OF AN APPLICATION UNDER SECTION 129 OF THE SECURITIES ACT (ONTARIO), R.S.O. 1990, c. S. 5, AS AMENDED

RE: ONTARIO SECURITIES COMMISSION (Applicant) AND BRIDGING FINANCE INC., BRIDGING INCOME FUND LP, BRIDGING MIDMARKET DEBT FUND LP, SB FUND GP INC., BRIDGING FINANCE GP INC., BRIDGING INCOME RSP FUND, BRIDGING MID-MARKET DEBT RSP FUND, BRIDGING PRIVATE DEBT INSTITUTIONAL LP, BRIDGING REAL ESTATE LENDING FUND LP, BRIDGING SMA 1 LP, BRIDGING INFRASTRUCTURE FUND LP, BRIDGING MJ GP INC., BRIDGING INDIGENOUS IMPACT FUND, BRIDGING FERN ALTERNATIVE CREDIT FUND, BRIDGING SMA 2 LP, BRIDGING SMA 2 GP INC., and BRIDGING PRIVATE DEBT INSTITUTIONAL RSP FUND (Respondents)

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

Heard: August 6, 2021
Judgment: August 12, 2021
Docket: CV-21-00661458-00CL

Counsel: John Finnigan, Grant Moffat, Adam Driedger, for Receiver
Lawrence Thacker, for Natasha Sharpe
David Bish, for The Coco Group, 2693600 Ontario Inc., Rocky Coco and Jenny Coco
Justine Erickson, Marc Wasserman, for BlackRock Financial Management, Inc.
Steve Graff, for Investors in various Bridging Funds
Sharon Kour, Andrew Kent, for Ad-Hoc Group of Retail Investors
David T. Ullmann, for Respondents, Thomas Canning (Maidstone) Limited, William Thomas, Robert Thomas, and 2190330 Ontario Ltd.

Related Abridgment Classifications
Bankruptcy and insolvency
IV Receivers
IV.4 Miscellaneous
Debtors and creditors
VII Receivers
VII.6 Conduct and liability of receiver
VII.6.a General conduct of receiver
Headnote
Bankruptcy and insolvency --- Receivers — Miscellaneous
Receiver satisfied test for approval of proposed sale and investment solicitation process (SISP).
Debtors and creditors --- Receivers — Conduct and liability of receiver — General conduct of receiver
Receiver sought approval of proposed sale and investment solicitation process (SISP) as next step in its broader strategy of maximizing value for unitholders and other stakeholders — As described in fifth report, receiver notified each borrower of proposed disclosure pursuant to SISP and requested that any concerns with respect to such disclosure be communicated to receiver — Receiver brought motion authorizing it to disclose borrower information to qualified bidders during SISP — Motion

granted — Best interests of investors may have been jeopardized if receiver was unable to properly market business and property by making reasonable disclosure of borrower information to limited number of qualified bidders.

Table of Authorities

Cases considered by *G.B. Morawetz C.J. Ont. S.C.J.*:

CCM Master Qualified Fund Ltd. v. blutip Power Technologies Ltd. (2012), 2012 ONSC 1750, 2012 CarswellOnt 3158, 90 C.B.R. (5th) 74 (Ont. S.C.J. [Commercial List]) — followed

Canadian Imperial Bank of Commerce v. Sayani (1993), 83 B.C.L.R. (2d) 167, 33 B.C.A.C. 85, 54 W.A.C. 85, 11 B.L.R. (2d) 28, [1994] 2 W.W.R. 260, 1993 CarswellBC 240 (B.C. C.A.) — referred to

Murano v. Bank of Montreal (1998), 163 D.L.R. (4th) 21, 111 O.A.C. 242, 1998 CarswellOnt 2841, 22 C.P.C. (4th) 235, 41 B.L.R. (2d) 10, 41 O.R. (3d) 222, 5 C.B.R. (4th) 57 (Ont. C.A.) — considered

Rodaro v. Royal Bank (2002), 2002 CarswellOnt 1047, 22 B.L.R. (3d) 274, 157 O.A.C. 203, 49 R.P.R. (3d) 227, 59 O.R. (3d) 74, [2002] O.T.C. 442 (Ont. C.A.) — referred to

Royal Bank of Canada v. Trang (2016), 2016 SCC 50, 2016 CSC 50, 2016 CarswellOnt 18044, 2016 CarswellOnt 18045, 403 D.L.R. (4th) 193, 72 R.P.R. (5th) 1, 94 C.P.C. (7th) 1, 14 Admin. L.R. (6th) 98, [2016] 2 S.C.R. 412, 144 O.R. (3d) 384 (note) (S.C.C.) — considered

Royal Bank v. Soundair Corp. (1991), 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321, 4 O.R. (3d) 1, 1991 CarswellOnt 205 (Ont. C.A.) — referred to

Royal Bank v. Vincenzi (1994), 1994 CarswellBC 2175 (B.C. S.C.) — referred to

Tournier v. National Provincial & Union Bank of England (1923), [1924] 1 K.B. 461, [1923] All E.R. Rep. 550, 29 Com. Cas. 129, 93 L.J.K.B. 449 (Eng. C.A.) — considered

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

1 At the conclusion of the hearing on August 6, 2021, I granted this motion with reasons to follow. These are the reasons.

2 The Receiver seeks an order (the "SISP Order") approving the Receiver's proposed sale and investment solicitation process (the "SISP") and authorizing the Receiver to disclose Borrower Information to Qualified Bidders, (defined terms are referenced in the Receiver's Factum) during the SISP in accordance with the provisions of the SISP Order.

3 The evidentiary basis for the requested relief is set out in the Fifth Report of the Receiver dated July 29, 2021 (the "Fifth Report"). The support for the legal basis is provided in the factum submitted by counsel to the Receiver.

4 There was no opposition to the requested relief.

5 The issues on the motion are as follows:

(a) whether the SISP should be approved; and

(b) whether the Court should authorize the Receiver to disclose Borrower Information to Qualified Bidders during the SISP notwithstanding any express or implied prohibition on such disclosure.

6 The Receiver seeks approval of the SISP as the next step in its broader strategy of maximizing value for Unitholders and the other stakeholders of Bridging. The Receiver proposes that the process commence with a Notice and Solicitation of Interest, followed by a Phase 1 process to identify Qualified Bidders and a Phase 2 process to select the most favourable Qualified Bid, subject to court approval.

7 The test for approval of a SISP in a receivership proceeding was set out by D. Brown J. (as he then was) in CCM Master Qualified Fundv. bluetip Power Technologies, 2012 ONSC 1750 (Ont. S.C.J. [Commercial List]) at para. 6. When reviewing a sales and marketing process proposed by a receiver, the court should assess the following:

(a) the fairness, transparency and integrity of the proposed process;

(b) the commercial efficacy of the proposed process in light of the specific circumstances facing the receiver; and

(c) whether the sales process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale.

8 Counsel for the Receiver submits that the foregoing factors are based on, and should be assessed in light of, the factors for the approval of a proposed sale transaction set out by the Court of Appeal for Ontario in Royal Bank of Canada v. Soundair Corp., 1991 CanLII 2727 (ONCA).

9 At paragraph [8] of the factum, counsel for the Receiver details the reasons why the proposed SISP satisfies the test set out in *CCM*. Specific reference is made to the marketing process, the two-phase process, the proposed timing of the SISP, the flexibility of the SISP, the discretion of the Receiver, the fact that borrowers are protected and that the Receiver, in its business judgement, is of the view that the proposed SISP represents the best option in the circumstances to maximize the value of the Business and Property of Bridging.

10 In my view, the test as outlined in *CCM* has been satisfied.

11 The second issue to consider is whether the Receiver should be authorized to disclose Borrower Information to Qualified Bidders in the context of the SISP notwithstanding any express or implied confidentiality obligations of Bridging under the applicable credit agreement or similar documentation setting out the terms of each Loan.

12 As described in the Fifth Report, the Receiver notified each borrower of the proposed disclosure pursuant to the SISP and requested that any concerns with respect to such disclosure be communicated to the Receiver. In its submission, counsel to the Receiver advised that all concerns with respect to this issue have been resolved.

13 Counsel to the Receiver submits that it is well-established at common law that a contract between the borrower and the lender includes an implied contractual term imposing upon the lender an obligation not to disclose information concerning the borrower and the lender's dealings with the borrower (see *Murano v. Bank of Montréal*, [1998] O.J. No. 2897 (ONCA) at para 13; *Canadian Imperial Bank of Commerce v. Sayani*, [1993] BCJ No 1898 (BCCA) at para. 21; and Tournierv. National Provincial and Union Bank of England [1924] 1 KB 461 at 473).

14 Counsel to the Receiver submits, however, whether express or implied, a lender's contractual duty of confidentiality to a borrower is not unqualified and is subject to the following four exceptions (collectively, the "Tournier Exceptions"):

(a) where disclosure is required by law;

(b) where there is a duty to the public to disclose;

(c) where the interests of the lender require disclosure; and

(d) where the borrower provides its express or implied consent.

15 Counsel to the Receiver submits that the Tournier Exceptions have been adopted under Canadian law by the Supreme Court of Canada in Royal Bank of Canadav. Trang, 2016 SCC 50 (S.C.C.) at para 40, as well as the Court of Appeal for Ontario in *Murano* and the British Columbia Court of Appeal *Sayani* at para 21.

16 As such, in order to disclose Borrower Information, the Receiver must establish that a least one of the Tournier Exceptions applies.

17 Counsel to the Receiver submits that the third Tournier Exception (where the interests of the lender require disclosure) is satisfied in these circumstances.

18 Counsel to the Receiver advised that there appears to be only two reported decisions in Canada in which the third Tournier Exception is addressed. The first is Royal Bank of Canada v. Vincenzi, 1994 CanLII 1823. The second is Rodarov. Royal Bank of Canada v. Trang2016[2002] O.J. No. 1365 (ONCA).

19 Counsel to the Receiver submits that the case law with respect to the third Tournier Exception is not well developed nor is it particularly helpful in determining the scope of the exception or the circumstances in which it applies. However, counsel submits that the case law and general receivership principles suggest that the disclosure of borrower information is permitted where the lender is taking steps to recover the amount owing to the lender by the borrower, whether in the context of a court proceeding or private transaction to assign the indebtedness and security held by the lender.

20 The Receiver is of the view that, absent sufficient access to Borrower Information, parties that did not obtain information regarding the Loans and Borrowers through the SISP process will likely not have the information required to make a competitive bid. The Receiver submits that the best interests of investors may be jeopardized if the Receiver is unable to properly market the Business and Property by making reasonable disclosure of Borrower Information to a limited number of Qualified Bidders.

21 In my view, given the communication to borrowers and the affirmation by counsel that all concerns have been resolved, it is not necessary to address this issue in detail, other than to comment that I accept the Receiver's submission that the best interests of investors may be jeopardized if the Receiver is unable to properly market the Business and Property by making reasonable disclosure of Borrower Information to a limited number of Qualified Bidders. I have also taken into account that the Receiver is well aware of the issues of confidentiality surrounding the disclosure of Borrower Information and further that Qualified Bidders in both Phase 1 and Phase 2 of the SISP will be subject to certain confidentiality obligations.

22 In submissions on the timetable accompanying the SISP, certain parties requested that the Phase 1 process be extended from four weeks to six weeks. Having considered the impact of the summer schedule, including holidays, I expressed the view that five weeks would be more appropriate. No party expressed concerns with this proposed timeline, which is now reflected in the SISP Order.

23 In the result, the SISP is approved and the Receiver is authorized to disclose Borrower Information to Qualified Bidders during the SISP in accordance with the provisions of the SISP Order.

24 The activities of the Receiver as described in the Fifth Report are also approved on the terms set out in the SISP Order. There was no opposition to this relief.

25 I also note that counsel to the Receiver indicated that it is likely that the Receiver will be recommending that representative counsel be appointed for certain investors. In a previous endorsement I indicated that the appointment of representative counsel should be reviewed 60 days after the date of that endorsement, which I understand is August 22, 2021. In my view, it would be helpful if the Receiver takes a proactive approach in identifying the proposed scope of the retainer for representative counsel and to identify interested counsel for this appointment, when it files its next Report.

Motion granted.

TAB I

2023 ONSC 6212
Ontario Superior Court of Justice [Commercial List]

iSpan Systems LP

2023 CarswellOnt 16935, 2023 ONSC 6212

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF ISPAN SYSTEMS LP

iSpan Systems LP (Applicant)

Peter J. Osborne J.

Heard: October 26, 2023
Judgment: November 1, 2023
Docket: CV-22-00686113-00CL

Counsel: Sam Babe, for Applicant
Heather Meredith, Saneea Tanvir, for King David Inc.
Philip Cho, Les O'Connor, for Wilkinson Construction Services
David Ullmann, for Intact Insurance
Matilda Lici, for DIP Lender
Annamaria Perruccio, for Ivan Joseph

Headnote
Bankruptcy and insolvency
Civil practice and procedure
Table of Authorities
Cases considered by *Peter J. Osborne J.*:

Bank of Montreal v. Carnival National Leasing Ltd. (2011), 2011 ONSC 1007, 2011 CarswellOnt 896, 74 C.B.R. (5th) 300 (Ont. S.C.J.)

Bank of Nova Scotia v. Freure Village on Clair Creek (1996), 40 C.B.R. (3d) 274, 1996 CarswellOnt 2328 (Ont. Gen. Div. [Commercial List])

CCM Master Qualified Fund Ltd. v. blutip Power Technologies Ltd. (2012), 2012 ONSC 1750, 2012 CarswellOnt 3158, 90 C.B.R. (5th) 74 (Ont. S.C.J. [Commercial List])

Canadian Equipment Finance and Leasing Inc. v. The Hypoint Company Limited, 2618905 Ontario Limited, 2618909 Ontario Limited, Beverley Rockliffe and Chantal Bock (2022), 2022 ONSC 6186, 2022 CarswellOnt 15689 (Ont. S.C.J. [Commercial List])

Elleway Acquisitions Ltd. v. Cruise Professionals Ltd. (2013), 2013 ONSC 6866, 2013 CarswellOnt 16639 (Ont. S.C.J. [Commercial List])

Maple Trade Finance Inc. v. CY Oriental Holdings Ltd. (2009), 2009 BCSC 1527, 2009 CarswellBC 2982, 60 C.B.R. (5th) 142 (B.C. S.C. [In Chambers])

Pandion Mine Finance Fund LP v. Otso Gold Corp. (2022), 2022 BCSC 136, 2022 CarswellBC 176, 96 C.B.R. (6th) 273 (B.C. S.C.)

Royal Bank v. Soundair Corp. (1991), 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321, 4 O.R. (3d) 1, 1991 CarswellOnt 205 (Ont. C.A.)

Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc. (2019), 2019 ONCA 508, 2019 CarswellOnt 9683, 70 C.B.R. (6th) 181, 3 R.P.R. (6th) 175, 435 D.L.R. (4th) 416, 11 P.P.S.A.C. (4th) 11 (Ont. C.A.)

Statutes considered:

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

Generally

s. 69

s. 69.1 [en. 1992, c. 27, s. 36(1)]

s. 243

s. 244

Courts of Justice Act, R.S.O. 1990, c. C.43

Generally

s. 101

***Peter J. Osborne J.*:**

1 The DIP Agent seeks the appointment of The Fuller Landau Group Inc. ("Fuller") as non-possessory Receiver pursuant to section 243 of the *BIA* and section 101 of the *CJA*, for the limited purpose of monitoring iSpan and conducting a sale solicitation process (SSP). It also seeks related relief in the form of an order suspending the Claims Adjudication Process and the Mediation directed by Justice Steele on March 16, 2023.

2 Defined terms in this Endorsement have the meaning given to them in the motion materials unless otherwise stated.

3 The relief sought by the DIP Agent is strongly supported and recommended by the proposed Receiver who is also the Proposal Trustee. It is not opposed by any other party, save and except as described below — two unsecured (contingent) creditors oppose certain terms of the proposed SSP and sought clarification regarding others. The form of receivership order was settled amongst the parties, and the submissions today related to the SSP.

4 The chronology and progress of this matter is somewhat unusual, but in my view the appointment of a receiver is appropriate here.

5 iSpan manufactures and installs proprietary cold-formed steel floor joist and framing systems for residential, commercial and industrial building projects principally in Ontario. It operates from a property in Princeton, Ontario, which it leases from a related party, iSpan Systems Holdings Inc. ("Holdings").

6 The financial troubles of iSpan began during the pandemic and were exacerbated by dramatic swings in the price of steel, which is the primary cost input of its production processes. In addition, iSpan is facing prosecution by the Ministry of Labour in respect of a tragic building collapse on one of its projects in London, Ontario which resulted in the deaths of two workers and exposure to iSpan of a maximum potential penalty in excess of $11 million.

7 iSpan filed an NOI on August 7, 2022 and Fuller was appointed Proposal Trustee.

8 The deadline for filing a proposal was extended on September 6, 2022, October 19, 2022 and December 2, 2022. Also on September 6, 2022, the Court approved the DIP Facility with a credit limit of $1,500,000 to be used for working capital purposes and to fund costs of the Proposal Proceeding.

9 The debts of iSpan total approximately $20.5 million excluding amounts owing under the DIP Facility and the potential exposure to the Ministry of Labour. CIBC was the first ranking creditor and is owed approximately $1.7 million. CIBC had served a section 244 Notice prior to the filing of the NOI.

10 The second ranking generally secured creditors are the beneficiaries of the Administration Charge. The third ranking secured creditors are the DIP Lenders.

11 iSpan filed a proposal and then an Amended Proposal which was accepted by its creditors on February 6, 2023. It was approved by the Court on March 16, 2023. That contemplated, among other things, payments in instalments. The problem now is that iSpan is not able to fund the next $500,000 payment due on October 31, 2023 or subsequent payments as they come due.

12 Certain Litigation Claims have been advanced against iSpan (prior to filing) and while large, they are as yet unproven. They were assigned a value of one dollar for the purpose of voting on the Amended Proposal.

13 Those Litigation Claims include a claim advanced by Wilkinson Construction Services Inc. ("Wilkinson") in the amount of $3,101,149.57, and a claim advanced by King David Inc. ("King David") in the amount of $9,408,591, together with three other claims. It is the view of the Proposal Trustee as described in its Fourth Report dated March 6, 2023, that there is duplication and overlap between the claims of Wilkinson and King David respectively since the proofs of claim arise from the same work that iSpan performed on a project called Cathedraltown.

14 The present financial challenges of iSpan are exacerbated by continued interest rate increases, the Canadian construction market and slow approval processes. As a result, in addition to the inability of iSpan to make the remaining payments contemplated by the Amended Proposal as described above, it was not able to repay the DIP Facility on its maturity date of April 30, 2023 and cannot repay the CIBC Credit Facilities indebtedness which has, since the start of April, been subject only to day-to-day forbearance.

15 Since CIBC served its Notice of Intention and iSpan waived the 10-day notice period and consented to immediate enforcement, CIBC is not subject to the stays imposed by sections 69 and 69.1 of the *BIA* in the Proposal Proceedings. Previous forbearance arrangements have not been formally extended.

16 Holdings has now paid out the CIBC indebtedness and stepped into its position as assignee and subrogee, and, as a result, Holdings is now the first ranking secured creditor.

17 Rather than following the more typical process that would flow from a failed Proposal in circumstances where, as here, the six-month period (as extended) allowed under the *BIA* for filing a proposal has already expired, all parties here are in agreement that there is still significant value in the order book of iSpan, with the result that a sale process is the best way to preserve value for stakeholders.

18 The alternative would be a situation where the creditors could move to have iSpan declared bankrupt, which would destroy much of the present value of its business leaving effectively only equipment to be sold on an "as is" basis.

19 It is expected that the business and assets of iSpan will be sold as a going concern, since the value of its order book, its intellectual property and the intellectual know-how of its staff, are of greatest value if sold together.

20 Accordingly, iSpan has agreed with the DIP Lenders that the DIP Agent should bring this motion to seek the appointment of Fuller as Receiver with the mandate to conduct an SSP.

21 The proposed Receivership would, as stated above, focus the powers of the Receiver on monitoring the business of iSpan and conducting the SSP. It would leave iSpan in possession and control of its business, albeit under the oversight of the Receiver, thereby maintaining the order book and the employment and critical knowledge of employees to be preserved pending a sale.

22 The requested relief also includes a suspension of the Claims Processes (the Claims Adjudication Process and the Mediation) since those concern unsecured claims which may or may not see surplus proceeds after secured claims are satisfied.

23 It is submitted that it makes good practical sense to suspend the Claims Processes until a sale has been completed and, practically, it is known whether there are any net proceeds remaining to pay out those unsecured claims (including the unsecured contingent claims of Wilkinson and King David) even if they were successful. To proceed with the Claims Processes now would incur professional fees, costs and expenses which may ultimately turn out to have been incurred in respect of issues that are rendered moot if there are no surplus proceeds.

24 The proposed SSP is set out in Schedule "A" to the draft order. All parties are in agreement that a receivership rather than a bankruptcy will maximize potential recoveries for stakeholders and, while unusual, is appropriate here. No party opposes an SSP or that it be conducted by the Receiver.

25 The two Litigation Claim contingent unsecured creditors, Wilkinson and King David, however, took issue with, and/or required clarification of, certain elements of the proposed SSP.

26 I will address the issues in order.

27 First, should a receiver be appointed?

28 The First Extension Order gives the DIP Agent the right, upon default under the DIP Loan Agreement, to seek the appointment of a receiver. The DIP Agent has the same right under the DIP GSA. Defaults have occurred.

29 The test for the appointment of a receiver is well settled under both the *BIA* and *CJA*: is it just or convenient to appoint a receiver?

30 In making a determination about whether it is, in the circumstances of a particular case, just or convenient to appoint a receiver, the Court must have regard to all of the circumstances, but in particular the nature of the property and the rights and interests of all parties in relation thereto. These include the rights of the secured creditor pursuant to its security: Bank of Nova Scotia v. Freure Village on the Clair Creek, 1996 O.J. No. 5088, 1996 CanLII 8258.

31 Where the rights of the secured creditor include, pursuant to the terms of its security, the right to seek the appointment of a receiver, the burden on the applicant is lessened: while the appointment of a receiver is generally an extraordinary equitable remedy, the courts do not so regard the nature of the remedy where the relevant security permits the appointment and as a result, the applicant is merely seeking to enforce a term of an agreement already made by both parties: Elleway Acquisitions Ltd. v. Cruise Professionals Ltd.,2013 ONSC 6866 at para. 27. However, the presence or lack of such a contractual entitlement is not determinative of the issue.

32 The Courts have considered numerous factors which have been historically taken into account in the determination of whether it is appropriate to appoint a receiver and which I have considered in this case:

> a. whether irreparable harm might be caused if no order is made, although as stated above, it is not essential for a creditor to establish irreparable harm if a receiver is not appointed where the appointment is authorized by the security documentation;
>
> b. the risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of assets while litigation takes place;
>
> c. the nature of the property;
>
> d. the apprehended or actual waste of the debtor's assets;
>
> e. the preservation and protection of the property pending judicial resolution;
>
> f. the balance of convenience to the parties;
>
> g. the fact that the creditor has a right to appointment under the loan documentation;
>
> h. the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulties with the debtor;
>
> i. the principle that the appointment of a receiver should be granted cautiously;

j. the consideration of whether a court appointment is necessary to enable the receiver to carry out its duties efficiently;

k. the effect of the order upon the parties;

l. the conduct of the parties;

m. the length of time that a receiver may be in place;

n. the cost to the parties;

o. the likelihood of maximizing return to the parties; and

p. the goal of facilitating the duties of the receiver.

See: *Canadian Equipment Finance and Leasing Inc. v. The Hypoint Company Limited*, 2022 ONSC 6186, the Supreme Court of British Columbia, citing *Bennett on Receivership*, 2nd ed. (Toronto, Carswell, 1999) and *Maple Trade Finance Inc. v. CY Oriental Holdings Ltd.*, 2009 BCSC 1527at para. 25

33 How are these factors to be applied? The British Columbia Supreme Court put it, I think, correctly: "these factors are not a checklist but a collection of considerations to be viewed holistically in an assessment as to whether, in all the circumstances, the appointment of a receiver is just or convenient: Pandion Mine Finance Fund LP v. Otso Gold Corp., 2022 BCSC 136 at para. 54.

34 It is not essential that the moving party establish, prior to the appointment of a receiver, that it will suffer irreparable harm or that the situation is urgent. However, where the evidence respecting the conduct of the debtor suggests that a creditor's attempts to privately enforce its security will be delayed or otherwise fail, a court-appointed receiver may be warranted: Bank of Montreal v. Carnival National Leasing Ltd., 2011 ONSC 1007 at paras. 24, 28-29.

35 Accordingly, is it just or convenient to appoint a receiver in the particular circumstances of this case?

36 In my view, it is, for the reasons set out above. The Receiver is needed to run the SSP, and the SSP is in turn necessary to maximize value for stakeholders, as they all agree. The alternative is bankruptcy which would destroy much of the value in the estate. In particular, the Proposal Trustee, the first ranking secured creditor (or its assignee, Holdings), and iSpan all consent to and support the proposed SSP.

37 The other parties present today, including the contingent unsecured creditors Wilkinson and King David do not oppose the process.

38 Fuller is an experienced Receiver and certainly qualified to run the SSP. It has consented to act and is hereby appointed as Receiver on the terms of the proposed order, principally to monitor the business of iSpan and conduct the SSP.

39 Second, should the SSP be approved?

40 The Court has jurisdiction pursuant to section 243 of the *BIA* to appoint a receiver to, among other things, take any action that the Court considers advisable. The Court of Appeal for Ontario has held that this includes the discretion to empower a receiver to sell assets: Third Eye Capital Corporation v. Ressources Dianor Inc., 2019 ONCA 508 at para. 76.

41 In considering a sales solicitation process, including the use of a stalking horse bid, the Court should assess the following factors (See: CCM Master Qualified Fund v. bluetip Power Technologies, 2012 ONSC 1750 at para. 6):

a. the fairness, transparency and integrity of the proposed process;

b. the commercial efficacy of the proposed process in light of the specific circumstances facing the receiver; and

c. whether the sales process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale.

42 These factors are to be considered in light of the well-known *Soundair Principles*, which, while applicable to the test for approving a transaction following a sales process, not surprisingly track the same principles applicable to approval of the process itself. (See Royal Bank of Canada v. Soundair Corp., (1991), 4 O.R. (3d) 1 (Ont. C.A.) at para. 16):

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

b. the interests of all parties;

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

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

43 The proposed SSP has been developed by Fuller to be fair and transparent and to have integrity. The particulars of the process are set out at Schedule "A" to the proposed order. A teaser will be sent to a list of potential bidders prepared by the Receiver in consultation with iSpan and its financial advisor, FAAN, who is also experienced in such matters. Notice will be published in *The Globe & Mail (National Edition*). Those who sign a non-disclosure agreement will be given access to an electronic data room and, upon reasonable request, access to the company's management, facilities and equipment. The timeline for the SSP including the bid deadline, is set out in advance and applies to all bidders.

44 King David, supported by Wilkinson, submits that the proposed timeline is extremely tight (approximately five weeks), and it submits that a seven-week timeline is more reasonable. King David also submits that the required deposit should be reduced to 10% from the proposed 15%, and that there should be proactive contact to possible bidders. King David proposed other less fundamental changes as well, such as allowing discretion to the Receiver in accepting bids in different formats and requiring approval for material amendments to the process.

45 I am satisfied that the proposed process here satisfies the *CCM* factors. In my view, it is not, in most cases, necessary or desirable for the Court to micro-manage the intricacies of every step of a proposed sales process. The Court cannot and should not do that, and indeed that is why the qualified and experienced Receiver is appointed to conduct the process in the first place. The Court needs to be satisfied that the process is fair, transparent and will be conducted with integrity. The objective is to maximize recovery for stakeholders, and to do so following a process that is conducted such that all stakeholders will have confidence in the outcome which results from confidence in the process by which that outcome was achieved.

46 I am satisfied that the proposed process, developed by Fuller in consultation with iSpan and FAAN, does that here.

47 The timing of the process is, without question, short. The Receiver is going to proactively contact known potential bidders. The balance that is required is that between minimizing the length of the process and the cost on the one hand, as against the objective of ensuring that the market is fully canvassed on the other hand. In the particular circumstances of this case, even a relatively short extension has a magnifying effect since that will extend the process over the Christmas/New Year's holidays and into next year. I defer to the recommendation of the Receiver that the proposed timeframe is sufficient in the particular circumstances of this case.

48 I also defer to the Receiver that the proposed deposit of 15% is appropriate, particularly in the absence of any evidence to the effect that 15% would have a chilling effect on the process and dissuade potential bidders, and also in the absence of any evidence to the effect that reducing the deposit to 10% would remedy that chilling effect. In my view, the requirement for a 15% deposit is not disproportionately high, yet at the same time is sufficient so as to demonstrate a commitment to complete any transaction entered into.

49 Finally, significant submissions were made by the parties arising out of a concern raised by King David and supported by Wilkinson to the effect that if, as could happen as part of the SSP, a credit bid is made, that any such credit bid include only

such amounts as are owing pursuant to the DIP Loan Facility, including applicable interest and fees pursuant to the DIP Loan Agreement and the secured indebtedness owing to Holdings.

50 To be clear, that would not include "Existing Loans" as that term is defined in the DIP Loan Agreement made as of August 15, 2022 (see Ex. "F" to the Affidavit of Walter Koppelaar sworn October 19, 2023 and relied upon by the DIP Agent in this motion). I need not determine this point, since it has now been agreed by parties, and is reflected in the revised draft order proposed. Whether the Existing Loans are properly "Obligations" under the DIP Loan Agreement can be determined if and as necessary, another day. As submitted by the DIP Agent, the Court previously approved the DIP Facility, not the DIP Agreement.

51 The proposed SSP is approved.

52 Third, should the Claims Adjudication Process be suspended pending the results of the SSP? As stated above, this suspension is not opposed by any party. In my view it makes good practical sense for the reasons set out above. Most fundamentally, the parties will not know whether there will in fact be any surplus proceeds for distribution to unsecured creditors including contingent unsecured Litigation Claim creditors if those claims are successful, until the SSP has been completed.

53 No party is requesting today that the Court direct that the Claims Adjudication Process, which, while entirely appropriate at the time it was approved, should continue now with the attendant incurring of fees and expenses.

54 Accordingly, the Claims Adjudication Process is suspended pending the results of the SSP.

55 I have signed the Receivership Order and the SSP Approval Order. Both orders to go in the form signed by me today. They have immediate effect without the necessity of issuing and entering.

TAB J

ALBERTA
RULES OF COURT

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

Application of this Division

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

(a) to ban publication of court proceedings,

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

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

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

(e) for use of a pseudonym.

Restricted court access applications and orders

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

When restricted court access application may be filed

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

AR 124/2010 s6.30;194/2020

Timing of application and service

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

(a) file the application in Form 32, and

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

Notice to media

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

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

(b) any other person named by the Court.

AR 124/2010 s6.32;163/2010

TAB K

Most Negative Treatment: Distinguished
Most Recent Distinguished: T.Z. v. P.V.R. | 2022 SKQB 129, 2022 CarswellSask 256 | (Sask. Q.B., May 17, 2022)

2021 SCC 25, 2021 CSC 25
Supreme Court of Canada

Sherman Estate v. Donovan

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

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

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

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

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

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Robert S. Anderson, Q.C., for Interveners, Ad IDEM/Canadian Media Lawyers Association, Postmedia Network Inc., CTV, a Division of Bell Media Inc., Global News, a division of Corus Television Limited Partnership, The Globe and Mail Inc. and Citytv, a division of Rogers Media Inc.
Adam Goldenberg, for Intervener, British Columbia Civil Liberties Association
Khalid Janmohamed, for Interveners, HIV & AIDS Legal Clinic Ontario, the HIV Legal Network and the Mental Health Legal Committee

Related Abridgment Classifications
Civil practice and procedure
XXIII Practice on appeal
XXIII.13 Powers and duties of appellate court
XXIII.13.e Evidence on appeal
XXIII.13.e.i New evidence

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

Headnote

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Table of Authorities

Cases considered by *Kasirer J.*:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

R. v. Spencer (2014), 2014 SCC 43, 2014 CSC 43, 2014 CarswellSask 342, 2014 CarswellSask 343, [2014] 8 W.W.R. 209, 11 C.R. (7th) 52, 458 N.R. 249, 438 Sask. R. 230, 608 W.A.C. 230, 312 C.C.C. (3d) 215, 375 D.L.R. (4th) 255, [2014] 2 S.C.R. 212, 312 C.R.R. (2d) 349 (S.C.C.) — referred to

R. v. Tessling (2004), 2004 SCC 67, 2004 CarswellOnt 4351, 2004 CarswellOnt 4352, 244 D.L.R. (4th) 541, 189 C.C.C. (3d) 129, 23 C.R. (6th) 207, 326 N.R. 228 (Eng.), 326 N.R. 228 (Fr.), [2004] 3 S.C.R. 432, 192 O.A.C. 168, 75 O.R. (3d) 480 (note), 123 C.R.R. (2d) 257 (S.C.C.) — referred to

Reference re s. 12 (1) of the Juvenile Delinquents Act (Canada) (1983), 146 D.L.R. (3d) 408, 41 O.R. (2d) 113, 3 C.C.C. (3d) 515, (sub nom. *R. v. Southam Inc.)* 34 C.R. (3d) 27, 6 C.R.R. 1, (sub nom. *R. v. Southam Inc.)* 33 R.F.L. (2d) 279, 1983 CarswellOnt 273 (Ont. C.A.) — referred to

S. c. Lamontagne (2020), 2020 QCCA 663, 2020 CarswellQue 4349 (C.A. Que.) — considered

Sierra Club of Canada v. Canada (Minister of Finance) (2002), 2002 SCC 41, 2002 CarswellNat 822, 2002 CarswellNat 823, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 211 D.L.R. (4th) 193, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, 287 N.R. 203, 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 93 C.R.R. (2d) 219, 223 F.T.R. 137 (note), [2002] 2 S.C.R. 522, 2002 CSC 41 (S.C.C.) — followed

Toronto Star Newspaper Ltd. v. R. (2012), 2012 ONCJ 27, 2012 CarswellOnt 1255, (sub nom. *Toronto Star Newspaper Ltd. v. Ontario)* 255 C.R.R. (2d) 207, 289 C.C.C. (3d) 549 (Ont. C.J.) — referred to

Toronto Star Newspapers Ltd. v. Ontario (2005), 2005 SCC 41, 2005 CarswellOnt 2613, 2005 CarswellOnt 2614, 197 C.C.C. (3d) 1, 253 D.L.R. (4th) 577, 29 C.R. (6th) 251, (sub nom. *R. v. Toronto Star Newspapers Ltd.)* 200 O.A.C. 348, (sub nom. *R. v. Toronto Star Newspapers Ltd.)* 335 N.R. 201, 76 O.R. (3d) 320 (note), 132 C.R.R. (2d) 178, [2005] 2 S.C.R. 188 (S.C.C.) — referred to

UFCW, Local 401 v. Alberta (Information and Privacy Commissioner) (2013), 2013 SCC 62, 2013 CarswellAlta 2210, 2013 CarswellAlta 2211, D.T.E. 2013T-775, 365 D.L.R. (4th) 257, [2014] 2 W.W.R. 1, 60 Admin. L.R. (5th) 173, 88 Alta. L.R. (5th) 1, (sub nom. *Alberta (IPC) v. UFCW, Local 401)* 2014 C.L.L.C. 210-003, (sub nom. *United Food and Commercial Workers, Local 401 v. Privacy Commissioner (Alta.))* 451 N.R. 253, (sub nom. *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401)* [2013] 3 S.C.R. 733, (sub nom. *United Food and Commercial Workers, Local 401 v. Privacy Commissioner (Alta.))* 561 A.R. 359, (sub nom. *United Food and Commercial Workers, Local 401 v. Privacy Commissioner (Alta.))* 594 W.A.C. 359, 239 L.A.C. (4th) 317, (sub nom. *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, local 401)* 297 C.R.R. (2d) 71 (S.C.C.) — considered

Vancouver Sun, Re (2004), 2004 SCC 43, 2004 CarswellBC 1376, 2004 CarswellBC 1377, (sub nom. *R. v. Bagri)* 184 C.C.C. (3d) 515, (sub nom. *R. v. Bagri)* 240 D.L.R. (4th) 147, (sub nom. *Application Under Section 83.28 of the Criminal Code, Re)* 322 N.R. 161, 21 C.R. (6th) 142, (sub nom. *Application Under Section 83.28 of the Criminal Code, Re)* 199 B.C.A.C. 1, [2004] 2 S.C.R. 332, 33 B.C.L.R. (4th) 261, 120 C.R.R. (2d) 203, [2005] 2 W.W.R. 671 (S.C.C.) — considered

Work Safe Twerk Safe v. Her Majesty the Queen in Right of Ontario (2021), 2021 ONSC 1100, 2021 CarswellOnt 1831 (Ont. Div. Ct.) — referred to

X. v. Y. (2011), 2011 BCSC 943, 2011 CarswellBC 1874, 21 B.C.L.R. (5th) 410, [2011] 11 W.W.R. 514, 338 D.L.R. (4th) 156, 238 C.R.R. (2d) 219 (B.C. S.C.) — distinguished

Statutes considered:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

Generally — referred to

s. 2(b) — referred to

s. 8 — considered

Charte des droits et libertés de la personne, RLRQ, c. C-12

art. 5 — referred to

Code civil du Québec, L.Q. 1991, c. 64

art. 35-41 — referred to

Code de procédure civile, RLRQ, c. C-25.01

art. 12 — considered

Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F.31

Generally — referred to

Personal Information Protection and Electronic Documents Act, S.C. 2000, c. 5

Generally — referred to

Privacy Act, R.S.C. 1985, c. P-21

Generally — referred to

Kasirer J. **(Wagner C.J.C. and Moldaver, Karakatsanis, Brown, Rowe and Martin JJ. concurring):**

I. Overview

1 This Court has been resolute in recognizing that the open court principle is protected by the constitutionally-entrenched right of freedom of expression and, as such, it represents a central feature of a liberal democracy. As a general rule, the public can attend hearings and consult court files and the press — the eyes and ears of the public — is left free to inquire and comment on the workings of the courts, all of which helps make the justice system fair and accountable.

2 Accordingly, there is a strong presumption in favour of open courts. It is understood that this allows for public scrutiny which can be the source of inconvenience and even embarrassment to those who feel that their engagement in the justice system brings intrusion into their private lives. But this discomfort is not, as a general matter, enough to overturn the strong presumption that the public can attend hearings and that court files can be consulted and reported upon by the free press.

3 Notwithstanding this presumption, exceptional circumstances do arise where competing interests justify a restriction on the open court principle. Where a discretionary court order limiting constitutionally-protected openness is sought — for example, a sealing order, a publication ban, an order excluding the public from a hearing, or a redaction order — the applicant must demonstrate, as a threshold requirement, that openness presents a serious risk to a competing interest of public importance. That this requirement is considered a high bar serves to maintain the strong presumption of open courts. Moreover, the protection of open courts does not stop there. The applicant must still show that the order is necessary to prevent the risk and that, as a matter of proportionality, the benefits of that order restricting openness outweigh its negative effects.

4 This appeal turns on whether concerns advanced by persons seeking an exception to the ordinarily open court file in probate proceedings — the concerns for privacy of the affected individuals and their physical safety — amount to important public interests that are at such serious risk that the files should be sealed. The parties to this appeal agree that physical safety is an important public interest that could justify a sealing order but disagree as to whether that interest would be at serious risk, in the circumstances of this case, should the files be unsealed. They further disagree whether privacy is in itself an important interest that could justify a sealing order. The appellants say that privacy is a public interest of sufficient import that can justify limits on openness, especially in light of the threats individuals face as technology facilitates widespread dissemination of personally sensitive information. They argue that the Court of Appeal was mistaken to say that personal concerns for privacy, without more, lack the public interest component that is properly the subject-matter of a sealing order.

5 This Court has, in different settings, consistently championed privacy as a fundamental consideration in a free society. Pointing to cases decided in other contexts, the appellants contend that privacy should be recognized here as a public interest that, on the facts of this case, substantiates their plea for orders sealing the probate files. The respondents resist, recalling that privacy has generally been seen as a poor justification for an exception to openness. After all, they say, virtually every court proceeding entails some disquiet for the lives of those concerned and these intrusions on privacy must be tolerated because open courts are essential to a healthy democracy.

6 This appeal offers, then, an occasion to decide whether privacy can amount to a public interest in the open court jurisprudence and, if so, whether openness puts privacy at serious risk here so as to justify the kind of orders sought by the appellants.

7 For the reasons that follow, I propose to recognize an aspect of privacy as an important public interest for the purposes of the relevant test from *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522. Proceedings in open court can lead to the dissemination of highly sensitive personal information that would result not just in discomfort or embarrassment, but in an affront to the affected person's dignity. Where this narrower dimension of privacy, rooted in what I see as the public interest in protecting human dignity, is shown to be at serious risk, an exception to the open court principle may be justified.

8 In this case, and with this interest in mind, it cannot be said that the risk to privacy is sufficiently serious to overcome the strong presumption of openness. The same is true of the risk to physical safety here. The Court of Appeal was right in the circumstances to set aside the sealing orders and I would therefore dismiss the appeal.

II. Background

9 Prominent in business and philanthropic circles, Bernard Sherman and Honey Sherman were found dead in their Toronto home in December of 2017. Their deaths had no apparent explanation and generated intense public interest and press scrutiny. In January of the following year, the Toronto Police Service announced that the deaths were being investigated as homicides. As the present matter came before the courts, the identity and motive of those responsible remained unknown.

10 The couple's estates and estate trustees (collectively the "Trustees") [1] sought to stem the intense press scrutiny prompted by the events. The Trustees hoped to see to the orderly transfer of the couple's property, at arm's length from what they saw as the public's morbid interest in the unexplained deaths and the curiosity around apparently great sums of money involved.

11 When the time came to obtain certificates of appointment of estate trustee from the Superior Court of Justice, the Trustees sought a sealing order so that the estate trustees and beneficiaries ("affected individuals") might be spared any further intrusions into their privacy and be protected from what was alleged to be a risk to their safety. The Trustees argued that if the information in the court files was revealed to the public, the safety of the affected individuals would be at risk and their privacy compromised as long as the deaths were unexplained and those responsible for the tragedy remained at large. In support of their request, they argued that there was a real and substantial risk that the affected individuals would suffer serious harm from the public exposure of the materials in the circumstances.

12 Initially granted, the sealing orders were challenged by Kevin Donovan, a journalist who had written a series of articles on the couple's deaths, and Toronto Star Newspapers Ltd., for which he wrote (collectively the "Toronto Star").[2] The Toronto Star said the orders violated its constitutional rights of freedom of expression and freedom of the press, as well as the attending principle that the workings of the courts should be open to the public as a means of guaranteeing the fair and transparent administration of justice.

III. Proceedings Below

A. Ontario Superior Court of Justice, 2018 ONSC 4706, 41 E.T.R. (4th) 126 (Dunphy J.)

13 In addressing whether the circumstances warranted interference with the open court principle, the application judge relied on this Court's judgment in *Sierra Club* . He noted that a confidentiality order should only be granted when: "(1) such an order is necessary ... to prevent a serious risk to an important interest because reasonable alternative measures will not prevent the risk; and (2) the salutary effects of the confidentiality order outweigh its deleterious effects, including the effects on the right to free expression and the public interest in open and accessible court proceedings" (para. 13(d)).

14 The application judge considered whether the Trustees' interests would be served by granting the sealing orders. In his view, the Trustees had correctly identified two legitimate interests in support of making an exception to the open court principle: "protecting the privacy and dignity of victims of crime and their loved ones" and "a reasonable apprehension of risk on behalf of those known to have an interest in receiving or administering the assets of the deceased" (paras. 22-25). With respect to the first interest, the application judge found that "[t]he degree of intrusion on that privacy and dignity has already been extreme and ... excruciating" (para. 23). For the second interest, although he noted that "it would have been preferable to include objective evidence of the gravity of that risk from, for example, the police responsible for the investigation", he concluded that "the lack of such evidence is not fatal" (para. 24). Rather, the necessary inferences could be drawn from the circumstances notably the "willingness of the perpetrator(s) of the crimes to resort to extreme violence to pursue whatever motive existed" (*ibid.*). He concluded that the "current uncertainty" was the source of a reasonable apprehension of the risk of harm and, further, that the foreseeable harm was "grave" (*ibid.*).

15 The application judge ultimately accepted the Trustees' submission that these interests "very strongly outweigh" what he called the proportionately narrow public interest in the "essentially administrative files" at issue (paras. 31 and 33). He therefore concluded that the harmful effects of the sealing orders were substantially outweighed by the salutary effects on the rights and interests of the affected individuals.

16 Finally, the application judge considered what order would protect the affected individuals while infringing upon the open court principle to the minimum extent possible. He decided no meaningful part of either file could be disclosed if one were to make the redactions necessary to protect the interests he had identified. Open-ended sealing orders did not, however, sit well with him. The application judge therefore sealed the files for an initial period of two years, with the possibility of renewal.

B. Court of Appeal for Ontario, 2019 ONCA 376, 47 E.T.R. (4th) 1 (Doherty, Rouleau and Hourigan JJ.A.)

17 The Toronto Star's appeal was allowed, unanimously, and the sealing orders were lifted.

18 The Court of Appeal considered the two interests advanced before the application judge in support of the orders to seal the probate files. As to the need to protect the privacy and dignity of the victims of violent crime and their loved ones, it recalled that the kind of interest that is properly protected by a sealing order must have a public interest component. Citing *Sierra Club*, the Court of Appeal wrote that "[p]ersonal concerns cannot, without more, justify an order sealing material that would normally be available to the public under the open court principle" (para. 10). It concluded that the privacy interest for which the Trustees sought protection lacked this quality of public interest.

19 While it recognized the personal safety of individuals as an important public interest generally, the Court of Appeal wrote that there was no evidence in this case that could warrant a finding that disclosure of the contents of the estate files posed a real risk to anyone's physical safety. The application judge had erred on this point: "the suggestion that the beneficiaries and trustees are somehow at risk because the Shermans were murdered is not an inference, but is speculation. It provides no basis for a sealing order" (para. 16).

20 The Court of Appeal concluded that the Trustees had failed the first stage of the test for obtaining orders sealing the probate files. It therefore allowed the appeal and set aside the orders.

C. Subsequent Proceedings

21 The Court of Appeal's order setting aside the sealing orders has been stayed pending the disposition of this appeal. The Toronto Star brought a motion to adduce new evidence on this appeal, comprised of land titles documents, transcripts of the cross-examination of a detective on the murder investigation, and various news articles. This evidence, it says, supports the conclusion that the sealing orders should be lifted. The motion was referred to this panel.

IV. Submissions

22 The Trustees have appealed to this Court seeking to restore the sealing orders made by the application judge. In addition to contesting the motion for new evidence, they maintain that the orders are necessary to prevent a serious risk to the privacy and physical safety of the affected individuals and that the salutary effects of sealing the court probate files outweigh the harmful effects of limiting court openness. The Trustees argue that two legal errors led the Court of Appeal to conclude otherwise.

23 First, they submit the Court of Appeal erred in holding that privacy is a personal concern that cannot, without more, constitute an important interest under *Sierra Club* . The Trustees say the application judge was right to characterize privacy and dignity as an important public interest which, as it was subject to a serious risk, justified the orders. They ask this Court to recognize that privacy in itself is an important public interest for the purposes of the analysis.

24 Second, the Trustees submit that the Court of Appeal erred in overturning the application judge's conclusion that there was a serious risk of physical harm. They argue that the Court of Appeal failed to recognize that courts have the ability to draw reasonable inferences by applying reason and logic even in the absence of specific evidence of the alleged risk.

25 The Trustees say that these errors led the Court of Appeal to mistakenly set aside the sealing orders. In answer to questions at the hearing, the Trustees acknowledged that an order redacting certain documents in the file or a publication ban could assist in addressing some of their concerns, but maintained neither is a reasonable alternative to the sealing orders in the circumstances.

26 The Trustees submit further that the protection of these interests outweighs the deleterious effects of the orders. They argue that the importance of the open court principle is attenuated by the nature of these probate proceedings. Given that it is non-contentious and not strictly speaking necessary for the transfer of property at death, probate is a court proceeding of an "administrative" character, which diminishes the imperative of applying the open court principle here (paras. 113-14).

27 The Toronto Star takes the position that the Court of Appeal made no mistake in setting aside the sealing orders and that the appeal should be dismissed. In the Toronto Star's view, while privacy can be an important interest where it evinces a public component, the Trustees have only identified a subjective desire for the affected individuals in this case to avoid further publicity, which is not inherently harmful. According to the Toronto Star and some of the interveners, the Trustees' position

would allow that measure of inconvenience and embarrassment that arises in every court proceeding to take precedence over the interest in court openness protected by the *Canadian Charter of Rights and Freedoms* in which all of society has a stake. The Toronto Star argues further that the information in the court files is not highly sensitive. On the issue of whether the sealing orders were necessary to protect the affected individuals from physical harm, the Toronto Star submits that the Court of Appeal was right to conclude that the Trustees had failed to establish a serious risk to this interest.

28 In the alternative, even if there were a serious risk to one or another important interest, the Toronto Star says the sealing orders are not necessary because the risk could be addressed by an alternative, less onerous order. Furthermore, it says the orders are not proportionate. In seeking to minimize the importance of openness in probate proceedings, the Trustees invite an inflexible approach to balancing the effects of the order that is incompatible with the principle that openness applies to all court proceedings. In any event, there is a public interest in openness specifically here, given that the certificates sought can affect the rights of third parties and that openness ensures the fairness of the proceedings, whether they are contested or not.

V. Analysis

29 The outcome of the appeal turns on whether the application judge should have made the sealing orders pursuant to the test for discretionary limits on court openness from this Court's decision in *Sierra Club* .

30 Court openness is protected by the constitutional guarantee of freedom of expression and is essential to the proper functioning of our democracy (Canadian Broadcasting Corp. v. New Brunswick (Attorney General), [1996] 3 S.C.R. 480, at para. 23; Vancouver Sun (Re), 2004 SCC 43, [2004] 2 S.C.R. 332, at paras. 23-26). Reporting on court proceedings by a free press is often said to be inseparable from the principle of open justice. "In reporting what has been said and done at a public trial, the media serve as the eyes and ears of a wider public which would be absolutely entitled to attend but for purely practical reasons cannot do so" (*Khuja v. Times Newspapers Ltd*, 2017 UKSC 49, [2019] A.C. 161 (U.K. S.C.), at para. 16, citing *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, at pp. 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 TorontoStar 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 (*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. Chamberland2004 CanLII 4122(Que. C.A.), at para. 30). Saying that any impact on individual privacy is sufficient to establish a serious risk to an important public interest for the purposes of the test for discretionary limits on court openness could render this initial requirement moot. Many cases would turn on the balancing at the proportionality stage. Such a development would amount to a departure from *Sierra Club*, which is the appropriate framework and one which must be preserved.

60 Further, recognizing an important interest in privacy generally could prove to be too open-ended and difficult to apply. Privacy is a complex and contextual concept (*Dagg*, at para. 67; see also B. McIsaac, K. Klein and S. Brown, *The Law of Privacy in Canada* (loose-leaf), vol. 1, at pp. 1-4; D. J. Solove, "Conceptualizing Privacy" (2002), 90 Cal. L. Rev. 1087, at p. 1090). Indeed, this Court has described the nature of limits of privacy as being in a state of "theoretical disarray" (R. v. Spencer, 2014 SCC 43, [2014] 2 S.C.R. 212, at para. 35). Much turns on the context in which privacy is invoked. I agree with the Toronto Star that a bald recognition of privacy as an important interest in the context of the test for discretionary limits on court openness, as the Trustees advance here, would invite considerable confusion. It would be difficult for courts to measure a serious risk to such an interest because of its multi-faceted nature.

61 While I acknowledge these concerns have merit, I disagree that they require that privacy never be considered in determining whether there is a serious risk to an important public interest. I reach this conclusion for two reasons. First, the problem of privacy's complexity can be attenuated by focusing on the purpose underlying the public protection of privacy as it is relevant to the judicial process, in order to fix precisely on that aspect which transcends the interests of the parties in this context. That narrower dimension of privacy is the protection of dignity, an important public interest that can be threatened by open courts. Indeed, rather than attempting to apply a single unwieldy concept of privacy in all contexts, this Court has generally fixed on more specific privacy interests tailored to the particular situation (*Spencer*, at para. 35; *Edmonton Journal*, at p. 1362, per Wilson J.). That is what must be done here, with a view to identifying the public aspect of privacy that openness might inappropriately undermine.

62 Second, I recall that in order to pass the first stage of the analysis one must not simply invoke an important interest, but must also overcome the presumption of openness by showing a serious risk to this interest. The burden of showing a risk to such an interest on the facts of a given case constitutes the true initial threshold on the person seeking to restrict openness. It is never sufficient to plead a recognized important public interest on its own. The demonstration of a serious risk to this interest is still required. What is important is that the interest be accurately defined to capture only those aspects of privacy that engage legitimate public objectives such that showing a serious risk to that interest remains a high bar. In this way, courts can effectively maintain the guarantee of presumptive openness.

63 Specifically, in order to preserve the integrity of the open court principle, an important public interest concerned with the protection of dignity should be understood to be seriously at risk only in limited cases. Nothing here displaces the principle that covertness in court proceedings must be exceptional. Neither the sensibilities of individuals nor the fact that openness is disadvantageous, embarrassing or distressing to certain individuals will generally on their own warrant interference with court openness (*MacIntyre*, at p. 185; *New Brunswick*, at para. 40; *Williams*, at para. 30; Coltsfoot Publishing Ltd. v. Foster-Jacques, 2012 NSCA 83, 320 N.S.R. (2d) 166, at para. 97). These principles do not preclude recognizing the public character of a privacy interest as important when it is related to the protection of dignity. They merely require that a serious risk be shown to exist in respect of this interest in order to justify, exceptionally, a limit on openness, as is the case with any important public interest under *Sierra Club* . As Professors Sylvette Guillemard and Séverine Menétrey explain, [TRANSLATION] "[t]he confidentiality of the proceedings may be justified, in particular, in order to protect the parties' privacy .... However, the jurisprudence indicates that embarrassment or shame is not a sufficient reason to order that proceedings be held *in camera* or to impose a publication ban" (*Comprendre la procédure civile québécoise* (2nd ed. 2017), at p. 57).

64 How should the privacy interest at issue be understood as raising an important public interest relevant to the test for discretionary limits on court openness in this context? It is helpful to recall that the orders below were sought to limit access to documents and information in the court files. The Trustees' argument on this point focused squarely on the risk of immediate and widespread dissemination of the personally identifying and other sensitive information contained in the sealed materials by the Toronto Star. The Trustees submit that this dissemination would constitute an unwarranted intrusion into the privacy of the affected individuals beyond the upset they have already suffered as a result of the publicity associated with the death of the Shermans.

65 In my view, there is value in leaving individuals free to restrict when, how and to what extent highly sensitive information about them is communicated to others in the public sphere, because choosing how we present ourselves in public preserves our moral autonomy and dignity as individuals. This Court has had occasion to underscore the connection between the privacy interest engaged by open courts and the protection of dignity specifically. For example, in *Edmonton Journal*, Wilson J. noted that the impugned provision which would limit publication about matrimonial proceedings addressed "a somewhat different aspect of privacy, one more closely related to the protection of one's dignity ... namely the personal anguish and loss of dignity that may result from having embarrassing details of one's private life printed in the newspapers" (pp. 1363-64). In *Bragg*, as a further example, the protection of a young person's ability to control sensitive information was said to foster respect for "dignity, personal integrity and autonomy" (para. 18, citing Toronto Star Newspaper Ltd., at para. 44).

66 Consistent with this jurisprudence, I note by way of example that the Quebec legislature expressly highlighted the preservation of dignity when the *Sierra Club* test was codified in the Code of Civil Procedure, CQLR, c. C-25.01 ("C.C.P."), art. 12 (see also Ministère de la Justice, *Commentaires de la ministre de la Justice: Code de procédure civile*, *chapitre C-25.01* (2015), art. 12). Under art. 12 *C.C.P.*, a discretionary exception to the open court principle can be made by the court if "public order, in particular the preservation of the dignity of the persons involved or the protection of substantial and legitimate interests", requires it.

67 The concept of public order evidences flexibility analogous to the concept of an important public interest under *Sierra Club* yet it recalls that the interest invoked transcends, in importance and consequence, the purely subjective sensibilities of the persons affected. Like the "important public interest" that must be at serious risk to justify the sealing orders in the present appeal, public order encompasses a wide array of general principles and imperative norms identified by a legislature and the courts as fundamental to a given society (see Goulet v. Transamerica Life Insurance Co. of Canada, 2002 SCC 21, [2002] 1 S.C.R. 719, at paras. 42-44, citing *Godbout v. Longueuil (Ville de)*, [1995] R.J.Q. 2561 (C.A.), at p. 2570, aff'd [1997] 3 S.C.R. 844). As one Quebec judge wrote, referring to *Sierra Club* prior to the enactment of art. 12 *C.C.P.*, the interest must be understood as defined [TRANSLATION] "in terms of a public interest in confidentiality" (see *3834310 Canada inc.*, at para. 24, per Gendreau J.A. for the court of appeal). From among the various considerations that make up the concept of public order and other legitimate interests to which art. 12 *C.C.P.* alludes, it is significant that dignity, and not an untailored reference to either privacy, harm or access to justice, was given pride of place. Indeed, it is that narrow aspect of privacy considered to be a fundamental right that courts had fixed upon before the enactment of art. 12 *C.C.P.* — [TRANSLATION] "what is part of one's personal life, in short, what constitutes a minimum personal sphere" (*Godbout*, at p. 2569, per Baudouin J.A.; see also A. v. B.1990 CanLII 3132(Que. C.A.), at para. 20, per Rothman J.A.).

68 The "preservation of the dignity of the persons involved" is now consecrated as the archetypal public order interest in art. 12 *C.C.P.* It is the exemplar of the *Sierra Club* important public interest in confidentiality that stands as justification for an exception to openness (S. Rochette and J.-F. Côté, "Article 12", in L. Chamberland, ed., *Le grand collectif*: *Code de procédure civile — Commentaires et annotations* (5th ed. 2020), vol. 1, at p. 102; D. Ferland and B. Emery, *Précis de procédure civile du Québec* (6th ed. 2020), vol. 1, at para. 1-111). Dignity gives concrete expression to this public order interest because all of society has a stake in its preservation, notwithstanding its personal connections to the individuals concerned. This codification of *Sierra Club* 's notion of important public interest highlights the superordinate importance of human dignity and the appropriateness of limiting court openness on this basis as against an overbroad understanding of privacy that might be otherwise unsuitable to the open court context.

69 Consistent with this idea, understanding privacy as predicated on dignity has been advanced as useful in connection with challenges brought by digital communications (K. Eltis, "The Judicial System in the Digital Age: Revisiting the Relationship between Privacy and Accessibility in the Cyber Context" (2011), 56 McGill L.J. 289, at p. 314).

70 It is also significant, in my view, that the application judge in this case explicitly recognized, in response to the relevant arguments from the Trustees, an interest in "protecting the privacy *and dignity* of victims of crime and their loved ones" (para. 23 (emphasis added)). This elucidates that the central concern for the affected individuals on this point is not merely protecting their privacy for its own sake but privacy where it coincides with the public character of the dignity interests of these individuals.

71 Violations of privacy that cause a loss of control over fundamental personal information about oneself are damaging to dignity because they erode one's ability to present aspects of oneself to others in a selective manner (D. Matheson, "Dignity and Selective Self-Presentation", in I. Kerr, V. Steeves and C. Lucock, eds., *Lessons from the Identity Trail: Anonymity, Privacy and Identity in a Networked Society* (2009), 319, at pp. 327-28; L. M. Austin, "Re-reading Westin" (2019), 20 *Theor. Inq. L.* 53, at pp. 66-68; Eltis (2016), at p. 13). Dignity, used in this context, is a social concept that involves presenting core aspects of oneself to others in a considered and controlled manner (see generally Matheson, at pp. 327-28; Austin, at pp. 66-68). Dignity is eroded where individuals lose control over this core identity-giving information about themselves, because a highly sensitive aspect of who they are that they did not consciously decide to share is now available to others and may shape how they are seen

in public. This was even alluded to by La Forest J., dissenting but not on this point, in *Dagg*, where he referred to privacy as "[a]n expression of an individual's unique personality or personhood" (para. 65).

72 Where dignity is impaired, the impact on the individual is not theoretical but could engender real human consequences, including psychological distress (see generally Bragg, at para. 23). La Forest J., concurring, observed in *Dyment* that privacy is essential to the well-being of individuals (p. 427). Viewed in this way, a privacy interest, where it shields the core information associated with dignity necessary to individual well-being, begins to look much like the physical safety interest also raised in this case, the important and public nature of which is neither debated, nor, in my view, seriously debatable. The administration of justice suffers when the operation of courts threatens physical well-being because a responsible court system is attuned to the physical harm it inflicts on individuals and works to avoid such effects. Similarly, in my view, a responsible court must be attuned and responsive to the harm it causes to other core elements of individual well-being, including individual dignity. This parallel helps to understand dignity as a more limited dimension of privacy relevant as an important public interest in the open court context.

73 I am accordingly of the view that protecting individuals from the threat to their dignity that arises when information revealing core aspects of their private lives is disseminated through open court proceedings is an important public interest for the purposes of the test.

74 Focusing on the underlying value of privacy in protecting individual dignity from the exposure of private information in open court overcomes the criticisms that privacy will always be at risk in open court proceedings and is theoretically complex. Openness brings intrusions on personal privacy in virtually all cases, but dignity as a public interest in protecting an individual's core sensibility is more rarely in play. Specifically, and consistent with the cautious approach to the recognition of important public interests, this privacy interest, while determined in reference to the broader factual setting, will be at serious risk only where the sensitivity of the information strikes at the subject's more intimate self.

75 If the interest is ultimately about safeguarding a person's dignity, that interest will be undermined when the information reveals something sensitive about them as an individual, as opposed to generic information that reveals little if anything about who they are as a person. Therefore the information that will be revealed by court openness must consist of intimate or personal details about an individual — what this Court has described in its jurisprudence on s. 8 of the Charter as the "biographical core" — if a serious risk to an important public interest is to be recognized in this context (*R. v. Plant*, [1993] 3 S.C.R. 281, at p. 293; R. v. Tessling, 2004 SCC 67, [2004] 3 S.C.R. 432, at para. 60; *R. v. Cole*, 2012 SCC 53, [2012] 3 S.C.R. 34, at para. 46). Dignity transcends personal inconvenience by reason of the highly sensitive nature of the information that might be revealed. This Court in *Cole* drew a similar line between the sensitivity of personal information and the public interest in protecting that information in reference to the biographical core. It held that "reasonable and informed Canadians" would be more willing to recognize the existence of a privacy interest where the relevant information cuts to the "biographical core" or, "[p]ut another way, the more personal and confidential the information" (para. 46). The presumption of openness means that mere discomfort associated with lesser intrusions of privacy will generally be tolerated. But there is a public interest in ensuring that openness does not unduly entail the dissemination of this core information that threatens dignity — even if it is "personal" to the affected person.

76 The test for discretionary limits on court openness imposes on the applicant the burden to show that the important public interest is at serious risk. Recognizing that privacy, understood in reference to dignity, is only at serious risk where the information in the court file is sufficiently sensitive erects a threshold consistent with the presumption of openness. This threshold is fact specific. It addresses the concern, noted above, that personal information can frequently be found in court files and yet finding this sufficient to pass the serious risk threshold in every case would undermine the structure of the test. By requiring the applicant to demonstrate the sensitivity of the information as a necessary condition to the finding of a serious risk to this interest, the scope of the interest is limited to only those cases where the rationale for not revealing core aspects of a person's private life, namely protecting individual dignity, is most actively engaged.

77 There is no need here to provide an exhaustive catalogue of the range of sensitive personal information that, if exposed, could give rise to a serious risk. It is enough to say that courts have demonstrated a willingness to recognize the sensitivity of information related to stigmatized medical conditions (see, e.g., *A.B.*, at para. 9), stigmatized work (see, e.g., Work Safe

Twerk Safe v. Her Majesty the Queen in Right of Ontario, 2021 ONSC 1100, at para. 28 (CanLII)), sexual orientation (see, e.g., *Paterson*, at paras. 76, 78 and 87-88), and subjection to sexual assault or harassment (see, e.g., Fedeli v. Brown, 2020 ONSC 994, at para. 9 (CanLII)). I would also note the submission of the intervener the Income Security Advocacy Centre, that detailed information about family structure and work history could in some circumstances constitute sensitive information. The question in every case is whether the information reveals something intimate and personal about the individual, their lifestyle or their experiences.

78 I pause here to note that I refer to cases on s. 8 of the Charter above for the limited purpose of providing insight into types of information that are more or less personal and therefore deserving of public protection. If the impact on dignity as a result of disclosure is to be accurately measured, it is critical that the analysis differentiate between information in this way. Helpfully, one factor in determining whether an applicant's subjective expectation of privacy is objectively reasonable in the s. 8 jurisprudence focuses on the degree to which information is private (see, e.g., *R. v.* Marakah, 2017 SCC 59, [2017] 2 S.C.R. 608, at para. 31; *Cole*, at paras. 44-46). But while these decisions may assist for this limited purpose, this is not to say that the remainder of the s. 8 analysis has any relevance to the application of the test for discretionary limits on court openness. For example, asking what the Trustees' reasonable expectation of privacy was here could invite a circular analysis of whether they reasonably expected their court files to be open to the public or whether they reasonably expected to be successful in having them sealed. Therefore, it is only for the limited purpose described above that the s. 8 jurisprudence is useful.

79 In cases where the information is sufficiently sensitive to strike at an individual's biographical core, a court must then ask whether a serious risk to the interest is made out in the full factual context of the case. While this is obviously a fact-specific determination, some general observations may be made here to guide this assessment.

80 I note that the seriousness of the risk may be affected by the extent to which information would be disseminated without an exception to the open court principle. If the applicant raises a risk that the personal information will come to be known by a large segment of the public in the absence of an order, this is a plainly more serious risk than if the result will be that a handful of people become aware of the same information, all else being equal. In the past, the requirement that one be physically present to acquire information in open court or from a court record meant that information was, to some extent, protected because it was "practically obscure" (D. S. Ardia, “Privacy and Court Records: Online Access and the Loss of Practical Obscurity”(2017), 4 U. Ill. L. Rev. 1385, at p. 1396). However, today, courts should be sensitive to the information technology context, which has increased the ease with which information can be communicated and cross-referenced (see Bailey and Burkell, at pp. 169-70; Ardia, at pp. 1450-51). In this context, it may well be difficult for courts to be sure that information will not be broadly disseminated in the absence of an order.

81 It will be appropriate, of course, to consider the extent to which information is already in the public domain. If court openness will simply make available what is already broadly and easily accessible, it will be difficult to show that revealing the information in open court will actually result in a meaningful loss of that aspect of privacy relating to the dignity interest to which I refer here. However, just because information is already accessible to some segment of the public does not mean that making it available through the court process will not exacerbate the risk to privacy. Privacy is not a binary concept, that is, information is not simply either private or public, especially because, by reason of technology in particular, absolute confidentiality is best thought of as elusive (see generally *R. v.* Quesnelle, 2014 SCC 46, [2014] 2 S.C.R. 390, at para. 37; *UFCW*, at para. 27). The fact that certain information is already available somewhere in the public sphere does not preclude further harm to the privacy interest by additional dissemination, particularly if the feared dissemination of highly sensitive information is broader or more easily accessible (see generally Solove, at p. 1152; Ardia, at p. 1393-94; E. Paton-Simpson, "Privacy and the Reasonable Paranoid: The Protection of Privacy in Public Places” (2000), 50 U.T.L.J. 305, at p. 346).

82 Further, the seriousness of the risk is also affected by the probability that the dissemination the applicant suggests will occur actually occurs. I hasten to say that implicit in the notion of risk is that the applicant need not establish that the feared dissemination will certainly occur. However, the risk to the privacy interest related to the protection of dignity will be more serious the more likely it is that the information will be disseminated. While decided in a different context, this Court has held that the magnitude of risk is a product of both the gravity of the feared harm and its probability (R. v. Mabior, 2012 SCC 47, [2012] 2 S.C.R. 584, at para. 86).

83 That said, the likelihood that an individual's highly sensitive personal information will be disseminated in the absence of privacy protection will be difficult to quantify precisely. It is best to note as well that probability in this context need not be identified in mathematical or numerical terms. Rather, courts may merely discern probability in light of the totality of the circumstances and balance this one factor alongside other relevant factors.

84 Finally, and as discussed above, individual sensitivities alone, even if they can be notionally associated with "privacy", are generally insufficient to justify a restriction on court openness where they do not rise above those inconveniences and discomforts that are inherent to court openness (*MacIntyre*, at p. 185). An applicant will only be able to establish that the risk is sufficient to justify a limit on openness in exceptional cases, where the threatened loss of control over information about oneself is so fundamental that it strikes meaningfully at individual dignity. These circumstances engage "social values of superordinate importance" beyond the more ordinary intrusions inherent to participating in the judicial process that Dickson J. acknowledged could justify curtailing public openness (pp. 186-87).

85 To summarize, the important public interest in privacy, as understood in the context of the limits on court openness, is aimed at allowing individuals to preserve control over their core identity in the public sphere to the extent necessary to preserve their dignity. The public has a stake in openness, to be sure, but it also has an interest in the preservation of dignity: the administration of justice requires that where dignity is threatened in this way, measures be taken to accommodate this privacy concern. Although measured by reference to the facts of each case, the risk to this interest will be serious only where the information that would be disseminated as a result of court openness is sufficiently sensitive such that openness can be shown to meaningfully strike at the individual's biographical core in a manner that threatens their integrity. Recognizing this interest is consistent with this Court's emphasis on the importance of privacy and the underlying value of individual dignity, but is also tailored to preserve the strong presumption of openness.

D. The Trustees Have Failed to Establish a Serious Risk to an Important Public Interest

86 As *Sierra Club* made plain, a discretionary order limiting court openness can only be made where there is a serious risk to an important public interest. The arguments on this appeal concerned whether privacy is an important public interest and whether the facts here disclose the existence of serious risks to privacy and safety. While the broad privacy interest invoked by the Trustees cannot be relied on to justify a limit on openness, the narrower concept of privacy understood in relation to dignity is an important public interest for the purposes of the test. I also recognize that a risk to physical safety is an important public interest, a point on which there is no dispute here. Accordingly, the relevant question at the first step is whether there is a serious risk to one or both of these interests. For reasons that follow, the Trustees have failed to establish a serious risk to either. This alone is sufficient to conclude that the sealing orders should not have been issued.

(1) The Risk to Privacy Alleged in this Case Is Not Serious

87 As I have said, the important public interest in privacy must be understood as one tailored to the protection of individual dignity and not the broadly defined interest the Trustees have asked this Court to recognize. In order to establish a serious risk to this interest, the information in the court files about which the Trustees are concerned must be sufficiently sensitive in that it strikes at the biographical core of the affected individuals. If it is not, there is no serious risk that would justify an exception to openness. If it is, the question becomes whether a serious risk is made out in light of the facts of this case.

88 The application judge never explicitly identified a serious risk to the privacy interest he identified but, to the extent he implicitly reached this conclusion, I respectfully do not share his view. His finding was limited to the observation that "[t]he degree of intrusion on that privacy and dignity [i.e., that of the victims and their loved ones] has already been extreme and, I am sure, excruciating" (para. 23). But the intense scrutiny faced by the Shermans up to the time of the application is only part of the equation. As the sealing orders can only protect against the disclosure of the information in these court files relating to probate, the application judge was required to consider the sensitivity of the specific information they contained. He made no such measure. His conclusion about the seriousness of the risk then focused entirely on the risk of physical harm, with no indication that he found that the Trustees met their burden as to the serious risk to the privacy interest. Said very respectfully and with the

knowledge that the application judge did not have the benefit of the above framework, the failure to assess the sensitivity of the information constituted a failure to consider a required element of the legal test. This warranted intervention on appeal.

89 Applying the appropriate framework to the facts of this case, I conclude that the risk to the important public interest in the affected individuals' privacy, as I have defined it above in reference to dignity, is not serious. The information the Trustees seek to protect is not highly sensitive and this alone is sufficient to conclude that there is no serious risk to the important public interest in privacy so defined.

90 There is little controversy in this case about the likelihood and extent of dissemination of the information contained in the estate files. There is near certainty that the Toronto Star will publish at least some aspects of the estate files if it is provided access. Given the breadth of the audience of its media organization, and the high-profile nature of the events surrounding the death of the Shermans, I have no difficulty in concluding that the affected individuals would lose control over this information to a significant extent should the files be open.

91 With regard to the sensitivity of the information, however, the information contained in these files does not reveal anything particularly private about the affected individuals. What would be revealed might well cause inconvenience and perhaps embarrassment, but it has not been shown that it would strike at their biographical core in a way that would undermine their control over the expression of their identities. Their privacy would be troubled, to be sure, but the relevant privacy interest bearing on the dignity of the affected persons has not been shown to be at serious risk. At its highest, the information in these files will reveal something about the relationship between the deceased and the affected individuals, in that it may reveal to whom the deceased entrusted the administration of their estates and those who they wished or were deemed to wish to be beneficiaries of their property at death. It may also reveal some basic personal information, such as addresses. Some of the beneficiaries might well, it may fairly be presumed, bear family names other than Sherman. I am mindful that the deaths are being investigated as homicides by the Toronto Police Service. However, even in this context, none of this information provides significant insight into who they are as individuals, nor would it provoke a fundamental change in their ability to control how they are perceived by others. The fact of being linked through estate documents to victims of an unsolved murder is not in itself highly sensitive. It may be the source of discomfort but has not been shown to constitute an affront to dignity in that it does not probe deeply into the biographical core of these individuals. As a result, the Trustees have failed to establish a serious risk to an important public interest as required by *Sierra Club* .

92 The fact that some of the affected individuals may be minors is also insufficient to cross the seriousness threshold. While the law recognizes that minors are especially vulnerable to intrusions of privacy (see Bragg, at para. 17), the mere fact that information concerns minors does not displace the generally applicable analysis (see, e.g., Bragg, at para. 11). Even taking into account the increased vulnerability of minors who may be affected individuals in the probate files, there is no evidence that they would lose control of information about themselves that reveals something close to the core of their identities. Merely associating the beneficiaries or trustees with the Shermans' unexplained deaths is not enough to constitute a serious risk to the identified important public interest in privacy, defined in reference to dignity.

93 Further, while the intense media scrutiny on the family following the deaths suggests that the information would likely be widely disseminated, it is not in itself indicative of the sensitivity of the information contained in the probate files.

94 Showing that the information that would be revealed by court openness is sufficiently sensitive and private such that it goes to the biographical core of the affected individual is a necessary prerequisite to showing a serious risk to the relevant public interest aspect of privacy. The Trustees did not advance any specific reason why the contents of these files are more sensitive than they may seem at first glance. When asserting a privacy risk, it is essential to show not only that information about individuals will escape the control of the person concerned — which will be true in every case — but that this particular information concerns who the individuals are as people in a manner that undermines their dignity. This the Trustees have not done.

95 Therefore, while some of the material in the court files may well be broadly disseminated, the nature of the information has not been shown to give rise to a serious risk to the important public interest in privacy, as appropriately defined in this context in reference to dignity. For that reason alone, I conclude that the Trustees have failed to show a serious risk to this interest.

(2) The Risk to Physical Safety Alleged in this Case is Not Serious

96 Unlike the privacy interest raised in this case, there was no controversy that there is an important public interest in protecting individuals from physical harm. It is worth underscoring that the application judge correctly treated the protection from physical harm as a distinct important interest from that of the protection of privacy and found that this risk of harm was "foreseeable" and "grave" (paras. 22-24). The issue is whether the Trustees have established a serious risk to this interest for the purpose of the test for discretionary limits on court openness. The application judge observed that it would have been preferable to include objective evidence of the seriousness of the risk from the police service conducting the homicide investigation. He nevertheless concluded there was sufficient proof of risk to the physical safety of the affected individuals to meet the test. The Court of Appeal says that was a misreading of the evidence, and the Toronto Star agrees that the application judge's conclusion as to the existence of a serious risk to safety was mere speculation.

97 At the outset, I note that direct evidence is not necessarily required to establish a serious risk to an important interest. This Court has held that it is possible to identify objectively discernable harm on the basis of logical inferences (*Bragg*, at paras. 15-16). But this process of inferential reasoning is not a licence to engage in impermissible speculation. An inference must still be grounded in objective circumstantial facts that reasonably allow the finding to be made inferentially. Where the inference cannot reasonably be drawn from the circumstances, it amounts to speculation (*R. v.* Chanmany, 2016 ONCA 576, 352 O.A.C. 121, at para. 45).

98 As the Trustees correctly argue, it is not just the probability of the feared harm, but also the gravity of the harm itself that is relevant to the assessment of serious risk. Where the feared harm is particularly serious, the probability that this harm materialize need not be shown to be likely, but must still be more than negligible, fanciful or speculative. The question is ultimately whether this record allowed the application judge to objectively discern a serious risk of physical harm.

99 This conclusion was not open to the application judge on this record. There is no dispute that the feared physical harm is grave. I agree with the Toronto Star, however, that the probability of this harm occurring was speculative. The application judge's conclusion as to the seriousness of the risk of physical harm was grounded on what he called "the degree of mystery that persists regarding both the perpetrator and the motives" associated with the deaths of the Shermans and his supposition that this motive might be "transported" to the trustees and beneficiaries (para. 5; see also paras. 19 and 23). The further step in reasoning that the unsealed estate files would lead to the perpetrator's next crime, to be visited upon someone mentioned in the files, is based on speculation, not the available affidavit evidence, and cannot be said to be a proper inference or some kind of objectively discerned harm or risk thereof. If that were the case, the estate files of every victim of an unsolved murder would pass the initial threshold of the test for a sealing order.

100 Further, I recall that what is at issue here is not whether the affected individuals face a safety risk in general, but rather whether they face such a risk as a result of the openness of these court files. In light of the contents of these files, the Trustees had to point to some further reason why the risk posed by this information becoming publicly available was more than negligible.

101 The speculative character of the chain of reasoning leading to the conclusion that a serious risk of physical harm exists in this case is underlined by differences between these facts and those cases relied on by the Trustees. In *X. v. Y.*, 2011 BCSC 943, 21 B.C.L.R. (5th) 410, the risk of physical harm was inferred on the basis that the plaintiff was a police officer who had investigated "cases involving gang violence and dangerous firearms" and wrote sentencing reports for such offenders which identified him by full name (para. 6). In *R. v. Esseghaier*, 2017 ONCA 970, 356 C.C.C. (3d) 455, Watt J.A. considered it "self-evident" that the disclosure of identifiers of an undercover operative working in counter-terrorism would compromise the safety of the operative (para. 41). In both cases, the danger flowed from facts establishing that the applicants were in antagonistic relationships with alleged criminal or terrorist organizations. But in this case, the Trustees asked the application judge to infer not only the fact that harm would befall the affected individuals, but also that a person or persons exist who wish to harm them. To infer all this on the basis of the Shermans' deaths and the association of the affected individuals with the deceased is not reasonably possible on this record. It is not a reasonable inference but, as the Court of Appeal noted, a conclusion resting on speculation.

102 Were the mere assertion of grave physical harm sufficient to show a serious risk to an important interest, there would be no meaningful threshold in the analysis. Instead, the test requires the serious risk asserted to be well grounded in the record or the circumstances of the particular case (*Sierra Club*, at para. 54; *Bragg*, at para. 15). This contributes to maintaining the strong presumption of openness.

103 Again, in other cases, circumstantial facts may allow a court to infer the existence of a serious risk of physical harm. Applicants do not necessarily need to retain experts who will attest to the physical or psychological risk related to the disclosure. But on this record, the bare assertion that such a risk exists fails to meet the threshold necessary to establish a serious risk of physical harm. The application judge's conclusion to the contrary was an error warranting the intervention of the Court of Appeal.

E. There Would Be Additional Barriers to a Sealing Order on the Basis of the Alleged Risk to Privacy

104 While not necessary to dispose of the appeal, it bears mention that the Trustees would have faced additional barriers in seeking the sealing orders on the basis of the privacy interest they advanced. I recall that to meet the test for discretionary limits on court openness, a person must show, in addition to a serious risk to an important interest, that the particular order sought is necessary to address the risk and that the benefits of the order outweigh its negative effects as a matter of proportionality (*Sierra Club*, at para. 53).

105 Even if the Trustees had succeeded in showing a serious risk to the privacy interest they assert, a publication ban — less constraining on openness than the sealing orders — would have likely been sufficient as a reasonable alternative to prevent this risk. The condition that the order be necessary requires the court to consider whether there are alternatives to the order sought and to restrict the order as much as reasonably possible to prevent the serious risk (*Sierra Club*, at para. 57). An order imposing a publication ban could restrict the dissemination of personal information to only those persons consulting the court record for themselves and prohibit those individuals from spreading the information any further. As I have noted, the likelihood and extent of dissemination may be relevant factors in determining the seriousness of a risk to privacy in this context. While the Toronto Star would be able to consult the files subject to a publication ban, for example, which may assist it in its investigations, it would not be able to publish and thereby broadly disseminate the contents of the files. A publication ban would seem to protect against this latter harm, which has been the focus of the Trustees' argument, while allowing some access to the file, which is not possible under the sealing orders. Therefore, even if a serious risk to the privacy interest had been made out, it would likely not have justified a sealing order, because a less onerous order would have likely been sufficient to mitigate this risk effectively. I hasten to add, however, that a publication ban is not available here since, as noted, the seriousness of the risk to the privacy interest at play has not been made out.

106 Further, the Trustees would have had to show that the benefits of any order necessary to protect from a serious risk to the important public interest outweighed the harmful effects of the order, including the negative impact on the open court principle (*Sierra Club*, at para. 53). In balancing the privacy interests against the open court principle, it is important to consider whether the information the order seeks to protect is peripheral or central to the judicial process (paras. 78 and 86; *Bragg*, at paras. 28-29). There will doubtless be cases where the information that poses a serious risk to privacy, bearing as it does on individual dignity, will be central to the case. But the interest in important and legally relevant information being aired in open court may well overcome any concern for the privacy interests in that same information. This contextual balancing, informed by the importance of the open court principle, presents a final barrier to those seeking a discretionary limit on court openness for the purposes of privacy protection.

VI. Conclusion

107 The conclusion that the Trustees have failed to establish a serious risk to an important public interest ends the analysis. In such circumstances, the Trustees are not entitled to any discretionary order limiting the open court principle, including the sealing orders they initially obtained. The Court of Appeal rightly concluded that there was no basis for asking for redactions because the Trustees had failed at this stage of the test for discretionary limits on court openness. This is dispositive of the

appeal. The decision to set aside the sealing orders rendered by the application judge should be affirmed. Given that I propose to dismiss the appeal on the existing record, I would dismiss the Toronto Star's motion for new evidence as being moot.

108 For the foregoing reasons, I would dismiss the appeal. The Toronto Star requests no costs given the important public issues in dispute. As such, there will be no order as to costs.

Appeal dismissed.

Pourvoi rejeté.

Footnotes

1 As noted in the title of proceedings, the appellants in this matter have been referred to consistently as the "Estate of Bernard Sherman and Trustees of the Estate and Estate of Honey Sherman and Trustees of the Estate." In these reasons the appellants are referred to throughout as the "Trustees" for convenience.

2 The use of "Toronto Star" as a collective term referring to both respondents should not be taken to suggest that only Toronto Star Newspapers Ltd. is participating in this appeal. Mr. Donovan is the only respondent to have been a party throughout. Toronto Star Newspapers Ltd. was a party in first instance, but was removed as a party on consent at the Court of Appeal. By order of Karakatsanis J. dated March 25, 2020, Toronto Star Newspapers Ltd. was added as a respondent in this Court.

3 At the time of writing the House of Commons is considering a bill that would replace part one of *PIPEDA*: Bill C-11, *An Act to enact the Consumer Privacy Protection Act and the Personal Information and Data Protection Tribunal Act and to make consequential and related amendments to other Acts*, 2nd Sess., 43rd Parl., 2020.

TAB L

Most Negative Treatment: Recently added (treatment not yet designated)
Most Recent Recently added (treatment not yet designated): Séquestre de Société immobilière Notsag ltée | 2023 QCCA 1355, 2023 CarswellQue 15498, EYB 2023-534518 | (C.A. Que, Oct 27, 2023)

2022 YKSC 2
Yukon Territory Supreme Court

Yukon (Government of) v. Yukon Zinc Corporation

2022 CarswellYukon 3, 2022 YKSC 2, 343 A.C.W.S. (3d) 8, 96 C.B.R. (6th) 255

GOVERNMENT OF YUKON as represented by the Minister of the Department of Energy, Mines and Resources (PETITIONER) AND YUKON ZINC CORPORATION (RESPONDENT)

S.M. Duncan C.J.S.C.

Judgment: January 21, 2022
Docket: Whitehorse S.C. 19-A0067

Counsel: John T. Porter, Kimberly Sova, for Petitioner
No one for Yukon Zinc Corporation
H. Lance Williams, Forrest Finn, for Welichem Research General Partnership
Tevia Jeffries, Emma Newbery, for PricewaterhouseCoopers Inc.

Related Abridgment Classifications
Bankruptcy and insolvency
VI Proposal
VI.1 Approval by court
Bankruptcy and insolvency
XIV Administration of estate
XIV.4 Sale of assets
Business associations
V Legal proceedings involving business associations
V.3 Practice and procedure in proceedings involving corporations
V.3.n Confidentiality or sealing orders

Headnote
Bankruptcy and insolvency --- Administration of estate — Sale of assets — Jurisdiction of court to approve sale
Receiver of mining company was responsible for care and maintenance of mine — Receiver developed sale and investment solicitation plan (SISP) that proposed evaluation of bids for assets and property of company — Although several bids were made, some bidders withdrew — Receiver concluded that no bid could result in viable sale — After consultation with Yukon government, receiver agreed to terminate sale process — Receiver subsequently received binding bid from another company (M) for small portion of assets — Receiver believed M bid could be viable sale of small portion of assets — Receiver brought applications for approval of purchase agreement with M and termination of sale and investment solicitation plan, and for order sealing its confidential report — Applications granted — There was no evidence of any improvident actions by receiver — M was experienced mining company and only bidder specifically for small portion of assets — Even though sale to M represented small fraction of assets, their sale would generate some funds for estate which was in interests of all parties — Yukon government supported sale — M's offer was obtained through SISP process, which was approved by court as fair, transparent and commercially efficacious — Purchase agreement with M was approved.
Bankruptcy and insolvency --- Proposal — Approval by court — General principles

Receiver of mining company was responsible for care and maintenance of mine — Receiver developed sale and investment solicitation plan (SISP) that proposed evaluation of bids for assets and property of company — Although several bids were made, some bidders withdrew — Receiver concluded that no bid could result in viable sale — After consultation with Yukon government, receiver agreed to terminate sale process — Receiver subsequently received binding bid from another company (M) for small portion of assets — Receiver believed M bid could be viable sale of small portion of assets — Receiver brought applications for approval of purchase agreement with M and termination of sale and investment solicitation plan, and for order sealing its confidential report — Applications granted — In reviewing sales process court was to defer to business expertise of receiver, and was not to intervene in receiver's recommendations and conclusions — Receiver undertook thorough process in attempting to attract and identify acceptable bidders in consultation with Yukon government — Receiver appeared to have implemented SISP fairly and in good faith — Yukon government agreed with termination of SISP — Court approved termination of SISP.

Business associations --- Legal proceedings involving business associations — Practice and procedure in proceedings involving corporations — Confidentiality or sealing orders

Receiver of mining company was responsible for care and maintenance of mine — Receiver developed sale and investment solicitation plan (SISP) that proposed evaluation of bids for assets and property of company — Although several bids were made, some bidders withdrew — Receiver concluded that no bid could result in viable sale — After consultation with Yukon government, receiver agreed to terminate sale process — Receiver subsequently received binding bid from another company (M) for small portion of assets — Receiver believed M bid could be viable sale of small portion of assets — Receiver brought applications for approval of purchase agreement with M and termination of sale and investment solicitation plan, and for order sealing its confidential report — Applications granted — It was standard practice to keep all aspects of bidding or sales process confidential — Sealing that information ensured integrity of sales and marketing process and avoided misuse of information by bidders in subsequent process to obtain unfair advantage — Requirement for confidentiality no longer existed when sale process was completed — Court acknowledged importance of sealing receiver's confidential report, which contained results of SISP and details of process — Commercial interests of bidders, creditors, stakeholders and maintaining integrity of sales process outweighed negative effects of sealing order — Redaction of documents was not reasonable alternative as virtually all information in report was confidential — Court ordered redacted material relating to M's purchase to be unsealed once sale was complete — As future of sales process for whole assets was uncertain, court ordered report to be sealed for three years or until further order.

Table of Authorities

Cases considered by *S.M. Duncan C.J.S.C.*:

Bank of Montreal v. On-Stream Natural Gas Ltd. Partnership (1994), 29 C.B.R. (3d) 203, 1994 CarswellBC 633 (B.C. S.C.) — referred to

Canadian Broadcasting Corp. v. New Brunswick (Attorney General) (1996), 2 C.R. (5th) 1, 110 C.C.C. (3d) 193, [1996] 3 S.C.R. 480, 139 D.L.R. (4th) 385, 182 N.B.R. (2d) 81, 463 A.P.R. 81, 39 C.R.R. (2d) 189, 203 N.R. 169, 1996 CarswellNB 462, 1996 CarswellNB 463, 2 B.H.R.C. 210 (S.C.C.) — considered

GE Canada Real Estate Financing Business Property Co. v. 1262354 Ontario Inc. (2014), 2014 ONSC 1173, 2014 CarswellOnt 2113 (Ont. S.C.J. [Commercial List]) — considered

Look Communications Inc. v. Look Mobile Corp. (2009), 2009 CarswellOnt 7952 (Ont. S.C.J. [Commercial List]) — considered

Royal Bank of Canada v. Keller & Sons Farming Ltd. (2016), 2016 MBCA 46, 2016 CarswellMan 147, 397 D.L.R. (4th) 573, 39 C.B.R. (6th) 219, 330 Man. R. (2d) 12, 675 W.A.C. 12 (Man. C.A.) — referred to

Royal Bank v. Soundair Corp. (1991), 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321, 4 O.R. (3d) 1, 1991 CarswellOnt 205 (Ont. C.A.) — followed

Sherman Estate v. Donovan (2021), 2021 SCC 25, 2021 CSC 25, 2021 CarswellOnt 8339, 2021 CarswellOnt 8340, 66 C.P.C. (8th) 1, 67 E.T.R. (4th) 163, 458 D.L.R. (4th) 361, 72 C.R. (7th) 223 (S.C.C.) — followed

Sierra Club of Canada v. Canada (Minister of Finance) (2002), 2002 SCC 41, 2002 CarswellNat 822, 2002 CarswellNat 823, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 211 D.L.R. (4th) 193, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, 287 N.R. 203, 20 C.P.C. (5th) 1, 40

Admin. L.R. (3d) 1, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 93 C.R.R. (2d) 219, 223 F.T.R. 137 (note), [2002] 2 S.C.R. 522, 2002 CSC 41 (S.C.C.) — followed

Vancouver Sun, Re (2004), 2004 SCC 43, 2004 CarswellBC 1376, 2004 CarswellBC 1377, (sub nom. *R. v. Bagri)* 184 C.C.C. (3d) 515, (sub nom. *R. v. Bagri)* 240 D.L.R. (4th) 147, (sub nom. *Application Under Section 83.28 of the Criminal Code, Re)* 322 N.R. 161, 21 C.R. (6th) 142, (sub nom. *Application Under Section 83.28 of the Criminal Code, Re)* 199 B.C.A.C. 1, [2004] 2 S.C.R. 332, 33 B.C.L.R. (4th) 261, 120 C.R.R. (2d) 203, [2005] 2 W.W.R. 671 (S.C.C.) — referred to

Statutes considered:

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

s. 243(1) — referred to

s. 247(a) — referred to

s. 247(b) — referred to

Canada Business Corporations Act, R.S.C. 1985, c. C-44

Generally — referred to

Quartz Mining Act, S.Y. 2003, c. 14

Generally — referred to

Waters Act, S.Y. 2003, c. 19

Generally — referred to

***S.M. Duncan C.J.S.C.*:**

Introduction

1 The court-appointed Receiver, PricewaterhouseCoopers Inc., brings two applications: one for Orders approving the sale of certain mineral claims and related assets of Yukon Zinc Corporation ("Yukon Zinc") to Almaden Minerals Ltd. ("Almaden") and for the termination of the sale and investment solicitation plan (the "SISP"), and the second for an Order sealing the Receiver's Confidential Supplemental Eighth Report to the Court, with appendices, currently unfiled.

2 The Government of Yukon supports these applications. The applications are unopposed or subject to no position taken by Welichem Research General Partnership ("Welichem") a secured creditor of Yukon Zinc and lessor of items comprising substantially all of the infrastructure, tools, vehicles and equipment at the Wolverine Mine (the "Mine"). No other interested party appeared on the application or made submissions.

3 For the following reasons, I will grant the Orders requested, subject to certain conditions as set out below.

Background

4 These applications arise in the context of the ongoing receivership of all the assets, undertakings and property of Yukon Zinc. Its principal asset is the Mine, a zinc-silver-lead mine located 282 km northeast of Whitehorse, Yukon. It holds 2,945 quartz mineral claims, a quartz mining license issued under the Quartz Mining Act, SY 2003, c.14, and a water licence issued under the Waters Act, SY 2003, c.19. Yukon Zinc carried out exploration and development activities between 2008 and 2011. The Mine began production in March 2012. In January 2015, the Mine ceased operating because of financial difficulties and was put into care and maintenance. Despite a successful restructuring in October 2015, Yukon Zinc was unable to obtain additional funds to operate the Mine and it continued in care and maintenance. In 2017, the underground portion of the Mine flooded and contaminated water was diverted to the tailings storage facility, creating an increased risk of the release of untreated water into the environment. In May 2018, the Yukon government requested from Yukon Zinc an increase in reclamation security from $10,588,966 to $35,548,650 to enable it to address the deteriorating condition of the Mine. Yukon Zinc never provided this increased amount. In September 2019, the Yukon government's petition for the appointment of the Receiver of Yukon Zinc's property and assets was granted by this Court. By October 2019, Yukon Zinc had not filed a proposal in the bankruptcy matter, commenced in British Columbia, and Yukon Zinc was deemed to have made an assignment into bankruptcy. PricewaterhouseCoopers Inc. was appointed the trustee in bankruptcy.

5 Pursuant to s. 243(1) of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 as amended (the "*BIA*"), the Receiver became responsible for the care and maintenance of the Mine. It developed the SISP that proposed the evaluation of bids for the assets and property of Yukon Zinc on various factors. The SISP was approved by the Court on May 26, 2020 but was stayed pending the outcome of an appeal by Welichem. The Court's approval was confirmed on appeal.

6 The sale process began in April 2021. The Receiver contacted 559 potential bidders, advertised the SISP on-line and through media in British Columbia and Yukon and encouraged other stakeholders such as Yukon government and the Kaska Nation to provide additional contacts. Eighteen potential bidders signed non-disclosure agreements and were given access to the data room. By June 2021 several entities submitted non-binding expressions of interest. Throughout the summer of 2021, the Receiver held multiple calls with each of these potential bidders to discuss their plans and ensure the Receiver understood them, to explain and clarify the SISP evaluation criteria, and to support the bidders' due diligence work, including providing explanations of the regulatory requirements. The Receiver also discussed the progress of the SISP regularly with Yukon government and the Kaska Nation. The binding bid deadline was extended and by July the Receiver had received several binding bids. The Receiver began to evaluate these bids. By September 2021, however, some bidders withdrew from the process for various reasons. These withdrawals were confirmed in writing by the Receiver (the "Removal Letters").

7 On completion of the evaluation of the remaining bids, the Receiver concluded that no bid could result in a viable sale of substantially all of Yukon Zinc's assets. The Receiver advised the relevant stakeholders by letter, after consultation with Yukon government, that the sale process would be terminated (the "Termination Letters"). The Receiver also determined at that time that the preferred approach was to transfer the care and maintenance to the Yukon government.

8 In June 2021, the Receiver received a non-binding expression of interest and subsequently a binding bid from Almaden for a small portion of the assets of Yukon Zinc, the Logan interests. Almaden had entered into a joint venture agreement with Yukon Zinc (then called Expatriate Resources Ltd.) in 2005. This agreement led to the forming of a contractual joint venture to explore and develop the Logan interests. No such activity was ever commenced. The Logan interests consist of 156 mineral claims located approximately 100 km south of the Mine. Under the joint venture, Yukon Zinc had an interest of 60% and Almaden 40%. Almaden offered to purchase the Yukon Zinc 60% interest.

9 The Receiver believes the Almaden bid could be a viable sale of the Logan interests and has entered into a purchase and sale agreement with Almaden for this purpose, subject to court approval.

10 The Receiver has submitted copies of the non-binding expressions of interest, binding bids, Removal letters, Termination letters, the Almaden bid, and the Almaden purchase agreement as attachments to the Receiver's Confidential Supplemental Eighth Report. All of these documents along with the report are considered to contain sensitive commercial information and the Receiver seeks a sealing order over them.

Approval of Sale to Almaden

11 Subsections 3(k) and (l) of the Receiver's powers set out in the Order dated September 13, 2019 provide the Receiver with express power and authority to market any or all of the Yukon Zinc assets, undertakings or property, including advertising and soliciting offers for all or part of the property, negotiating appropriate terms and conditions, as well as authority to sell, convey, transfer, lease or assign the property with approval of this Court if the transaction exceeds $150,000.

12 The SISP sets out at s. 22 the evaluation criteria for qualified purchase bids. They are:

(a) Price;

(b) Structural complexity of the proposed transaction;

(c) Nature and sufficiency of funding for the proposed transaction;

(d) Probability of closing the proposed transaction and any relevant risks thereto, including nature of any remaining conditions and due diligence requirements;

(e) Whether the proposed transaction leaves any of the YZC [Yukon Zinc Corporation] Assets within the receivership;

(f) Impact on former employees of YZC;

(g) Bidder's financial strength, technical and environmental expertise and relevant experience to carry out work required to maintain regulatory compliance at the Wolverine Mine after closing of the proposed transaction;

(h) Bidder's historical environmental safety record, operational experience with undertakings of similar nature and/or scale and record of successful restart of mines out of care and maintenance;

(i) Strength of a bidder's proposal for posted required Reclamation Security as required by the DEMR [Department of Energy, Mines and Resources] and any other security required by any other applicable regulator;

(j) Qualified Bidder's willingness and demonstrated ability to obtain and maintain any necessary regulatory approval in connection with ownership and operation or case and maintenance of the Wolverine Mine, including from but not limited to the Water Board and the DEMR;

(k) Benefits that may accrue to Yukon residents and businesses and the affected Kaska Nations of Ross River Dena Council, Liard First Nation, Kwadacha Nation and Dease River First Nation.

13 The SISP also requires the Receiver to report to the Court on the outcome of the solicitation process, including whether it intends to proceed with any one or more of the qualified purchase bids. The applicable statutory obligations on the Receiver are set out in s. 247(a) and (b) of the BIA: to act honestly and in good faith, and to deal with the property of the debtor in a commercially reasonable manner.

14 The principles to be applied by a court in determining whether to approve a proposed sale by a receiver are set out in the leading case of Royal Bank v Soundair Corp(1991), 4 OR (3d) 1 (CA) at para. 16:

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

2. It should consider the interests of all parties.

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

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

15 Here, the Receiver made extensive efforts through direct and indirect contacts of potential bidders and advertising to obtain the best price for the assets. There is no evidence of any improvident actions by the Receiver. The Receiver spent time with each interested potential bidder to assist with their due diligence activities and other aspects of the bidding process.

16 As the Receiver reported, a review of the submitted bids shows that Almaden was the only bidder specifically for the Logan interests. While other bidders referred to the Logan interests, and included them in their bids, their overall bids were withdrawn or unacceptable to the Receiver. Almaden provided the best price for the Logan interests. Almaden is an experienced mining exploration company based in Vancouver.

17 The Receiver noted that although the Logan interests represent a small fraction of the Yukon Zinc assets and property, their sale will generate some funds for the estate which is in the interests of all parties. Yukon government supports this sale and Welichem does not oppose it.

18 The Almaden offer was obtained through the SISP process. This process was approved by the Court as fair, transparent and commercially efficacious.

19 Finally, the evidence shows the SISP process was conducted by the Receiver honestly and in good faith. There is no suggestion or evidence of unfairness in the way the process was carried out.

20 The finalizing of this sale process will be simple: the 60% interest in the Logan assets under the joint venture agreement will be transferred to Almaden. The other 40% are already in the name of Almaden. The commercial joint venture agreement will become defunct on closing. The Receiver advised the splitting off of these interests from the remainder of the assets and property would not be detrimental to any future sale process as they represent a small portion and there was no other bidder interested in solely the Logan interests. The cost to the Receiver of this transaction is reasonable given Almaden's existing agreement and interests.

21 The Almaden Purchase Agreement, a redacted copy of which is included in the filed materials, is approved.

Termination of the SISP

22 As noted above, the Receiver concluded that the SISP process did not lead to a viable sale. None of the bids was acceptable, either because the bidder withdrew from the process, or the bids contained conditions for closing or available consideration that were unacceptably uncertain. The specifics of each bid were not disclosed in the publicly filed eighth report of the Receiver, for reasons of confidentiality. This issue is addressed below.

23 In general, the reasons why certain bidders withdrew from the process included:

(a) the realization during the SISP process of the need for the purchaser to obtain a new water licence instead of assuming the current water licence, a process which could take two years or more;

(b) the possibility of ongoing litigation over the Welichem assets which remain at the site (the Court has been advised that the matter is in the process of settling, although the settlement agreement is not yet finalized);

(c) the unknown extent and costs of reconstruction to make the Mine operational, given the flooded state of the underground part of the Mine and its questionable structural integrity;

(d) the inability to determine potential value of the mineral claims because of an absence of updated exploration results; and

(e) the uncertainty of reclamation or remediation costs and how they will be shared with the Yukon government.

24 The Receiver explained that there was not one issue that presented a bar to the bidders who withdrew or were rejected; the concerns were different for each bidder.

25 The Order approving the SISP or the SISP do not contain a provision for termination of the SISP process. However, s. 30(a) of the SISP states that the Receiver, in consultation with Yukon government, may reject at any time any bid that is:

(i) inadequate or insufficient;

(ii) not in conformity with the requirements of the BIA, this SISP or any orders of the Court applicable to YZC or the Receiver; or

(iii) contrary to the interests of YZC's estate and stakeholders as determined by the Receiver;

26 Further, s. 23(f) of the SISP contemplates the possibility that the Receiver may report to the Court that it will not proceed with any one or more of the bids.

27 The jurisprudence offers little guidance on the role of the court in a situation of termination of a sales process in the event of no acceptable bidders. The Receiver noted one decision in which the Supreme Court of British Columbia observed it saw no reason why the Receiver could not recommend against completion of a sale, and that it had a duty to advise the court of any reason why the court might conclude the sale should not be approved (*Bank of Montreal v On-Stream Natural Gas Ltd Partnership* (1992), 29 CBR (3) 203 (BC SC) at para. 24).

28 The case law is clear that in reviewing a sales process the court is to defer to the business expertise of the Receiver, and is not to intervene or "second guess" the Receiver's recommendations and conclusions (*Royal Bank of Canada v* Keller & Sons Farming Ltd, 2016 MBCA 46 at para. 11). The court is to ensure the integrity of the process is maintained through the exercise of procedural fairness in any negotiations and bidding.

> ... The court should not proceed against the recommendations of its Receiver except in special circumstances and where the necessity and propriety of doing so are plain. ... [*Crown Trust Co v Rosenberg* (1986), 60 OR (2d) 87 (H Ct J) at para. 65]

29 Here, the Receiver undertook a thorough process in attempting to attract and identify an acceptable bidder and ultimate purchaser, in consultation with Yukon government and the Kaska Nation. By its own account, it provided substantial assistance to potential bidders throughout the summer of 2021, including extending deadlines, participating in multiple calls to clarify and understand their proposals, and providing them with necessary information and connections to enable them to complete their due diligence. The SISP has already been approved as fair and reasonable by this Court and as noted above, the Receiver's appears to have implemented the SISP fairly and in good faith.

30 Yukon government agreed with the termination of the SISP, indicating that the Receiver's good faith efforts were the best that could be achieved at this time. Welichem did not oppose the termination of the SISP.

31 While the confidential documents set out the more detailed reasons why the Receiver has concluded there are no appropriate bidders, scrutiny or assessment of these reasons is not the Court's role.

32 I note that the SISP process may have some value for future in that entities with interest in the project were identified and educated about the process, and a large amount of information was gathered and learned about the Mine both by the interested parties and the Receiver in consultation with Yukon government and the Kaska Nation. This may have some value for future bidding or sales processes.

33 For these reasons, the termination of the SISP is approved. The draft Approval and Vesting Order filed by the Receiver on this application is approved, with appropriate adjustments to reflect appearances of counsel.

Sealing Order

34 The Receiver seeks an order sealing its Confidential Supplemental Eighth Report to the Court containing the results of the SISP and attached documents. The report sets out details of the process including:

> (a) the names of the bidders, and the kind of work the Receiver engaged in over the summer of 2021 to advance the bids according to the evaluation criteria;
>
> (b) the details of each bid, including price and conditions;
>
> (c) the challenges of each bid;
>
> (d) the Receiver's review and application of the evaluation criteria; and
>
> (e) the reasons why certain bidders withdrew or were eliminated from the process.

35 The documents attached to the report include unredacted:

(a) expressions of interest;

(b) binding bids;

(c) Removal Letters;

(d) Termination Letters;

(e) Almaden's bid; and

(f) Almaden's Purchase Agreement.

36 The Receiver argues that the information in this report disclosing its application of the evaluation criteria and the challenges and problems with the bids, as well as the documents themselves, contain sensitive commercial information that would cause harm to any future efforts to market the Mine. Information about the identity of bidders, the proposed purchase prices, the proposed terms and conditions, the reasons for the bidders' withdrawal or rejection would affect the possibility of free and open negotiation in any future sale process.

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

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

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

> (1) court openness poses a serious risk to an important public interest;
>
> (2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and,
>
> (3) as a matter of proportionality, the benefits of the order outweigh its negative effects.

39 In the insolvency context, especially where there is a sale process, it is a standard practice to keep all aspects of the bidding or sales process confidential. Courts have found this appropriately meets the *Sierra Club* test as modified by *Sherman Estate*, as sealing this information ensures the integrity of the sales and marketing process and avoids misuse of information by bidders in a subsequent process to obtain an unfair advantage. The important public interest at stake is described as the commercial interests of the Receiver, bidders, creditors and stakeholders in ensuring a fair sales and marketing process is carried out, with all bidders on a level playing field.

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

> The purpose of granting such a sealing order is to protect the integrity and fairness of the sales process by ensuring that competitors or potential bidders do not obtain an unfair advantage by obtaining sensitive commercial information about the asset up for sale while others have to rely on their own resources to place a value on the asset when preparing their bids.

> **To achieve that purpose a sealing order typically remains in place until the closing of the proposed sales transaction. If the transaction closes, then the need for confidentiality disappears and the sealed materials can become part of the public court file. If the transaction proposed by the receiver does not close for some reason, then the materials remain sealed so that the confidential information about the asset under sale does not become available to potential bidders in the next round of bidding, thereby preventing them from gaining an unfair advantage in their subsequent bids. The integrity of the sale process necessitates keeping all bids confidential until a final sale of the assets has taken place.** [emphasis added].

41 *Look Communications Inc v Look Mobile Corp*, (2009), 183 ACWS (3d) 736 (Ont Sup Ct) ("*Look*") was decided not in the insolvency context but in the context of a court-approved sales process requiring the appointment of a monitor, and a plan of arrangement under the Business Corporations Act, R.S.C. 1985, c. C.44. The facts were like those of the case at bar in that only two of the five assets were sold through the initial sales process. The court ordered the monitor file an unredacted version of its report after the sale was completed and the monitor's certificate filed with the court. However, the company requested a further sealing of the report and documents for six months because it was continuing its efforts to sell the remaining assets and was in discussion with some of the same parties who submitted bids under the initial completed sales process. The court applied the principles in *Sierra Club*, noting that the "important commercial interest" must be more than the specific interest of the party requesting the confidentiality order, such as loss of business or profits. There must be a general principle at stake, such as a breach of a confidentiality agreement through the disclosure of the information.

42 The court in *Look* noted at para. 17:

> It is common when assets are being sold pursuant to a court process to seal the Monitor's report disclosing all of the various bids in case a further bidding process is required if the transaction being approved falls through. Invariably, no one comes back asking that the sealing order be set aside. That is because ordinarily all of the assets that were bid on during the court sale process end up being sold and approved by court order, and so long as the sale transaction or transactions closed, no one has any further interest in the information. In *8857574 Ontario Inc. v. Pizza Pizza Ltd*. (1994) 23 B.L.R. (2nd) 239, Farley J. discussed the fact that valuations submitted by a Receiver for the purpose of obtaining court approval are normally sealed. He pointed out that the purpose of that was to maintain fair play so that competitors or potential bidders do not obtain an unfair advantage by obtaining such information while others have to rely on their own resources. In that context, he stated that he thought the most appropriate sealing order in a court approval sale situation would be that the supporting valuation materials remain sealed until such time as the sale transaction had closed.

43 The court in *Look* granted the company's request for a sealing order for a further six months, finding that even though the remaining sales would not occur under the original sale process, the commercial interest in ensuring the assets were sold for the benefit of all stakeholders was the same.

44 Here, I acknowledge the importance of sealing the Receiver's Confidential Supplemental Eighth Report to the Court and attached documents during the sale process and until any ongoing sale process is complete. The important interest is the commercial interests of the bidders, the creditors, the stakeholders and maintaining the integrity of the sales process. The Receiver's counsel advised they represented to the bidders that the process would be confidential until completion. The bidders all signed non-disclosure agreements before they received access to the data. These interests outweigh the negative effects of a sealing order. Redaction of the documents or reports is not a reasonable alternative as virtually all of the information contained in the report and documents (other than the parts that are already public) is confidential for the reasons noted.

45 The issue of a future sales process of some kind however, is far less certain than it was in *Look*, where the new sales process was underway at the time of the court application. All parties in this case agree that the current Receiver-led SISP process is exhausted, and the unopposed or supported request for court approval of its termination confirms this. The Receiver has no intention of starting a new sales process.

46 Counsel for Yukon government indicated that they would be open to discussing the sale of some or all of the Yukon Zinc assets in future if approached by a potential purchaser. Yukon government confirmed it had no intention of commencing a similar sales process to the SISP in the near future, as their priority will be care and maintenance of the Mine when this responsibility is transitioned from the Receiver to them, likely in the fall of 2022.

47 The Receiver noted in its public reports several of the ongoing issues affecting a potential sale. These include the regulatory complexities of obtaining a new water licence, the uncertainty of the responsibilities and costs of restoring the Mine to an operable state, the uncertain value of the mineral claims, and the possibility of ongoing litigation over the Welichem assets if a settlement is not achieved. Unless one or more of these factors changes, the possibility of a future sale is unlikely, in the Receiver's view. This is different from *Look*, where the new sales process had commenced at the time the sealing order was requested.

48 The Supreme Court of Canada has emphasized the importance of the fundamental principle of open and accessible court proceedings. 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 SCR 480 at para. 23 ("New Brunswick"); Vancouver Sun (Re), 2004 SCC 43 at paras. 23-26). Public and media access to the courts is the way in which the judicial process is scrutinized and criticized. "The open court principle has been described as "the very soul of justice," guaranteeing that justice is administered in a non-arbitrary manner" (*New Brunswick* at para. 22). There is a strong presumption in favour of court openness. Judicial discretion in determining confidentiality or sealing orders must be exercised against this backdrop.

49 Given these unique factual circumstances, and applying the legal principles described above, I conclude the following in relation to sealing the materials.

50 Once the Almaden sale is complete, and the Receiver's certificate has been filed with the Court, the redacted material related to Almaden's purchase of the Logan Interests will be unsealed. The Receiver has disclosed most of the information related to this purchase and sale but some information such as the purchase price remains redacted. As the sale of this portion of the assets will be over once this transaction is completed, there is no reason to continue to seal the Almaden documents contained in the Confidential Supplemental Eighth Report to Court that have not already been disclosed.

51 The remoteness of a future sale of the remaining assets evident from the Receiver's materials and submissions means that the length of a sealing order could be indefinite. As noted in *Sierra Club*, at 545, a court is to restrict the sealing order as much as is reasonably possible while preserving the important interest in question. While it is still in the public interest to maintain the sealing order where a future sale is a possibility, at some point that possibility may no longer be realistic. Or, so much time will have passed that the information in the original bids may have little relationship to the actual situation so the importance of the interest to be protected is diminished.

52 The Receiver in this case advised that some of the current circumstances that prevented the success of the sales process would have to change before a sale is likely. Yukon government confirmed that their focus in the near term will be on care and maintenance issues and not on the longer term issues related to remediation, reconstruction, or water licence. It is possible, however, over the next few years, that some of these circumstances may change. For example, the litigation between Welichem and the Receiver over its assets will either be settled or judicially determined, more clarity on the responsibilities for remediation or even further steps taken towards remediation and reconstruction may occur, or more work may be done to value the mineral claims. Some or all of these changes could lead to a successful sale.

53 I will grant the sealing order over the Receiver's Confidential Supplemental Eighth Report to the Court, and attached documents, except for the documents related to the Almaden purchase once the Receiver's certificate is filed with the Court, for a period of three years, or until further order of this Court. The report shall be filed as of the date of these Reasons.

54 The draft sealing order filed by the Receiver on this application should be modified to reflect the terms set out in these reasons and to reflect the presence of all counsel.

Applications granted.

TAB M

2013 BCSC 993
British Columbia Supreme Court

HSBC Bank Canada v. Bay City Auto Inc.

2013 CarswellBC 1777, 2013 BCSC 993, [2013] B.C.W.L.D. 7343, 229 A.C.W.S. (3d) 363

HSBC Bank Canada Petitioner and Bay City Auto Inc., Bay City Auto Service Inc., Abenante Motor Sports Inc., Abenante Motor Group Inc., Avant Enterprises Inc., Joseph Abenante, Marco Abenante, Irwin Commercial Finance Canada, Indcom Leasing Inc., MCAP Leading Inc., Financialinx Corporation, Canadian Truck & Trailer Repair Inc. and Richard Blood Respondents

Burnyeat J., In Chambers

Heard: February 22, 2013
Judgment: June 13, 2013 *
Docket: Vancouver H100292

Counsel: V. Tickle for Applicant Receiver, Ernst & Young
G. Elliott for Respondent, Avant Enterprises Inc.

Related Abridgment Classifications
Debtors and creditors
VII Receivers
VII.8 Remuneration of receiver
VII.8.b Remuneration
VII.8.b.i General principles

Headnote
Debtors and creditors --- Receivers — Remuneration of receiver — Remuneration — General principles
Receiver was appointed by court by order of March 2010 which order included receiver's charge as security for receiver's fees and disbursements and those of receiver's legal counsel and passing of accounts to be heard in court on summary basis — Bank instigating appointment of receiver assigned indebtedness to company A and in June 2011 counsel for A advised receiver of request for review of accounts — On assumption that assessment would be on summary basis receiver sent A $80,000 as estimated surplus to funds required to complete receivership on express condition that A would pay any shortfall if receiver's taxation costs exceeded amount retained by receiver — In October 2011 receiver brought application for approval of fees and disbursements of receiver and legal counsel on summary basis, and sought discharge of receiver — A brought application for passing of accounts before registrar, opposed approval of receiver's and legal counsel's fees on basis that amounts were excessive, and opposed summary discharge of receiver — Subsequently receiver requested return from A of $80,000 on basis that unforeseen costs related to A's position on assessment resulted in receiver lacking sufficient funds to complete assessment — A alleged using $80,000 in ordinary course of business and that there was no agreement to return any amounts prior to assessment before registrar — Receiver brought application for security for costs and for special costs of application — Application granted — Order was issued for A to post $125,000 security for costs by June 21, 2013 failing which receiver could apply for summary passing of accounts, and to repay $80,000 to receiver by same date — Order was further issued entitling receiver to costs against A on full indemnity basis for application and other proceedings in matter — Jurisprudence supported conclusion that receiver had prima facie right to be paid its fees and disbursements and those of its legal counsel — Court-appointed receiver was not properly asked to forego own fees and expenses and be out of pocket for costs incurred to complete receivership — Had A made known its true intent to require passing of accounts before registrar, receiver would not have advanced $80,000.

Table of Authorities

Cases considered by *Burnyeat J., In Chambers*:

Canadian Imperial Bank of Commerce v. Barley Mow Inn Inc. (1996), 20 B.C.L.R. (3d) 70, [1996] 7 W.W.R. 296, 50 C.P.C. (3d) 29, 41 C.B.R. (3d) 251, 76 B.C.A.C. 190, 125 W.A.C. 190, 1996 CarswellBC 1083 (B.C. C.A.) — referred to

Ed Mirvish Enterprises Ltd. v. Stinson Hospitality Inc. (2009), 2009 CarswellOnt 6167 (Ont. S.C.J. [Commercial List]) — considered

Royal Bank v. Paulsen & Son Excavating Ltd. (2012), 2012 SKQB 267, 2012 CarswellSask 475, 92 C.B.R. (5th) 284, 400 Sask. R. 243 (Sask. Q.B.) — considered

80 Aberdeen Street Ltd. v. Surgeson Carson Associates Inc. (2008), 2008 CarswellOnt 330, 40 C.B.R. (5th) 109 (Ont. S.C.J.) — considered

269893 Alberta Ltd. v. Otter Bay Developments Ltd. (2011), 16 B.C.L.R. (5th) 298, 75 C.B.R. (5th) 1, 302 B.C.A.C. 21, 511 W.A.C. 21, 2011 BCCA 90, 2011 CarswellBC 370 (B.C. C.A.) — considered

***Burnyeat J., In Chambers*:**

1 Ernst & Young Inc. ("Receiver"), the Court-appointed Receiver of the assets and undertaking of Bay City Auto Inc. ("Bay City") and Abenante Motor Sports Inc. ("AMS") applies for the following against Avant Enterprises Inc. ("Avant"):

> (a) an order for security for costs pursuant to the inherent jurisdiction of the Court to require Avant to pay $80,000 and, until those funds are paid, the assessment of the accounts of the Receiver before the Registrar be stayed;
>
> (b) a declaration that the particulars delivered by Avant do not comply with the November 30, 2012 Order of Registrar Cameron so that any assessment of the fees and disbursements of the Receiver be adjourned pending delivery of particulars in compliance with the Order made by Registrar Cameron; and
>
> (c) that the Receiver be awarded special costs of this application payable forthwith.

Background

2 By a March 4, 2010 Order, Ernst & Young Inc. was appointed interim receiver of Bay City and Avant and was granted a first charge over the property of those two companies to secure payment of its fees and disbursements and of the fees and disbursements of its legal counsel.

3 By a March 24, 2010 order, the Receiver was appointed receiver of Bay City and was granted a charge over the property of Bay City as security for its fees and disbursements and the fees and disbursements of its legal counsel. The following provisions were included regarding the "Receiver's Accounts":

> THIS COURT ORDERS that any expenditure or liability which shall properly be made or incurred by the Receiver, including the fees of the Receiver and the fees and disbursements of its legal counsel, incurred at the standard rates and charges of the Receiver and its counsel, shall he allowed to it in passing its accounts and shall form a first charge on the Property in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person (the "Receiver's Charge").
>
> THIS COURT ORDERS that the Receiver and its legal counsel shall pass their accounts from time to time, and for this purpose the accounts of the Receiver and its legal counsel are hereby referred to a judge of the Supreme Court of British Columbia and may be heard on a summary basis.
>
> THIS COURT ORDERS that prior to the passing of its accounts, the Receiver shall be at liberty from time to time to apply reasonable amounts, out of the monies in its hands, against its fees and disbursements, including legal fees and disbursements, incurred at the normal rates and charges of the Receiver or its counsel, and such amounts shall constitute advances against its remuneration and disbursements when and as approved by this Court.

4 The appointments were at the instigation of HSBC Bank Canada ("HSBC"). HSBC held security over the assets of Bay City and AMS. Avant was a guarantor of the indebtedness of Bay City and AMS.

5 On April 19, 2010, the Receiver assigned Bay City into bankruptcy and Ernst & Young Inc. was appointed as Trustee. The Trustee was discharged by an August 11, 2011 Order.

6 In an April 15, 2011 Order, the interest of HSBC in the indebtedness owing to it by Bay City up to a maximum of $1,019,305 was transferred and assigned to Avant and the interest of HSBC and the indebtedness owing from AMS to it up to a maximum of $151,558 was transferred and assigned to Avant. That order also contained the following provisions:

> All right, title and interest of HSBC in and to any security instrument held by HSBC as security for the payment of either or both of the Bay City Debt and the ... [AMS] Debt ... is hereby transferred and assigned to Avante without the need for any further documentation evidencing such transfer and assignment.
>
> The Receiver is hereby authorized to distribute to Avant on account of the Assigned Indebtedness such amounts from time to time as the Receiver, in its sole discretion, deems to be available for distribution to Avant after making provision for all future and accrued Receivership liabilities whether covered by the Receiver's Charge, the Receiver's Borrowings Charge (as those terms are defined in the March 24, 2010 Orders of this Court, copies of which are attached hereto as Schedule "A") or otherwise, provided that the Receiver shall in no circumstances distribute to Avant more than the amount of the Assigned Indebtedness.
>
> This Order is without prejudice to: (i) the Receiver's obligation to pass its accounts, including the accounts of its legal counsel, in accordance with the March 24, 2010 Orders of this Court; and (ii) Avant's right to cause the Petitioner to pass its accounts and have its legal accounts assessed.

Payment of Funds to Avante after the Assignment

7 In a June 12, 2011 email to counsel for the Receiver, counsel for Avant advised:

> Accordingly I am instructed that Avante will require that the Receiver have his accounts reviewed in accordance with the Order made by Burnyeat J. appointing E&Y. I ask that you send to Thompson & Elliott in trust the funds held by E&Y after deduction of the amount to secure the Receiver for his future costs as particularized in your previous emails. Let me know when the cheque is ready and I will have it picked up. Thank you.

8 In a June 27, 2011 email from counsel for the Receiver to counsel for Avant, counsel for the Receiver stated:

> We should be able to get a cheque payable to Avante in the amount of $65,000 by early next week. It will be paid on the express condition that in the event, the Receiver's costs of taxation exceed the amount they have retained, that Avante will pay back such amount as is necessary to make up the shortfall. I am hopeful it does not come to that. We are working on our materials for a summary taxation of E&Y's accounts. I will serve you with those in due course.

9 In a July 6, 2011 letter from the Receiver to counsel for Avant, $80,000 was forwarded:

> Further to your direction to pay dated June 27, 2011, enclosed please find cheques totalling $80,000 made payable to your firm in trust for Avant Enterprises Inc. representing the surplus funds we are holding in our capacity as Receiver which are estimated to be required to complete the Receivership of the above noted companies.

Passing of the Accounts of the Receiver

10 Proceeding on the assumption that the accounts of the Receiver could be passed on a summary basis before the Court, the Receiver finalized its accounts, including the accounts of its counsel. In an application returnable October 26, 2011, the Receiver applied for orders approving its fees and disbursements and the fees and disbursements of its counsel on a summary

basis and discharging it as Receiver of Bay City and AMS. Those summary passing of accounts included the estimated fees and disbursements to complete the receiverships. At the same time, an order was sought releasing the Receiver and its legal counsel from any and all claims, actions, debts, expenses and any other recoveries on account of any other liability, obligation, demand or cause of action connected to the role of the Receiver as Receiver.

11 In support of the summary application, the Receiver produced the following invoices outlining the staff member who had worked on the receivership, the position of that staff member, the number of hours worked, the hourly rate of that person and the total value of the work at that hourly rate as follows:

(a) Number CA0189551414 dated April 16, 2010;

(b) Number CA0189554567 dated April 30, 2010;

(c) Number CA189558862 dated May 14, 2010;

(d) Number CA0189564011 dated June 4,2010;

(e) Number CA0189567834 dated June 23, 2010;

(f) Number CA0189574612 dated July 28, 2010;

(g) Number CA0189574618 dated July 29, 2010;

(h) Number CA0189585119 dated October 15, 2011;

(i) Number CA0189606518 dated February 25, 2011.

(j) Number CA0189551420 dated April 16, 2010;

(k) Number CA0189554409 dated April 30, 2010;

(l) Number CA189558867 dated May 14, 2010;

(m) Number CA0189563796 dated June 4, 2010;

(n) Number CA0189567851 dated June 23, 2010;

(o) Number CA0189574619 dated July 28, 2010;

(p) Number CA0189574622 dated July 29, 2010;

(q) Number CA0189606505 dated February 25, 2011.

12 For the March 24, 2010 to February 25, 2011 period, the Receiver billed 739.3 hours, representing fees of $170,395, from February 25, 2011 to October 21, 2011, the Receiver accrued 26.1 hours of unbilled work in progress. It estimated that it would carry out a further 41 hours of work to the time of its discharge representing further estimated fees of $14,925 (exclusive of administrative expenses and HST).

13 At the same time, the Receiver provided copies of accounts relating to the legal services provided by counsel for the Receiver. These accounts rendered to the Receiver set out in detail the date when services were rendered, the person rendering the services, the hours spent on the matter, the totals for each of the entries, and the disbursements of legal counsel. Those invoices were as follows relating to services to the receiver of Bay City:

(a) Number 475929 dated April 16, 2010;

(b) Number 484929 dated May 19, 2010;

(c) Number 491177 dated June 16, 2010;

(d) Number 499359 dated July 23, 2010;

(e) Number 502722 dated August 9, 2010;

(f) Number 513136 dated September 23, 2010;

(g) Number 533535 dated December 16, 2010;

(h) Number 548599 dated February 16, 2011;

(i) Number 552920 dated March 14, 2011;

(j) Number 560841 dated April 18, 2011;

(k) Number 567721 dated May 17, 2011;

(l) Number 587208 dated August 15, 2011.

14 Similar invoices are provided relating to the services provided by counsel for the Receiver of AMS:

(a) Number 475929 dated April 16, 2010;

(b) Number 484929 dated May 19, 2010;

(c) Number 491171 dated June 16, 2010;

(d) Number 499360 dated July 23, 2010;

(e) Number 513127 dated September 23, 2010;

(f) Number 560842 dated April 18, 2011;

(g) Number 567720 dated May 17, 2011.

15 For the period March 24, 2010 to October 21, 2011, the legal counsel for the Receiver billed 166.2 hours, representing fees of $54,061 (exclusive of administrative fees and GST/HST). The Receiver estimated that it would require 16 additional hours of legal services from October 4, 2011 to the time of its discharge, representing a further estimated $6,500 (exclusive of administrative expenses and HST).

16 In a December 9, 2011 letter to counsel for Avant, counsel for the Receiver stated:

> As we have indicated previously, we are unclear as to why Avant is proceeding with its application. You have been provided with the Receiver's detailed statements of account, supporting invoices, and statements of receipts and disbursements, and the Receiver has applied for orders approving its fees and disbursements. Therefore, the relief sought in paragraphs 2 to 6 of Part 1 of Avant's Notice of Application is unnecessary. Given that the Receiver is waiting for the statements of Services Canada in respect of *Wage Earner Protection Program Act* liability, it is premature for our client to deliver its final report to Court.
>
> In light of the foregoing, we are at a loss as to why your client's application needs to proceed. We would appreciate your advice in that regard. If, as we believe, your client's application is found to have been unnecessary, we expressly reserve the right to draw this letter to the attention of the Court and to seek costs against Avant.

17 By an October 17, 2011 Notice of Application, Avant sought an assessment of the accounts of the Receiver. The Notice of Application included requests for orders that the Receiver "forthwith provide his final report to the Court", "the Receiver provide all materials on which he intends to rely on an assessment of his accounts", "a date be set for the assessment of the Receiver's Accounts", that HSBC "provide an accounting of all monies had and received and expenses incurred since the date of the Order *Nisi*" and "forthwith attend to the assessment of all legal costs incurred in these proceedings".

18 In an application response filed December 20, 2011, Avant opposed the application for the summary discharge of the Receiver and opposed the approval of the fees and disbursements of the Receiver and its counsel on a summary basis.

19 The applications of the Receiver and Avant were adjourned.

20 In a January 5, 2012 email to counsel for Avant, counsel for the Receiver stated:

> You have failed to provide any details of your client's objections to the receiver's fees and disbursements other than 'they're too high'. As we have indicated previously, our client is willing to discuss any particular concerns that your client may have, but your client has declined to do so,
>
> We also note that you have been provided with all relevant documents with respect to the receiver's fees and disbursements but, despite requests to do so, have not given any indication as why Avant's application needs to proceed at all.

Order for the Passing of Accounts

21 In his April 9, 2012 Affidavit, Craig Munro, the Senior Vice President of the Receiver, stated that the April 4, 2012 invoices of the Receiver added additional costs to the Receivership:

> The Receiver's costs to completion of this matter (an estimate of which was set out in the Fourth Report of the Receiver dated October 21, 2011) have been significantly higher than anticipated, entirely due to the unexpected opposition of the Receiver's Notice of Application dated October 21, 2011 by Avant Enterprises Inc. and numerous requests for information from its counsel.
>
> As of the date of this affidavit, the Receiver has incurred, but not billed, fees and disbursements of approximately $2,000 (exclusive of taxes), and estimates that it will incur further fees and disbursements of approximately $1,500 (exclusive of taxes) to the completion of this matter, barring any further opposition to the Receiver's application for approval of fees and discharge, requests for information or similar, or any additional steps or hearings in these proceedings.

22 Invoices relating to the services provided by counsel for the Receiver of AMS after October 2011 were provided: (a) Number 607387 dated November 21, 2011; (b) Number 628917 dated February 21, 2012;(c) Number 638228 dated April 4, 2012;

23 After hearing submissions of the parties, an April 13, 2012 Order was made that provided that:

> (a) The accounts of the Receiver, in its capacity as interim receiver and in its capacity as receiver of all of the current and future assets, undertakings and properties of Bay City Auto Inc., for its receipts, disbursements and remuneration, including the accounts of the Receiver's legal counsel, be taken before the district registrar of this Court.
>
> (b) The district registrar shall make a report and recommendation to this court as to his findings made as a result of the taking of those accounts.

Subsequent Communications

24 In a May 2, 2012 email from counsel for the Receiver to counsel for Avant, counsel for the Receiver advised:

We advise that — as a result of the costs incurred in dealing with your clients' objections to the Receiver's applications — there are limited funds remaining in the receiverships. Therefore, unless your client is prepared to voluntarily post security for costs, our client will be applying for orders for same (including the repayment of the $80,000 transferred to your client, Avant in July 2011) at its earliest opportunity.

25 In a November 20, 2012 email to counsel for Avant, counsel for the Receiver stated:

I confirm that a pre-hearing conference has been scheduled for November 30, 2012, in respect of the assessment in these matters. There is a matter which we wish to raise in advance of that conference, as it will need to be resolved prior to the assessment.

Due to the significant unforeseen costs relating to obtaining the discharge of the Receiver and the approval of its fees and disbursements, the estates of Abenante Motor Sport Inc. ("AMS") and Bay City Auto Inc. ("Bay City') are out of funds.

By Order of the Court dated April 15, 2011 (the "Assignment Order"), the Receiver was authorized to distribute to Avant Enterprises Inc. ("Avant') such amounts from time to time as the Receiver, in its sole discretion, deemed to be available for distribution to Avant after making provision for all future and accrued Receivership liabilities, whether covered by the Receiver's Charge, the Receiver's Borrowings Charge or otherwise, up to the amount of the Assigned Indebtedness.

On July 6, 2011, the Receiver transferred funds of approximately $80,000 ($50,000 in respect of Abenante Motor Sports Inc. ("AMS") and $30,000 in respect of Bay City Auto Inc. ("Bay City")) to Avant pursuant to the Assignment Order. These funds were transferred on the basis that they would be surplus to requirements, on the assumption that Avant, AMS and Bay City would raise no significant objections to the fees and disbursements of the Receiver and its legal counsel.

However, as a result of your clients' (as yet unparticularized) objections to those fees and disbursements, the Receiver has incurred significant additional fees and disbursements, over and above those that could have been reasonably anticipated at the time the funds were transferred to Avant. As a result, the Receiver lacks sufficient funds to complete the assessment which it was ordered to undertake by Mr. Justice Burnyeat on April 13, 2011.

In the circumstances, it is the Receiver's view that either Avant should repay the funds it received from the Receiver, or Avant and Bay City should post security for costs.

Therefore, on behalf of our client, we request that Avant return the sum of $80,000 to the Receiver. Funds should be provided by bank draft or certified cheque to be received at our office by no later than 3:00 p.m. on Monday, November 26, 2012. In the alternative, if your client wishes to wire the funds to our trust account, please advise and we will provide our wiring instructions.

In the event that the requested funds are not received by that time, our client will have no alternative but to make an application that Avant (in the case of the receivership of Bay City) and AMS (in the case of its receivership) provide security for the Receiver's costs of the assessment.

Our consideration of the costs of this matter has highlighted an issue with respect to the practical ramifications of the assessment. Even if your clients are successful in having the Receiver's fees and disbursements reduced on the assessment, any reduction would be credited to the relevant estate(s). In the estate(s) any funds would be subject to the Receiver's Charges, which extend to "any expenditure or liability which shall properly be made or incurred by the Receiver, including the fees of the Receiver and the fees and disbursements to its legal counsel" and which "form a first charge on the Property in priority to all security interests, trusts, liens, charges or encumbrances, statutory or otherwise, in favour of any Person". The fees and disbursements of the Receiver and its counsel incurred in connection with the assessment of costs would be secured by the Receiver's Charge, and those fees and disbursements are already substantial.

In the circumstances, the Receiver is of the view that it would be in the interests of the parties to attempt to resolve this issue by agreement Would you be available for a call with us and our client to discuss the issues, either this week or early next week?

November 30, 2012 Pre-Hearing Conference and the Scheduled Assessment

26 An assessment of the accounts of the Receiver was scheduled for five days commencing January 14, 2013. At a pre-hearing conference, Registrar Cameron ordered that counsel for Avant was to provide "particulars" by December 31, 2012. In response to the Order made, the following particulars were provided by Avant on January 2, 2013:

> 1) The Receiver's Accounts do not represent a reasonable proportion to the amount of money or value of the assets involved;
>
> 2) The Receiver's Accounts do not reflect the fact that little or no unusual services were necessary and that this receivership was one lacking in complexity or uniqueness;
>
> 3) The Receiver's Accounts do not reflect the services and assistance rendered by Marco and Joe Abenante in the sale of most of the significant assets of both Bay City Auto Service Inc. ("Bay City") and Abenante Motor Sports Inc. ("AMS"). The fact is that every purchaser of those assets was located and referred to the Receiver by Marco Abenante and almost all of the cars sold from each of the Bay City and AMS lots to retail purchasers were sold by Marco and Joe Abenante.
>
> 4) The Receiver's Accounts do not reflect the assistance provided by the accounting staff of both Bay City and AMS (Sue McEvoy) all requested and available financial information and full assisted access to the their accounting books and computers.
>
> 5) The Receiver's Accounts included an administration fee in the amount of 9% of the fees charged which is simply a charge for overhead incurred by the Receiver which is unfair and unreasonable in that it constitutes an arbitrary calculation not capable of any transparent review or assessment.
>
> 6) The number of staff and resources generally used by the Receiver together with the time logged was excessive and unnecessary in the circumstances.

In the result, the compensation claimed by the Receiver in its accounts as presented is not a fair and reasonable value of its services rendered.

What follows are the particulars of the grounds on which Avant Enterprises Inc. opposes the legal fees claimed by Counsel for the Receiver:

> 1. The accounts of the Receiver's Legal Counsel do not represent a reasonable proportion to the value of the assets which were the subject of those services;
>
> 2. The time billed for in the accounts of the Receiver's Legal counsel is excessive and unreasonable in all the circumstances. The arithmetic basis for the fees charged (hours × hourly rate) exceeds the value of the services rendered after taking into account the routine nature of the issues involved in the receivership of AMS and Bay City.
>
> 3. The hourly rates charged by the various legal counsel for the Receiver were excessive.

In all of the circumstances, the compensation claimed by legal counsel for the Receiver is not a fair and reasonable value of the services rendered.

27 In his December 13, 2012 Affidavit relating to the receivership of AMS, Mr. Munrostated:

By Notice of Application filed in this proceeding on October 21, 2011 (the "Discharge Application"), the Receiver applied for an Order approving its fees and disbursements, and the fees and disbursements of Faskens, and for an Order discharging the Receiver. At that time:

(a) the total fees and disbursements of the Receiver were $188,151.78 (not including applicable taxes);

(b) the total fees and disbursements of Faskens were $54,061.00; and

(c) the Receiver held a cash balance of $41,561.54.

By Application Response filed December 20, 2011 (the "Application Response"), AMS purported to oppose the Receiver's discharge, and purported to oppose the approval of the Receiver's fees and disbursements and the fees and disbursements of Faskens. The Application Response was supported by Affidavit #2 of Marco Abenante, sworn January 25, 2012. The Assessment Application, the Application Response and the Affidavits of Mr. Abenante are hereinafter referred to as the "Response Materials".

Subsequent to receiving the Response Materials the Receiver has, on numerous occasions, requested that AMS provide it with the details of its objections to the Receiver's fees and disbursements, as it was not clear from the Response Materials what AMS' specific objections were (beyond that the fees and disbursements were excessive). The Receiver has also provided AMS with copies of all relevant documents with respect to the Receiver's fees and disbursements in an effort to satisfy AMS that such fees and disbursements were properly and reasonably incurred. Additionally, I am advised by Faskens, and do verily believe, that Faskens has received numerous requests for information from AMS' counsel, and that Faskens has responded to all of these requests despite the fact that most of the requested information had previously been provided to AMS' counsel.

Notwithstanding the efforts of the Receiver and Faskens, AMS to date has failed to provide the Receiver with any further particulars of its objections.

By Order dated November 30, 2012, Avant was directed to provide particulars of its objections by December 31, 2012.

On October 21, 2011, the date of filing of the Discharge Application, there was a cash balance of $41,561.54 in AMS' estate (the "Estate").

Since that date:

(a) the Receiver has received an HST refund of approximately $2,700.00;

(b) the Receiver has paid $15,134.53 to Service Canada relating to claims made pursuant to the Wage Earner Protection Program Act;

(c) the Receiver has issued invoices totalling $16,227.49 (including taxes), all of which have been paid; and

(d) Faskens has issued invoices totalling $15,955.85 (including taxes), of which $9,052.59 has been paid, and $6,903.26 remains outstanding.

The Receiver's current unbilled work in progress is approximately $7,000.00.

Faskens' current unbilled work in progress is approximately $13,700.00 (exclusive of disbursements).

In addition to the amounts owing to the Receiver and Faskens as set out above, the Receiver estimates its fees and disbursements to the completion of the receivership to be approximately $32,500.00 and believes the estimated fees and disbursements of Faskens to the completion of the receivership to be approximately $25,500.00.

I confirm that the information regarding Faskens' current unbilled work in progress and estimated completion costs, was provided to me by Kibben Jackson of Faskens, and I verily believe such information to be true.

There is currently about $3,921.00 left in the Estate. This amount is insufficient to pay Faskens' outstanding invoices, let alone the Receiver's costs or Faskens' costs to the completion of the receivership. I estimate that unless additional funds are made available to the Estate, the Receiver and its counsel will together have incurred approximately $81,682.26 in fees and disbursements that will go unpaid.

By Order made April 15, 2011 (the "Assignment Order") the Court: (i) assigned all indebtedness of AMS to its guarantor, the Respondent Avant, up to the maximum amount of $151,588.00; (ii) assigned all of the Petitioner's security in respect of such indebtedness to Avant; and (iii) authorized the Receiver, in its sole discretion, to distribute funds to Avant on account of such assigned indebtedness, if the Receiver thought such funds were available after making provision for all future and accrued receivership liabilities, whether covered by the Receiver's Charge, the Receiver's Borrowings Charge (as those terms are defined in the Receivership Order) or otherwise.

Avant and AMS were related companies; Mr. Abenante was president of both, and remains president of Avant. Further, as noted above, both Avant and AMS were subject to the terms of the Interim Receivership Order.

In or around June 2011, the Receiver believed the receivership was nearing completion and assumed its accounts, and the accounts of the Interim Receiver, would be passed summarily. Based on this, the Receiver determined the funds in the Estate exceeded the estimated future and accrued receivership liabilities, and on July 6, 2011 the Receiver paid $50,000.00 (the "Discretionary Payment") to Avant as it was authorized to do pursuant to the Assignment Order.

The Discretionary Payment was paid to Avant at the sole discretion of the Receiver and on the express condition that in the event the Receiver's costs of taxation exceeded the amount of funds in the Estate, Avant would pay back the amount necessary to make up the shortfall.

The Receiver has requested that Avant pay back the Discretionary Payment and, to date, Avant has refused to do so.

Avant is subject to the Interim Receivership Order and as such I have some personal knowledge of Avant's financial circumstances. At all times material to this proceeding, Avant's only substantial asset consisted of the lands on which the Bay City Auto Inc. KIA dealership operated, and which were sold and the proceeds paid to the Petitioner. Other than the Discretionary Payment I am unaware of any other assets which Avant may have, and I do not believe that Avant could satisfy any costs order made against it in this proceeding.

The Receiver now finds itself in an untenable position; if the Discretionary Payment is not returned to the Receiver, or some other provision made for payment of the Receiver's costs, the Receiver will be unable to pay its costs to the completion of the receivership, including the costs of the assessment, and cannot complete the administration of the Estate.

28 Further in his December 13, 2012 Affidavit, Mr. Munro stated that, as a result of the Order made that the accounts of the Receiver and the accounts of its counsel be referred to the Registrar for assessment, the Receiver's costs to complete the receivership and the costs of its legal counsel have been "significantly higher than was anticipated" at the time the application for discharge was filed in October of 2011. He stated that those extra costs relate to the time spent by the Receiver and its counsel as follows: (a) responding to Avant's numerous information requests and requests for documents; (b) preparing additional affidavit materials setting out the fees and disbursements incurred by the Receiver and its counsel since the Discharge Application; (c) preparing additional Receiver's Reports; (d) attending at additional hearings, including a pre-hearing conference before the Registrar; (e) preparing for, and bringing the application to secure funds to pay the Receiver's costs to the completion of the receivership; and (f) preparing for and attending at the assessment.

29 In his December 13, 2012 Affidavit, Mr. Munrostates that, at the date of the filing of the application for discharge, there was a cash balance of$71,729.18 in the Estate of Bay City and that since that date:

(a) the Receiver has brought in miscellaneous receipts of approximately $8,150.00;

(b) the Receiver has paid $25,331.91 to Service Canada relating to claims made pursuant to the Wage Earner Protection Program Act;

(c) the Receiver has issued invoices totalling $36,083.80 (including taxes), all of which have been paid; and

(d) Faskens has issued invoices totalling $17,375.71 (including taxes), of which $10,800.72 has been paid, and $6,574.99 remains outstanding.

30 The "current unbilled work in progress" of the Receiver was described as being $12,000 (exclusive of disbursements) and the current unbilled work in progress of counsel for the Receiver was described as being approximately $15,000 (exclusive of disbursements).

31 After 2011, counsel for the receiver of Bay City issued further invoices as follows: (a) Number 646306 dated May 14, 2012; (b) Number 646308 dated May 14, 2012; (c) Number 665032 dated August 10, 2012; (d) Number 665033 dated August 10, 2012; (e) Number 701405 dated January 17, 2013; (f) Number 710359 dated January 31, 2013. Similar invoices relating to the service provided by counsel for the Receiver of AMS were also issued: (a) Number 646306 dated May 14, 2012; and (b) Number 665032 dated August 10, 2012.

32 In his February 14, 2013 Affidavit, Marco Abenante, the President of Avant, states: "Avant has since used those funds in the ordinary course of its business and no longer has possession of the funds." "So far as the return of $80,000, there was never any condition or agreement that such return would happen prior to the assessment before the Registrar and a formal review of the Receiver's accounts." "Avant's only asset is the return of funds that may result from the assessment of the Receiver's accounts. Avant has no debts other than legal fees for various routine corporate matters." Mr. Abenante also states:

a) I or my brother Joe were the effective cause of the sale of substantially all the inventory of cars and trucks and the other related assets of Bay City and AMS with the exception of the new cars returned to Kia Canada. We found each and every purchaser and assisted in arriving at a sale agreement with the purchaser.

b) The Receiver charged an administration fee of 9.5% in addition to his hourly rates for him and all of his staff. There is no indication as to how the amount of this fee was determined except that it was in lieu of fax, photocopying, courier and long distance telephone charges.

c) The amount charged by the Receiver for his fees and administrative charges is excessive in comparison to the amount of money realized in the two receiverships. They are also excessive in light of the fact that my accounting staff worked with the Receiver to provide whatever information was requested regarding both Bay City and AMS.

d) The legal fees charged were excessive for the work done and unnecessary so far as the work related to the application for a summary accounting which was heard on April 14th 2012.

Case Authorities and Discussion

33 The Receiver has a *prima facie* right to be paid its fees and disbursements, including the fees and disbursements of its legal counsel from the estate. Creation of a Receiver's Charge is the recognition of that right. It is ordinarily the case that the amounts covered by the Receiver's Charge are paid in priority to all other creditors. In *269893 Alberta Ltd. v. Otter Bay Developments Ltd.* (2011), 16 B.C.L.R. (5th) 298 (B.C. C.A.), Lowry J.A. on behalf of the Court stated in this regard:

> The receiver relies on there being no amendment of the priority granted to it by express terms in the receivership order and cites the following from *Deloitte, Haskins & Sells Ltd. v. P.R.D. Travel Investments Inc.* (1984), 55 B.C.L.R. 38 at 44 (C.A.), as recognition of the priority a receiver enjoys:

A recent decision which contains a comprehensive review of the earlier authorities is *Oberman v. Mannahugh Hotels Ltd.*; *Mannahugh Hotels Ltd. v. Oberman*; *Assiniboine Credit Union Ltd. v. Mannahugh Hotels Ltd.*, [1980] 5 W.W.R. 487, 34 C.B.R. (N.S.) 181, 4 Man. R. (2d) 312 (Q.B.). At p. 496, Wilson J. summarized his conclusions as follows:

> *Prima facie*, then, the receiver is entitled to enter upon the discharge of his responsibilities secure in the knowledge that his costs and disbursements, including fees paid to solicitors necessarily engaged by the receiver ... will rank above all claims except those set apart by the order appointing him or otherwise entitled to rank ahead of the receiver himself: so Pearson J. in*Batten v. Wedgewood Coal & Iron Co.* [(1884), 28 Ch. D. 317], at p. 323:
>
> "I have been exceedingly surprised at some of the arguments which have been addressed to me, and also to find that there is so very little authority directly in point. To my mind, however, that arises from the fact that the principles on which the Court is in the habit of acting have never been challenged, and that the rule has always been to pay the receiver before distributing the estate."

It is said the interpretation of the consent order for which the mortgagee contends would work a commercial absurdity. The receiver was appointed by the court. It had no financial stake in the success of the receivership and no reason to agree that, in the event of a shortfall, it would forgo its own fees and expenses and be out of pocket some hundreds of thousands of dollars in costs incurred by it in endeavouring to complete the construction for the benefit of the creditors. A court-appointed receiver would never take a risk of that kind and would never be required to do so.

(at paras. 22-23)

34 As part of its compensation, the Receiver is entitled to be paid its fees and disbursements and those of its counsel relating to the application for discharge and the passing of its accounts on a full indemnity basis. By seeking its discharge and passing its accounts, the Receiver is completing the administration of the estate and is therefore entitled to special costs for that process payable by the estate unless a receiver is guilty of scandalous, outrageous or reprehensible conduct: *Canadian Imperial Bank of Commerce v. Barley Mow Inn Inc.* (1996), 20 B.C.L.R. (3d) 70 (B.C. C.A.), at para. 25.

35 It has not been suggested that the Receiver is guilty of conduct that could be described as scandalous, outrageous or reprehensible and, accordingly, the Receiver should be entitled to full indemnification out of the estate. It is the submission of the Receiver that, if it is to be put through an opposed assessment and further applications to obtain its discharge, it must be "secure in the knowledge that its costs will be paid".

36 By the March 24, 2010 Order, the Receiver was granted a charge as security for its fees and disbursements and the fees and disbursements of its legal counsel. That Order also contemplated that the Receiver and its legal counsel were to pass their accounts from time to time and that, for the purpose of passing the accounts, the accounts were "... referred to a judge of the Supreme Court of British Columbia and may be heard on a summary basis". That is how the Receiver proposed to proceed.That was the premise that the Receiver relied upon when the decision was made to advance $80,000 to Avant subsequent to Avant taking an assignment of the HSBC Security and the indebtedness owing under it.

37 Although the April 15, 2011 Order stated that it was without prejudice to the obligation of the Receiver to pass its accounts "in accordance with the March 24, 2010 Orders" and the right of Avant "to cause the Petitioner to pass its accounts and have its legal accounts assessed", there is nothing in the June 12, 2011 letter from counsel for Avant to counsel for the Receiver indicating that Avant would be requesting a passing of accounts before the Registrar. In fact, the June 12, 2011 email stated merely: "I am instructed that Avant will require that the Receiver have his accounts reviewed in accordance with the Order made ...".Quite properly, the Receiver could assume that the assessment of the accounts would be on a summary basis. It was on that basis that the Receiver calculated what funds were required to remain available to it and what funds could be paid to Avant as the assignee of the secured creditor, HSBC. On that basis, funds were then sent to Avant.

38 The June 27, 2011 email is clear. The amount paid by Avant was to be paid "... on the express condition that in the event the Receiver's costs of taxation exceed the amount they have retained, that Avant will pay back such amount as is necessary to make up the shortfall". In the same email counsel for the Receiver stated: "We are working on our materials for a summary taxation ...".

39 Nothing was received from Avant in response to that advice suggesting that Avant would be requiring the Receiver to pass its accounts before the Registrar of the Court. If the advice had been received that a passing of accounts before the Registrar was required, the Receiver would have been in a position to protect the payment of the amounts covered by the Receiver's Charge by not forwarding funds to Avant. All or some of what was forwarded to Avant would not have been forwarded. But for the failure of Avant to advise the Receiver that a passing of accounts before the Registrar would be required, the $80,000 was paid.

40 In requiring the Receiver to pass its accounts before the Registrar and by refusing to return the $80,000, Avant is placing the Receiver in the position outlined in *Otter Bay*, *supra*. The Receiver is being asked to forego its own fees and expenses and be thousands of dollars out of pocket in costs incurred by it to complete the duties imposed upon it by the Court when it was appointed as the Receiver of Bay City and AMS.

41 The Receiver is also in an untenable position because it is not in a position to look to the original Petitioner for indemnification. Avant as the guarantor of the indebtedness of Bay City and AMS to HSBC and as the assignee of HSBC has indicated that it is without funds. The question which arises is whether the orders sought should be granted.

42 I conclude that they should be.

43 Where appropriate, the Court will grant a receiver security for its costs: *80 Aberdeen Street Ltd. v. Surgeson Carson Associates Inc.* (2008), 40 C.B.R. (5th) 109 (Ont. S.C.J.) at para. 43; *Ed Mirvish Enterprises Ltd. v. Stinson Hospitality Inc.*, [2009] O.J. No. 4265 (Ont. S.C.J. [Commercial List]) at para. 3; *Royal Bank v. Paulsen & Son Excavating Ltd.* (2012), 92 C.B.R. (5th) 284 (Sask. Q.B.) at para. 25. In *80 Aberdeen Street*, the sum of $50,000 was retained in trust by the Receiver as security for the costs that would accrue to allow the Receiver to defend a contest regarding the fees of the Receiver. In *Ed Mirvish*, the following statement was made by S.E. Pepall J. in the context of whether it was appropriate to require security for costs:

> It seems to me that as a matter of principle, on discharge, a receiver should not be granted a release that encompasses gross negligence or willful misconduct. It may be that such conduct only comes to light after a receiver has been discharged. In such circumstances, a receiver should be liable for its actions. That said, post discharge, a claimant should still be required to obtain leave of the Court to institute and continue proceedings against a former receiver. When addressing the request for such leave, the Court will consider, amongst other things, prior Court approval of the conduct of the receiver, the claims bar process, if any, and its outcome, and whether as a condition of proceeding with litigation, it is appropriate for the claimant to post full indemnity security for costs by letter of credit or otherwise. In my view, absent a strong prima facie case, the latter should be the norm, such a regime strikes me as an appropriate balance between the desirability of providing appropriate protection to the Court's former officer and the need to address instances of gross negligence and willful misconduct.
>
> (at para. 14)

44 In *Paulsen*, the Receiver sought and was granted an order for security for costs in order to deal with a number of applications where the Receiver had been discharged subject to the taxation of the accounts so that there would be funds available for the Receiver to defend the opposition to the accounts that were presented.

45 Avant has already received $80,000. Avant hopes to receive more funds if it can show that what has been received by the Receiver by way of an interim advance against its remuneration and disbursements should be reduced and funds returned to the estates. For this to be the case, the Registrar will have to reduce substantially the fees and disbursements in order that there will be funds available to Avant. Avant has indicated that it is without funds. Accordingly, any funds properly owing to the Receiver for its fees and disbursements and the fees and disbursements of its counsel will not be recoverable against Avant.

46 The Court will not countenance a situation where a Court appointed receiver will be asked to forego its own fees and expenses and be out of pocket hundreds of thousands of dollars in costs incurred as it endeavours to complete the receivership. As indicated in *Otter Bay* , *supra*, a Court-appointed receiver would never take a risk of that kind and should never be required to do so.

47 The sum of $80,000 was advanced to Avant on the assumption that Avant would only require a summary passing of accounts. The advance of $80,000 should not have been made and would not have been made if Avant had made its true intentions known. In the circumstances, the sum of $80,000 advanced by the Receiver to Avant must be repaid no later than June 21, 2013.

48 The cost of the desire of Avant to have a passing of accounts before the Registrar should not be borne by the Receiver. If a passing of accounts before the Registrar is to proceed, it will be necessary for Avant to provide security for costs for the Receiver. Because I cannot be satisfied that the funds held by the Receiver as well as $80,000 will be sufficient to allow the Receiver to be protected for its costs and disbursements including the costs and disbursements of its counsel, a total of $125,000 for security for costs must be posted by or on behalf of Avant no later than June 21, 2013. Failing the posting of security for costs, the Receiver will be in a position to apply to the Court for a summary passing of its accounts.

49 The Receiver will be entitled to its costs throughout against Avant Enterprises Inc. on a full indemnification basis.

Application granted.

Footnotes

* A corrigendum issued by the court on July 18, 2013 has been incorporated herein.

TAB N

2015 ONSC 6458
Ontario Superior Court of Justice

Polish Alliance of Canada v. Polish Assn. of Toronto Ltd.

2015 CarswellOnt 15812, 2015 ONSC 6458, 259 A.C.W.S. (3d) 71

The Polish Alliance of Canada, Plaintiff and Polish Association of Toronto Limited, Marek Miasik aka Marek Adam Miasik, Maria Miasik, Jan Argyris aka Louis John Elie Argyris aka Louis aka John Argyris, Wladyslaw Jaslan aka Wladyslaw Julian Jaslan, Helena Jaslan, Eugeniusz Skibicki, Czeslawa Ericksen, Stanislaw Rogoz aka Stan Rogoz, Albert Joseph Flis and Richard Rusek, Defendants and Polish Association of Toronto Limited, Marek Miasik aka Marek Adam Miasik, Maria Miasik, Jan Argyris aka Louis John Elie Argyris aka Louis John Argyris aka John Argyris, Wladyslaw Jaslan aka Wladyslaw Julian Jaslan, Helena Jaslan, Eugeniusz Skibicki, Czeslawa Ericksen, Stanislaw Rogoz aka Stan Rogoz, and Albert Joseph Flis, Plaintiffs by Counterclaim and The Polish Alliance of Canada, Robert Zawierucha, Tadeusz Maziarz, Elizabeth Betowski, Danuta Zawierucha, Teresa Szramek, Andrzej Szuba, Adam Sikora, Elzbieta Gazda, Stanislaw Gidzinski, Stanislaw Iwanicki and Tadeusz Smietana, Defendants by Counterclaim

F.L. Myers J.

Heard: October 19, 2015
Judgment: October 19, 2015
Docket: CV-08-361644

Counsel: E. Patrick Shea, for Collins Barrow Toronto Limited, Receiver and Manager B.A. Kaminsky,, for Plaintiff
Bernie Romano, for Defendants / Respondents, except, for Richard Rusek

Related Abridgment Classifications
Debtors and creditors
VII Receivers
VII.6 Conduct and liability of receiver
VII.6.c Duties
VII.6.c.vii Miscellaneous
Debtors and creditors
VII Receivers
VII.8 Remuneration of receiver
VII.8.b Remuneration
VII.8.b.i General principles
Debtors and creditors
VII Receivers
VII.8 Remuneration of receiver
VII.8.d Miscellaneous

Headnote
Debtors and creditors --- Receivers — Remuneration of receiver — Remuneration — General principles
Quantum of fees and disbursements — Polish Alliance of Canada (PAC) commenced litigation against PAC's branch in Toronto (branch) — Receiver was appointed to protect valuable real estate property, ownership of which was disputed by PAC and branch — Receiver was also tasked with overseeing reconstitution of branch — Receiver was in place for about 16 months — Receiver sought court approval of his fees and disbursements, as well as those of law firm that had assisted him on file (subject fees and disbursements) — Subject fees and disbursements approved — Fees claimed by receiver in amount of $147,111.52

all-in were both fair and reasonable — This was unusual receivership, and receiver performed his unusual role exceptionally well — Receiver maintained integrity of his role as officer of court in difficult circumstances — These difficult circumstances included PAC becoming adverse to receiver after seeking appointment of receiver — Fees and disbursements of law firm were also fair and reasonable — Reduction in fees and disbursements of law firm was not warranted on ground that all lawyer time was performed by senior counsel, S — S billed at very low rate for downtown Toronto market — Receiver was entitled to utilize senior counsel because his mandate called for mature, nuanced judgment.
Debtors and creditors --- Receivers — Remuneration of receiver — Miscellaneous
Allocation of receiver's fees among interested parties on equitable basis.
Debtors and creditors --- Receivers — Conduct and liability of receiver — Duties — Miscellaneous
Party seeking remedy after receiver's mandate was done.

***F.L. Myers J.*:**

1 The Receiver seeks:

1) approval of its first and third reports and the activities recited therein (including supplemental reports);

2) approval of its fees and disbursements including those of its counsel;

3) an order for the sale of No. 32 Twenty-Fourth St., Toronto, to fund the payment of its fees; and

4) directions concerning the validity of the appointment of the members of the board of directors of PATL.

Issue (1)

2 There are no specific issues raised concerning the Receiver's activities as outlined in its reports except as dealt with below. Subject to what follows herein, the court approves the Receiver's activities as outlined in its first and third reports (including supplemental reports).

Issue (2)

3 All agree that the Receiver and counsel performed the work listed in its dockets and that the work itself was performed well and with diligence. I agree. The parties however, seek an unspecified reduction in the Receiver's fees because senior members of the Receiver's firm performed the bulk of the work and all lawyer time was performed by Mr. Shea.

4 This was an unusual receivership. The Receiver was appointed to protect a very valuable real estate property, the control and ownership of which is hotly disputed. It was also specifically tasked with overseeing the reconstitution of Branch 1-7 of the PAC in circumstances in which the PAC fundamentally altered the position that it took at trial and the defendants purported to act unilaterally in a manner that did not recognize the upshot of the trial decision. That is, this receivership is not the normal case of overseeing going concern operations of a failing business or conducting a liquidation of assets. This Receiver was plunked between warring parties and was asked to do specific things to enable the proper legal order to resume operations of the Branch. I specifically asked the Receiver to do as little as possible to interfere with the Branch's ability to perform its community services.

5 The Receiver performed its unusual role exceptionally well. Mr. Weisz is to be commended for maintaining the integrity of his role as an officer of the court in difficult circumstances. Although the PAC sought the appointment of the Receiver (to prevent the defendants from improperly reconstituting the Branch) the PAC became adverse to the Receiver when Mr. Weisz properly asserted his independence from both parties.

6 Mr. Shea is senior counsel, but he billed this file at a very low rate for the downtown Toronto market.

7 In my view, a receiver is entitled to utilize senior counsel where a mandate calls for mature, nuanced judgment as this one did. Juniors are fine for mundane tasks. The onslaught directed at the Receiver was far from mundane or appropriate.

8 The fees paid to Mrs. Miasik, and the security firm did save money and protect the operations of the Branch as I had ordered. The fees of the Receiver to May 31, 2015 of $147,111.52 all-in are both fair and reasonable. The fees and disbursements of Gowlings a set out in the affidavit of Murray Haddon sworn June 4, 2015, to May 26, 2015, paras. 3 and 4, are also fair and reasonable. Both are approved. I note that no party suggested an alternative measure of either set of fees on any specific basis. No expert evidence was submitted. I see no basis for a general reduction of X% or Y% in this case.

Issue (3)

9 In my endorsement dated September 3, 2014, 2014 ONSC 5095, at para. 21, I ruled that the Receiver would be paid from the properties under its control in accordance with its charge as established in its appointment order unless one of the parties steps up to pay. Neither has. The Receiver has been in place for about 16 months. It is completed all active aspects of its role. But it is not been paid one dollar. The Receiver is directed to sell No. 32 Twenty-Fourth St., Toronto to create a fund from which its fees can be paid. The Receiver will propose a sale process in writing to the parties within 30 days and seek approval of the process on consent, or, if opposed, on due notice.

10 The property to be sold will be conveyed by vesting order so that no formal involvement of the trustees, in whose name the property is held for the Branch, is required.

11 The Branch seeks indemnity from PAC for a share of the Receiver's costs. Allocation of a receiver's fees among interested parties on an equitable basis is appropriate. *DBDC Spadina Ltd et al. v. Norma Walton et al*. 2015 ONSC 2550.

12 The Branch benefited greatly from the receivership as it was protected from predation by the PAC while it got its legal house in order. Its operations and community programs were maintained and its clubhouse remained available and open while the Branch was reconstituted.

13 The PAC too benefited by keeping the defendants from proceeding as they planned in face of the trial judgment. The PAC has received over 50 applications for new members from the reconstituted Branch. It is also clear that the bulk of the fees of the Receiver and its counsel were incurred because of the unsuccessful and aggressive legal posturing against the Receiver by the PAC. There is some irony in the PAC complaining today that the Receiver should have used more junior counsel to protect itself from them or, even better, that they should have used more of the services of Mrs. Miasik to keep costs down, when they referred to her at the time as a "squatter" or a "trespasser".

14 I will return to this issue after I address the last point.

Issue (4)

15 The reconstituted Branch is the beneficial owner of the shares of PATL. It purported to elect a board of directors for the corporation. But it did not provide notice of the election meeting to the PAC that holds legal title to the bulk of the shares of the company. PATL asks me to recognize its board. It was elected by the beneficial holders and, as a trustee, the PAC could only vote the shares as the beneficial owners required. The PAC agrees with a caveat. It will vote as required within its constitution. It says that the Branch as reconstituted is once again running amok ignoring the PAC Constitution.

16 I cannot save the parties from themselves. Nor do I care to try. My trial judgment was very specific on the possibility of enforcement of the orders I made in that decision, with the help of a receiver if required. The Branch was reconstituted and once again made a viable operating body with the Receiver's help. What it does or did after that is beyond the contemplation of this proceeding. If the PAC wants to sue again and have its *bona fides* tested again is up to it. If the Branch gives the PAC grounds to enforce its constitution internally or in litigation, is up to them. The court is not operating the branch on some general trusteeship. The Receiver's mandate is done. It continues to exist solely to keep its name on title to preserve the clubhouse property pending the hearing of the appeal from the trial judgment. If someone sues for something new and seeks an interlocutory receiver in that case, then that is for another case. I decline to grant the directions sought by PATL and the Receiver. The approval of the

Receiver's third report does not imply any determination at all concerning the propriety of the election of the board of PATL. That is beyond the scope of this proceeding.

17 Finally, as is apparent from the foregoing, the war continues despite the court's efforts to bring the parties to cooperate in the best interests of members. Both sides are pulling out the stops to obtain tactical advantages and have been throughout. I cannot therefore assign greater benefit or blame to one party over the other. Every parry has been caused by a thrust and every thrust has been met by a parry. The PAC is therefore ordered to pay to the Branch 50% of all amounts that are paid to the Receiver and its counsel by the Branch or the proceeds of sale of its property. This order is effective and needs no further hearing for enforcement by the Branch as soon as monies are paid to the Receiver or its counsel from the Branch's property. This order (50/50, sharing), also covers all fees and disbursements of the Receiver and counsel from May 26, 2015 to today, if any, ordered after costs are argued.

18 Cost submissions of no more than five pages may be filed by the Receiver and the defendants by December 1, 2015. The Receiver's submissions shall be supported by affidavits in the usual form. The defendants shall deliver a Costs Outline with their submissions. The PAC may respond by no more than 10 pages of submissions by year-end. The plaintiff shall deliver its own Costs Outline for comparison.

19 All filings are to be by PDF attachment to an email to my assistant.

Order accordingly.

TAB O

2015 ABQB 745
Alberta Court of Queen's Bench

Servus Credit Union Ltd. v. Trimove Inc.

2015 CarswellAlta 2169, 2015 ABQB 745, [2015] A.J. No. 1275, [2016] A.W.L.D. 488, 260 A.C.W.S. (3d) 677

Servus Credit Union Ltd, Applicant and Trimove Inc. and Geeta Luthra, Respondents

J.B. Veit J.

Heard: November 18, 2015
Judgment: November 24, 2015
Docket: Edmonton 1503-06388

Counsel: Kentigern A. Rowan, Q.C., for Receiver, MNP Ltd.
Thomas Gusa, for Applicant, Servus Credit Union Ltd.
Darren R. Bieganek, Q.C., for AFSC (Agricultural Financial Service Corporation)
Vishal Luthra, Geeta Luthra, for themselves

Related Abridgment Classifications
Bankruptcy and insolvency
IV Receivers
IV.2 Fees and expenses
Headnote
Bankruptcy and insolvency --- Receivers — Fees and expenses
Court-appointed receiver recovered total of approximately $1.1 million of which approximately $863,000 was available to distribute to creditors — Receiver brought application for approval of its fees and its lawyer's fees which together totalled approximately $82,000 — Application granted — No basis was established for any substantive challenge to fees — Receiver provided detailed information about its activities and about individuals who undertook them and their rates — Amount of work undertaken by receiver was to be assessed in light of all circumstances of case including uncooperative attitude expressed by debtors at outset, difficulties of accounting for rolling stock, and ongoing failure of debtors to provide timely, accurate information — Debtors had contracted to pay receiver's lawyer's fees on full indemnity basis — Contract with respect to fees should be conclusive in absence of any argument that contract itself is invalid — There was no suggestion that legal fees exceeded those which could be said to be essential to and arising within four corners of litigation.
Table of Authorities
Cases considered by *J.B. Veit J.*:

Alberta Treasury Branches v. Weatherlok Canada Ltd. (2011), 2011 ABCA 314, 2011 CarswellAlta 1883, 343 D.L.R. (4th) 304, *(*sub nom. *Trinier v. Shurnaik)* 515 A.R. 148, *(*sub nom. *Trinier v. Shurnaik)* 532 W.A.C. 148, 68 Alta. L.R. (5th) 400 (Alta. C.A.) — referred to

BT-PR Realty Holdings Inc. v. Coopers & Lybrand (1997), 1997 CarswellOnt 1246, 29 O.T.C. 354 (Ont. Gen. Div. [Commercial List]) — considered

Bank of Nova Scotia v. Diemer (2014), 2014 ONCA 851, 2014 CarswellOnt 16721, 20 C.B.R. (6th) 292, 327 O.A.C. 376 (Ont. C.A.) — followed

Belyea v. Federal Business Development Bank (1983), 46 C.B.R. (N.S.) 244, 44 N.B.R. (2d) 248, 116 A.P.R. 248, 1983 CarswellNB 27 (N.B. C.A.) — followed

Confectionately Yours Inc., Re (2002), 2002 CarswellOnt 3002, 36 C.B.R. (4th) 200, 164 O.A.C. 84, 25 C.P.C. (5th) 207, 219 D.L.R. (4th) 72 (Ont. C.A.) — followed

Sidorsky v. CFCN Communications Ltd. (1995), 27 Alta. L.R. (3d) 296, 35 C.P.C. (3d) 239, [1995] 5 W.W.R. 190, 167 A.R. 181, 1995 CarswellAlta 86 (Alta. Q.B.) — referred to

911502 Alberta Ltd. v. Elephant Enterprises Inc. (2014), 2014 ABCA 437, 2014 CarswellAlta 2293, 588 A.R. 296, 626 W.A.C. 296 (Alta. C.A.) — referred to

Tariffs considered:

Alberta Rules of Court, Alta. Reg. 124/2010

Sched. C — referred to

***J.B. Veit J.*:**

Summary

1 The court-appointed receiver asks for approval of its, and its lawyer's, fees.

2 The debtors claim that both the receiver's fees and the receiver's lawyer's fees are excessive. They do not provide any evidence in support of their argument.

3 The court granted to Servus Credit Union Ltd. a without notice interim receivership, subsequently extended to a full receivership, of Trimove Inc. By the time of the granting of the full receivership, it was apparent that the debtors were insolvent: not only could they not pay Servus' demand claims, they could not pay their employees' salaries, etc. As of the date of the current application to distribute proceeds and award costs, the debtors owed Servus Credit Union approximately $1.2 million. The instruments creating the secured debt include a contractual obligation on Trimove Inc. and the guarantor Luthra to pay all costs and expense of enforcing the security, including legal fees on "a solicitor-and-his-own-client full indemnity basis". The receiver recovered a total of approximately $1.1 million, of which approximately $863,000.00 was available to distribute to Trimove's secured creditors. The receiver proposes that Servus receive approximately $298,000.00 of that fund. The fees claimed by the receiver and the receiver's lawyer total approximately $82,000.00.

4 The debtors propose that the court appoint an independent expert in receiverships to assess the costs claimed and report to the court; they propose that the maximum fee payable for that work be $3,000.00.

5 The debtors' application for the appointment of an expert to give an opinion on fees is denied. The applicant's request for approval of its, and its lawyers' fees, is granted.

6 Receivers and receivers' lawyers' fees are tested according to well-established legal principles as set out, for example, in *Belyea*, *Bakemates* and *Diemer*.

7 Here, the receiver has set out detailed dockets and an explanation of the multiplicand basis for its fee. Not only have the debtors not provided any evidence that the hourly fees charged were excessive, they have not established that the work undertaken was excessive. On the contrary, in light of the principal's early comment to the receiver, 'We'll make sure you get nothing", the nature of the assets - rolling stock, and the documented failure of the debtors to provide reliable information on such crucial assets as accounts receivable, there is no evidence that the time spent by the receiver in tracking down assets was unreasonable.

8 While the claim for lawyer's fees was set out in only two lines of information and was not verified by affidavit as is recommended in *Bakemates*, the debtors contracted to pay all legal costs associated with recovery "on an indemnity basis"; that contract does not limit fees to what is reasonable. There is no suggestion of duress or equivalent in the negotiation of the lawyer's fee contract; as indicated by Farley J., in the absence of duress, an "agreement as to the fees should be conclusive.":*BT-PR Realty Holdings*. In any event, however, neither of the two main secured creditors, who are the only parties whose recovery deficit would be ameliorated if the fees were reduced, nor the court, in the exercise of its oversight responsibility, discern any excess in the fees claimed by the receiver's lawyers.

9 If there were a basis for review of the receivers' fees, the court would not hire an outside expert; rather it would engage in the process outlined in *Bakemates*.

Cases and authority cited:

10 *By the debtors*: *Belyea v. Federal Business Development Bank*, [1983] N.B.J. No. 41 (N.B. C.A.); *Bank of Nova Scotia v. Diemer*, 2014 ONCA 851 (Ont. C.A.).

11 *By the court*: *Confectionately Yours Inc., Re*, [2002] O.J. No. 3569 (Ont. C.A.) [hereinafter Bakemates]; *BT-PR Realty Holdings Inc. v. Coopers & Lybrand*, [1997] O.J. No. 1097 (Ont. Gen. Div. [Commercial List]); *911502 Alberta Ltd. v. Elephant Enterprises Inc.*, 2014 ABCA 437 (Alta. C.A.); *Sidorsky v. CFCN Communications Ltd.*, [1995] A.J. No. 174 (Alta. Q.B.); *Alberta Treasury Branches v. Weatherlok Canada Ltd.*, 2011 ABCA 314 (Alta. C.A.) [hereinafter Trinier].

1. Background

12 Trimove is a transport company specializing in the delivery of heavy crude oil in the Vermilion area of Alberta; it also operates in the United States.

13 Servus Credit Union Ltd. issued a demand overdraft loan, and demand term loans, to Trimove Inc.; those facilities totalled approximately $1.1 million. As a representative example, in the $700,000.00 Demand Commercial Mortgage issued on June 12, 2013 to Trimove by Servus, Trimove agreed to the following conditions of credit:

> 1) The Borrower agrees to pay all expenses, fees and charges incurred by Servus Credit Union in relation to the loans; the preparation and registration of security, enforcement or preservation of Servus Credit union's rights and remedies; whether or not any such documentation is completed or any funds are advanced, including but not limited to legal expenses (on a solicitor-and-his-own-client full indemnity basis), cost of accountants, engineers, architects, consultants, appraisers and cost of searches and registration.

14 Geeta Luthra guaranteed the repayment of those facilities.

15 Neither the demand for repayment of the facilities nor the demand for payment of the guarantee, each of which was made on or about April 25, 2015, was met. Servus therefore initiated an *ex parte* receivership application as a result of which MNP Ltd was appointed as interim receiver on May 1, 2015. In support of that application, Servus filed an affidavit from one of its senior relationship managers of commercial special loans which included the following assertion:

> On April 29, 2015, due to Trimove's significantly worsening margining position, I advised Karan Luthra, a principal and director of Trimove, that Servus was no longer agreeable to the forbearance arrangements previously discussed .... In response to this statement Karan stated that "We'll make sure you get nothing".

16 When the matter came back before the court, on notice, on May 8, the court confirmed the receivership order, but, in response to the submissions of the debtors, required an undertaking from Servus not to file the order until May 22; the delay was intended to give the debtors time to retain an insolvency lawyer, to arrange alternate financing, and to comply with the terms of the Interim Receivership Order. On that date, the court explicitly reminded the debtors of their obligation to cooperate with the receiver. Up to that point, the debtors had received at least informal legal advice from Luthra Law Group.

17 On May 15, 2015, Trimove had insufficient funds to meet its payroll obligations. Trimove also had $146,480.00 in outstanding accounts payable and no funds to pay them.

18 On May 19, 2015, Servus went back to court and obtained an order authorizing the immediate use of the receivership order in order to protect both Trimove's estate and the interests of Servus and the other creditors. Servus' application asserted that representatives of Trimove had not been fully cooperative with the receiver in that they failed to provide financial information and to identify and locate equipment. The interim receiver had been forced to send a letter to Trimove threatening a contempt application before cooperation was improved, "but there still appears to be information that has not yet been provided to the Interim Receiver". Trimove never did retain an expert insolvency lawyer; nor did it obtain alternative financing.

19 On May 19, the debtor filed an affidavit from Vishal Luthra attempting to demonstrate that Trimove had been cooperative with the receiver. Mr. Luthra swore:

> [the receiver] demanded that we release to him all the data and mentioned that his team is out and about looking for our equipment. I assured him at that point, that equipment is safe and there is no risk for the lender's security....
>
> Eric Sirrs gave me 2 hours to compile information for him to satisfy his court order demands.... I provided him the following items ... list of equipment, I recalled from my memory and locations ...

20 Another example of the kind of lack of cooperation complained of is the failure of Trimove, even up to and including the date of this application, to explain how the payment of a Trimove account receivable ended up in the hands of a stranger. At this hearing, the debtors explained that they owned a separate entity, with a very similar name to Trimove Inc., and there had perhaps been a typing error in naming the payee of the cheque.

21 Another example of the problems experienced by the receiver relates to the failure of Trimove to satisfactorily explain the transfer of two of its serial numbered pieces of equipment to a third party who asserted that he had done machinist's work for Trimove over a period of a year and not been paid. That stranger, Khullar, has provided information to the receiver, but management has failed to do so.

22 Another example of the debtor's failure to provide accurate, timely information relates to the failure of Trimove to provide GPS locations for some of its equipment moving on highways even when, by May 12, one unit was still out of the country.

23 Finally, in respect of the Aarbro issue, the debtors filed evidence at this hearing concerning their interest in that property. In light of that late dispute relating to ownership of the company owning the ranch property in question, the disposition of the Aarbro claim is deferred to a separate hearing.

24 In support of the claim for its fees, MNP filed an affidavit attaching docketed time allocations for work done on the receivership, together with an outline of the individuals who worked on the receivership and their billable cost. MNP also approved as part of its receivership expenses the fees of its lawyer.

25 The legal fees claimed are not the subject of an affidavit. There is, however, reference in the law firm's two line claim to invoices relating to the totals claimed. There is no evidence that the debtors ever asked for information about the invoices themselves.

2. Testing receivers' and lawyers' fees

26 I agree with the debtors that general guidance to receivers', and their lawyers', fees can be found in *Belyea* and *Diemer*.

27 In addition to those authorities, I bring to the debtors' attention two additional cases, the first of which is *Bakemates*, which expands on some of the topics relating to the testing of fees and provides a useful outline of the processes by which any necessary examination of fees will be conducted.

28 The other case to which I must refer is *BT-PR Realty Holdings*. That decision is important in the circumstances here where there is a contract relating to fees, specifically the lawyer's fees. A court's general approach to fees must also take into account, not only the general principles as set out in decisions such as *Diemer*, but also any contract in relation to legal fees. As Farley J. said:

> I do not particularly quarrel with the list of factors set out in the *Bank of Montreal v. Nicar Trading Co.* (1990), 78 C.B.R. (N.S.) 85 (B.C.C.A.):
>
> > (a) the nature extent and value of the cases;
> >
> > (b) the complications and difficulties encountered;
> >
> > (c) the degree of assistance provided by the parties;

(d) time spent by the receiver;

(e) the receiver's knowledge, experience and skill;

(f) diligence and thoroughness;

(g) responsibilities assumed;

(h) results achieved; and,

(i) the cost of comparable services.

However I would add

(j) other material considerations - for example in this case:

(i) the April 12 agreement to the fees;

(ii) the priority receivership of the Bank in this co-receivership relationship; and (iii) the apparent diversionary and distracting excessive hands on requirements of Miller who all the while is demanding efficiency (more accurately a low fee at any price).

I would think however that where there is a retainer given which indicates that the fee will be based upon the multiplicand of hourly rates and time expended this factor should receive special emphasis as it is what the parties bargained for. See above for my views about allowing the taxi meter to run without taking the passenger along the appropriate route. In the subject case C&L charged on the multiplicand basis. Given their explanation and the lack of any credible and reliable evidence to the contrary, I see no reason to interfere with that charge. It would also seem to me that on balance C&L scores neutrally as to the other factors and of course, the agreement as to the fees should be conclusive if there is no duress or equivalent.

In other words, in *BT-PR Realty Holdings*, Farley J. emphasized that while an outrageous departure from the norm, such as a taxi driver "[taking] his fare from the Courthouse to the Royal York Hotel via Oakville", or, in Edmonton terms, taking a fare from the Law Courts to the MacDonald Hotel via Spruce Grove, will not be tolerated, an agreement about fees is usually conclusive.

3. Applying the principles in this case

a) Receiver's fees

29 Information about the receiver's fees is attached to an affidavit in the manner recommended by *Bakemates*. The debtors do not provide any evidence on the issue of fees.

30 It's true, of course, that this was not a technically complicated receivership. The receiver sold most of the debtors' assets by auction. However, even settling on that procedure entailed some work by the receiver as there were competing offers from auction businesses and the receiver had to do some research to determine why it should prefer one auctioneer's offer to the other.

31 More important than the way in which the receiver disposed of most of the assets is the unfortunate response of the debtor to the initial approach by the receiver, coupled with the nature of the debtor's assets; those two factors justify what the debtors consider to be excessive scrutiny by the receiver.

32 In addition to this main problem, which is represented by the docket in the greater expenditures at the outset of the receivership, there are the continuing problems over the course of the receivership.

33 The debtors never did retain an insolvency expert; therefore, the receiver was dealing with them personally. Dealing with self-represented litigants takes more time and care and provides less comfort than dealing with professionals.

34 Also, Mr. Luthra's affidavit of May 19, 2015 illustrates the gulf which Trimove did not recognize between verifiable information and opinion.

35 Problems of the type exemplified by the cheque which was attempted to be cashed by a stranger caused additional administration expenses since it precipitated a mail re-direction notice which then required the receiver to return mail which it received to a law firm which shared the mailing address of Trimove.

36 It's also true that, over time, Trimove and its representatives did become more cooperative without ever seeming to completely realize the importance from the receiver's perspective of getting accurate, substantiated, information promptly. Nonetheless, the failure to simply and promptly provide the information and documents required by the receiver caused the receiver to spend more time on the administration of this receivership than would otherwise be necessary.

37 Against the receiver's docketed multiplicand, the debtors have raised arguments of the "I can deliver goods to Texas for $3,000.00 so how come did it cost the receiver so much to go around to the yard I was renting to check my equipment" variety.

38 In summary with respect to the receiver's fees, the receiver has provided detailed information about its activities and the individuals, and their rates, who have undertaken those activities. The amount of work undertaken by the receiver must be assessed in light of all of the circumstances of this case, including the unfortunate attitude expressed by the debtor at the outset, the difficulties of accounting for rolling stock, and the ongoing failure of the debtors to provide timely, accurate, information. For their part, the debtors have not provided any evidence. Given the role of court-appointed receivers, and all of the information provided about this particular receivership, the court concludes that no basis has been established for any substantive challenge to the receiver's fees. The receiver's fees are therefore approved.

b) Lawyer's fees

39 The receiver's lawyers' fees have not been submitted by way of affidavit in the manner suggested in *Bakemates*: see, paras 38 ff. Indeed, the only information about the lawyer's fees is contained in two lines which set out the total amount of fees claimed.

40 However, there is no suggestion that the debtors attempted to learn more about the lawyers' fees by asking for copies of the invoices which are referred to in the two lines of information.

41 More importantly, the debtors contracted to pay any lawyers' fees on a full indemnity basis. It is important to note that the contract concerning fees was clear: the language referred explicitly to "solicitor-and-his-own-client full indemnity basis". Therefore, there is no uncertainty about the level of fees the debtor agreed to pay of the type identified by our Court of Appeal in *Elephant Enterprises*.

42 As to what a contract means when one party agrees to pay "solicitor and his own client full indemnity" fees, we obtain assistance from McMahon J. in *Sidorsky*, at para. 5 where that judge, who was an expert in the matter of fees having chaired a provincial committee on the setting of Schedule C fee items, said:

> 5 There are three levels of costs that may be payable by one party to another:
>
> 1. Party and party costs: calculated on the basis of Schedule C of the Alberta Rules of Court or some multiple thereof, plus reasonable disbursements.
>
> 2. Solicitor and client costs: which provide for indemnity to the party to whom they are awarded for costs that can be said to be essential to and arising within the four corners of the litigation.
>
> 3. Solicitor and his own client costs: sometimes referred to as complete indemnity for costs. These are costs which a solicitor could tax against a resisting client and may include payment for services which may not be strictly essential to the conduct of the litigation.

43 As to whether there is any capacity for a court to depart from a contract term that obliges one party to pay an indemnity of legal fees, I note our Court of Appeal's decision in *Trinier*:

> G. Any Discretion?
>
> 39 It was argued before us that the chambers judge now appealed from had a "discretion" to deny solicitor-client costs. Given the covenants here, it is doubtful.
>
> 40 But even if a discretion existed as to certain items, there is no proper legal ground to exercise such a discretion here. No misconduct or sharp practice by the appellants is even alleged. They ultimately lost no step, in my view. They did not churn, and did not pursue trivia in order to incur huge solicitor-client costs. And most of the steps whose costs were in issue had already been the subject of previous costs decisions.
>
> 41 If there was any discretion as to costs, at best it was as to the costs of the "side issue" about contribution for the first $100,000 paid by the appellants before the suit. But any such discretion was that of the first judge (Lewis J.), not the (second) chambers judge now under appeal. So the second judge was not entitled to revisit that. And so even if he was, the Court of Appeal owes him no deference on further appeal on that topic. He purported to sit on appeal from the taxing officer who taxed solicitor-client costs.
>
> 42 Besides, the covenants here are for solicitor-and-own-client costs, so a mere immoderate amount of costs or of the appellants' steps would likely not remove the right to such costs.

This, of course, echoes the comments of Farley J. to the effect that a contract with respect to fees should be conclusive in the absence of any argument that the contract itself is invalid: *BT-Pr Realty Holdings Inc.*

44 In summary on the legal interpretation of the contract the debtors executed, the debtors agreed to pay even for legal services which may not have been strictly essential to the conduct of the receivership.

45 However, and importantly, there is no suggestion whatever that the legal fees in the circumstances here even exceeded those which could be said to be essential to and arising within the four corners of the litigation. On the contrary, the two main creditors of Trimove, creditors who have hundreds of thousands of dollars of shortfall in their secured claims against Trimove and who are the only persons who might conceivably have their financial position improved by any reduction of the legal fees, have both accepted the legal fees claimed by the receiver's lawyer. As Farley J. said all those years ago, even if a party agreed to indemnify a lawyer for their fees, the court would then, and would still step in to prevent an injustice if there were some outrageous fee claim made by a lawyer. There is no such basis for interference here. The receiver's lawyer's fees are therefore approved.

4. Proposal to hire an expert to review the receiver's fees

46 If there had been a basis on which either the receiver's or the receiver's lawyer's fees should be reviewed, the court would have followed the procedure recommended in *Bakemates* rather than the proposal made by the debtors. Since the debtors did not establish the required basis, the *Bakemates* procedure does not arise.

5. Costs

47 The debtors were unsuccessful in their application to reduce the receivership fees. If the parties are not agreed on costs, I can be spoken to within 30 days of the release of this decision.

Application granted.

TAB P

2014 ONCA 851
Ontario Court of Appeal

Bank of Nova Scotia v. Diemer

2014 CarswellOnt 16721, 2014 ONCA 851, 20 C.B.R. (6th) 292, 247 A.C.W.S. (3d) 584, 327 O.A.C. 376

The Bank of Nova Scotia, Plaintiff (Respondent) and Daniel A. Diemer o/a Cornacre Cattle Co., Defendant (Respondent)

Alexandra Hoy A.C.J.O., E.A. Cronk, Sarah E. Pepall JJ.A.

Heard: June 10, 2014
Judgment: December 1, 2014
Docket: CA C58381

Proceedings: affirming *Bank of Nova Scotia v. Diemer* (2014), 2014 ONSC 365, 2014 CarswellOnt 666, A.J. Goodman J. (Ont. S.C.J.)

Counsel: Peter H. Griffin for Appellant, PricewaterhouseCoopers Inc.
James H. Cooke for Respondent, Daniel A. Diemer
No one for Respondent, The Bank of Nova Scotia

Related Abridgment Classifications
Debtors and creditors
VII Receivers
VII.8 Remuneration of receiver
VII.8.b Remuneration
VII.8.b.iii Miscellaneous

Headnote
Debtors and creditors --- Receivers — Remuneration of receiver — Remuneration — Miscellaneous
Counsel fees — Bank held security over debtor's cattle farm operations, and was owed approximately $2,000,000 — On application by bank, receiver was appointed — Receiver requested legal fees of $255,955 on behalf of its counsel — Motion judge found legal fees were excessive, given size of receivership, and refused to approve them — Motion judge assessed fees at $157,500, plus disbursements of $4,434.92 — Receiver appealed — Appeal dismissed — Motion judge did not err in disallowing counsel's fees — Initial appointment order stating that counsel was to be compensated at "standard rates", and subsequent approval of receiver's reports, did not oust need for court to consider whether fees claimed were fair and reasonable — Motion judge made no palpable and overriding error in concluding that counsel's fees were not fair and reasonable — It was inappropriate for motion judge to simply apply rates of London counsel, but this was not fatal — Motion judge was informed by correct principles, which led him to conclude fees lacked proportionality and reasonableness — Certain comments made by motion judge were not justified, but different result should not ensue.

Table of Authorities

Cases considered by *Sarah E. Pepall J.A.*:

Belyea v. Federal Business Development Bank (1983), 44 N.B.R. (2d) 248, 116 A.P.R. 248, 1983 CarswellNB 27, 46 C.B.R. (N.S.) 244 (N.B. C.A.) — followed

BT-PR Realty Holdings Inc. v. Coopers & Lybrand (1997), 29 O.T.C. 354, 1997 CarswellOnt 1246 (Ont. Gen. Div. [Commercial List]) — referred to

Confectionately Yours Inc., Re (2002), 2002 CarswellOnt 3002, 164 O.A.C. 84, 36 C.B.R. (4th) 200, 25 C.P.C. (5th) 207, 219 D.L.R. (4th) 72 (Ont. C.A.) — followed

Confectionately Yours Inc., Re (2003), 2003 CarswellOnt 1043, 2003 CarswellOnt 1044, 312 N.R. 195 (note), 41 C.B.R. (4th) 28, 181 O.A.C. 197 (note) (S.C.C.) — referred to

HSBC Bank Canada v. Lechier-Kimel (2014), 2014 CarswellOnt 14539, 2014 ONCA 721 (Ont. C.A.) — referred to

Statutes considered:

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

s. 243(1) — pursuant to

s. 248(2) — considered

s. 243(6) — pursuant to

Courts of Justice Act, R.S.O. 1990, c. C.43

s. 101 — considered

***Sarah E. Pepall J.A.*:**

1 The public nature of an insolvency which juxtaposes a debtor's financial hardship with a claim for significant legal compensation focuses attention on the cost of legal services.

2 This appeal involves a motion judge's refusal to approve legal fees of $255,955 that were requested by a court appointed receiver on behalf of its counsel in a cattle farm receivership that spanned approximately two months.

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

Facts

(a) Appointment of Receiver

4 The respondent, Daniel A. Diemer o/a Cornacre Cattle Co. (the "debtor"), is a cattle farmer. The Bank of Nova Scotia ("BNS") held security over his farm operations which were located near London, Ontario. BNS and Maxium Financial Services Inc. were owed approximately $4.9 million (approximately $2 million and $2.85 million respectively). BNS applied for the appointment of a receiver pursuant to s. 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*") and s. 101 of the *Courts of Justice Act*, R.S.O. 1990, c. 43. The debtor was represented by counsel and consented to the appointment.

5 On August 20, 2013, Carey J. granted the request and appointed PricewaterhouseCoopers Inc. ("PWC" or the "Receiver") as receiver of the debtor. The initial appointment order addressed various aspects of the receivership. This included the duty of the debtor to cooperate with the Receiver and the approval of a sales process for the farm operations described in materials filed in court by BNS. The order also contained a come-back provision allowing any interested party to apply to vary the order on seven days' notice.

6 Paragraphs 17 and 18 of the appointment order, which dealt with the accounts of the Receiver and its counsel, stated:

> 17. THIS COURT ORDERS that the Receiver and counsel to the Receiver shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, and that the Receiver and counsel to the Receiver shall be entitled to and are hereby granted a charge (the "Receiver's Charge") on the Property, as security for such fees and disbursements, both before and after the making of this Order in respect of these proceedings, and that the Receiver's Charge shall form a first charge on the Property in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person, but subject to sections 14.06(7), 81.4(4), and 81.6(2) of the BIA.
>
> 18. THIS COURT ORDERS that the Receiver and its legal counsel shall pass its accounts from time to time, and for this purpose the accounts of the Receiver and its legal counsel are hereby referred to a judge of the Ontario Superior Court of Justice.

There is no suggestion that the materials filed in support of the request for the appointment of the Receiver provided specifics on the standard rates and charges referred to in para. 17 of the initial appointment order.

7 Counsel to the Receiver was Borden Ladner Gervais LLP ("BLG") and the lead lawyer was Roger Jaipargas. Mr. Jaipargas was called to the Ontario bar in 2000, practises out of BLG's Toronto office, and is an experienced and capable insolvency practitioner. Among other things, at the time of the receivership, he was the Chair of the Insolvency Section of the Ontario Bar Association.

(b) Receiver's Activities

8 The activities of the Receiver and, to a certain extent, those of its counsel, were described in reports dated September 11 and October 15, 2013 filed in court by the Receiver. Both reports were subsequently approved by the court.

9 The reports revealed that:

- Following the granting of the initial appointment order, the Receiver entered into an agreement with the debtor pursuant to which the latter was to manage the day-to-day operations of the farm and the Receiver would provide oversight.

- After the Receiver was appointed, the debtor advised the Receiver of an August 13, 2013 offer he had received. It had resulted from a robust sales process conducted by the debtor. On learning of this offer, the Receiver negotiated an agreement of purchase and sale with the offeror for the purchase of the farm for the sum of $8.3 million. The purchase price included 170 milking cows.

- On September 17, 2013, the Receiver obtained, without objection from the debtor, a court order setting aside the sales process approved in the initial appointment order, approving the agreement of purchase and sale it had negotiated, and approving the Receiver's September 11, 2013 report outlining its activities to date.

- The agreement of purchase and sale required that over 150 cows be removed from the farm (not including the 170 milking cows that were the subject of the agreement of purchase and sale). Complications relating to these cows and an additional 60 cows which the debtor wanted to rent to increase his milking quota arose to which the Receiver and its counsel were required to attend.

- The Receiver and BLG also negotiated an access agreement to permit certain property to remain on the farm after the closing date of the agreement of purchase and sale at no cost to the debtor. Unbeknownst to the Receiver, the debtor then removed some of that property.

- The Receiver and its counsel also had to consider numerous claims to the proceeds of the receivership by other interested creditors and an abandoned request by the debtor to change the venue of the receivership from London to Windsor.

10 After approximately two months, the debtor asked that the Receiver be replaced. Accordingly, PWC brought a motion to substitute BDO Canada Ltd. as receiver and to approve its second report dated October 15, 2013.

(c) Application to Approve Fees

11 The Receiver also asked the court to approve its fees and disbursements and those of its counsel including both of their estimates of fees to complete.

12 The Receiver's fees amounted to $138,297 plus $9,702.52 in disbursements. The fees reflected 408.7 hours spent by the Receiver's representatives at an average hourly rate of $338.38. The highest hourly rate charged by the Receiver was $525 per hour. Fees estimated to complete were $20,000.

13 The Receiver's counsel, BLG, performed a similar amount of work but charged significantly higher rates. BLG's fees from August 6 to October 14, 2013 amounted to $255,955, plus $4,434.92 in disbursements and $33,821.69 in taxes for a total

account of $294,211.61. The fees reflected 397.60 hours spent with an average hourly rate of $643.75. Mr. Jaipargas's hours amounted to 195.30 hours at an hourly rate of $750.00. The rates of the other 10 people on the account ranged from $950 per hour for a senior lawyer to $195 for a student and $330 for a law clerk.

14 Fees estimated to complete were $20,000.

15 In support of the request for approval of both sets of accounts, the Receiver filed an affidavit of its own representative and one from its counsel, Mr. Jaipargas.

16 As is customary in receiver fee approval requests, the Receiver's representative stated that, to the best of his knowledge, the rates charged by its counsel were comparable to the rates charged by other law firms for the provision of similar services and that the fees and disbursements were fair and reasonable in the circumstances.

17 In his affidavit, Mr. Jaipargas attached copies of BLG's accounts and a summary of the hourly rates and time spent by the eleven BLG timekeepers who worked on the receivership. The attached accounts included detailed block descriptions of the activities undertaken by the BLG timekeepers with total daily aggregate hours recorded. Usually the entries included multiple tasks such as e-mails and telephone calls. Time was recorded in six minute increments. Of the over 160 docket entries, a total of 11 entries reflected time of .1 (6 minutes) and .2 (12 minutes).

18 On October 23, 2013, the motion judge granted a preliminary order. He ordered that:

- BDO Canada Ltd. be substituted as receiver;
- PWC's fees and disbursements be approved;
- the Receiver's October 15, 2013 report and the activities of the Receiver set out therein be approved;
- $100,000 of BLG's fees be approved; and
- the determination of the approval of the balance of BLG's fees and disbursements be adjourned to January 3, 2014.

19 Prior to the January return date, the debtor filed an affidavit of a representative from his law firm. The affiant described the billing rates of legal professionals located in the cities of London and Windsor, Ontario. These rates tended to be significantly lower than those of BLG. For example, the highest billing rate was $500 for the services of a partner called to the bar in 1988. Mr. Jaipargas replied with an affidavit that addressed Toronto rates in insolvency proceedings in Toronto with which BLG's rates compared favourably. He also revised BLG's estimate to complete to $30,000.

Motion Judge's Decision

20 On January 3, 2014, the motion judge heard the motion relating to approval of the balance of BLG's fees and disbursements. He refused to grant the requested fee approval and provided detailed reasons for his decision dated January 22, 2014.

21 In his reasons, the motion judge considered and applied the principles set out in *Confectionately Yours Inc., Re* (2002), 164 O.A.C. 84 (Ont. C.A.) [hereinafter Bakemates], leave to appeal refused, (2003), [2002] S.C.C.A. No. 460 (S.C.C.) (also referred to as *Confectionately Yours Inc., Re*); *BT-PR Realty Holdings Inc. v. Coopers & Lybrand* (1997), 29 O.T.C. 354 (Ont. Gen. Div. [Commercial List]); and *Belyea v. Federal Business Development Bank* (1983), 44 N.B.R. (2d) 248 (N.B. C.A.). The motion judge considered the nature, extent and value of the assets handled, the complications and difficulties encountered, the degree of assistance provided by the debtor, and the cost of comparable services.

22 The motion judge took into account the challenges identified by the Receiver in dealing with the debtor. However, he found that the debtor had co-operated and that there was little involvement by the Receiver and counsel that required either day-to-day management or identification of a potential purchaser.

23 He noted, at para. 17 of his reasons, that although counsel for the debtor took specific issue with BLG counsel's rates: "I glean from submissions that the thrust of his argument evolved from a complaint about the rates being charged to an overall dispute of the unreasonableness of the entirety of the fees (and by extension — the hours) submitted for reimbursement."

24 The motion judge considered the hourly rates, time spent and work done. He noted that the asset was a family farm worth approximately $8.3 million and that the scope of the receivership was modest. In his view, the size of the receivership estate should have some bearing on the hourly rates. He determined that the amount of counsel's efforts and the work involved was disproportionate to the size of the receivership. After the size of the estate became known, the usual or standard rates were too high. He expressly referred to paras. 17 and 18 of the initial appointment order.

25 The motion judge also took issue with the need for, and excessive work done by, senior counsel on routine matters. He rejected the Receiver's opinion endorsing its counsel's fees, found that the number of hours reflected a significant degree of inefficiency, and that some of the work could have been performed at a lower hourly rate. He concluded: "I have concerns about the fees claimed that involve the scope of work over the course of just over two months in what appears to be a relatively straightforward receivership. Frankly, the rates greatly exceed what I view as fair and reasonable."

26 He acknowledged that there were several methods to achieve what he believed to be a just and reasonable amount including simply cutting the overall number of hours billed. Instead, so as to reduce the amount claimed, he adopted the average London rate of $475 for lawyers of similar experience and expertise as shown in the affidavit filed by the debtor. He also expressly limited his case to the facts at hand, noting that his reasons should not be construed as saying that Toronto rates have no application in matters in the Southwest Region.

27 The motion judge concluded that BLG's fees were "nothing short of excessive." He assessed them at $157,500 from which the $100,000 allowed in his October 23, 2013 order was to be deducted. He also allowed disbursements of $4,434.92 and applicable HST.

Grounds of Appeal

28 The appellant advances three grounds of appeal. It submits that the motion judge erred: (1) by failing to apply the clear provisions of the appointment order which entitled BLG to charge fees at its standard rates; (2) by reducing BLG's fees in the absence of evidence that the fees were not fair and reasonable; and (3) by making unfair and unsupported criticisms of counsel.

Burden of Proof

29 The receiver bears the burden of proving that its fees are fair and reasonable: *HSBC Bank Canada v. Lechier-Kimel*, 2014 ONCA 721 (Ont. C.A.), at para. 16 and *Bakemates*, at para. 31.

Analysis

(a) Appointment of a Receiver

30 Under s. 243(1) of the *BIA*, the court may appoint a receiver and under s. 243(6), may make any order respecting the fees and disbursements of the receiver that the court considers proper. Similarly, s.101 of the *Courts of Justice Act* provides for the appointment of a receiver and that the appointment order may include such terms as are considered just. As in the case under appeal, the initial appointment order may provide for a judicial passing of accounts. Section 248(2) of the *BIA* also permits the Superintendent of Bankruptcy, the debtor, the trustee in bankruptcy or a creditor to apply to court to have the receiver's accounts reviewed. The court also relies on its supervisory role and inherent jurisdiction to review a receiver's requests for payment: *Bakemates*, at para. 36 and Kevin P. McElcheran, *Commercial Insolvency in Canada*, 2d ed. (Markham: LexisNexis, 2011), at pp. 185-186.

31 The receiver is an officer of the court: *Bakemates*, at para. 34. As stated by McElcheran, at p.186:

> The receiver, once appointed, is said to be a "fiduciary" for all creditors of the debtor. The term "fiduciary" to describe the receiver's duties to creditors reflects the representative nature of its role in the performance of its duties. The receiver does not have a financial stake in the outcome. It is not an advocate of any affected party and it has no client. As a court officer and appointee, the receiver has a duty of even-handedness that mirrors the court's own duty of fairness in the administration of justice. [Footnotes omitted.]

(b) Passing of a Receiver's Accounts

32 In *Bakemates*, this court described the purpose of the passing of a receiver's accounts and also discussed the applicable procedure. Borins J.A. stated, at para. 31, that there is an onus on the receiver to prove that the compensation for which it seeks approval is fair and reasonable. This includes the compensation claimed on behalf of its counsel. At para. 37, he observed that the accounts must disclose the total charges for each of the categories of services rendered. In addition:

> The accounts should be in a form that can be easily understood by those affected by the receivership (or by the judicial officer required to assess the accounts) so that such person can determine the amount of time spent by the receiver's employees (and others that the receiver may have hired) in respect to the various discrete aspects of the receivership.

33 The court endorsed the factors applicable to receiver's compensation described by the New Brunswick Court of Appeal in *Belyea*: *Bakemates*, at para. 51. In *Belyea*, at para. 9, Stratton J.A. listed the following factors:

- the nature, extent and value of the assets;
- the complications and difficulties encountered;
- the degree of assistance provided by the debtor;
- the time spent;
- the receiver's knowledge, experience and skill;
- the diligence and thoroughness displayed;
- the responsibilities assumed;
- the results of the receiver's efforts; and
- the cost of comparable services when performed in a prudent and economical manner.

These factors constitute a useful guideline but are not exhaustive: *Bakemates*, at para. 51.

34 In Canada, very little has been written on professional fees in insolvency proceedings: see Stephanie Ben-Ishai and Virginia Torrie, "A 'Cost' Benefit Analysis: Examining Professional Fees in *CCAA* Proceedings" in Janis P. Sarra, ed., *Annual Review of Insolvency Law* (Toronto: Carswell, 2010) 141, at p.151.

35 Having said that, it is evident that the fairness and reasonableness of the fees of a receiver and its counsel are the stated lynchpins in the *Bakemates* analysis. However, in actual practice, time spent, that is, hours spent times hourly rate, has tended to be the predominant factor in determining the quantum of legal fees.

36 There is a certain irony associated with this dichotomy. A person requiring legal advice does not set out to buy time. Rather, the object of the exercise is to buy services. Moreover, there is something inherently troubling about a billing system that pits a lawyer's financial interest against that of its client and that has built-in incentives for inefficiency. The billable hour model has both of these undesirable features.

(c) The Rise and Dominance of the Billable Hour

37 For many decades now, the cornerstone of legal accounts and law firms has been the billable hour. It ostensibly provides an objective measure for both clients and law firms. For the most part, it determines the quantum of fees. From an internal law firm perspective, the billable hour also measures productivity and is an important tool in assessing the performance of associates and partners alike.

38 The billable hour traces its roots to the mid-20th century. In 1958, the American Bar Association ("ABA")'s Special Commission on the Economics of Law Practice published a study entitled "The 1958 Lawyer and his 1938 Dollar". The study noted that lawyers' incomes had not kept pace with those of other professionals and recommended improved recording of time spent and a target of 1,300 billable hours per year to boost lawyers' profits: see Stuart L. Pardau, "*Bill, Baby, Bill: How the Billable Hour Emerged as the Primary Method of Attorney Fee Generation and Why Early Reports of its Demise May be Greatly Exaggerated*" (2013) 50 Idaho L. Rev. 1, at pp. 4-5. By 2002, in its Commission on Billable Hours, the ABA revised its proposed expectation to 2,300 hours docketed annually of which 1,900 would represent billable work: see Pardau, at p. 2. And that was in 2002.

39 Typically, a lawyer's record of billable hours is accompanied by dockets that record and detail the time spent on a matter. In theory, this allows for considerable transparency. However, docketing may become more of an art than a science, and the objective of transparency is sometimes elusive.

40 This case illustrates the problem. Here, the lawyers provided dockets in blocks of time that provide little, if any, insight into the value provided by the time recorded. Moreover, each hour is divided into 10 six-minute segments, with six minutes being the minimum docket. So, for example, reading a one line e-mail could engender a 6 minute docket and associated fee. This segmenting of the hour to be docketed does not necessarily encourage accuracy or docketing parsimony.

(d) Fees in Context of Court Appointed Receiver

41 The cost of legal services is highlighted in the context of a court-supervised insolvency due to its public nature. In contrast, the cost of putting together many of the transactions that then become unravelled in court insolvency proceedings rarely attract the public scrutiny that professional fees in insolvencies do. While many of the principles described in these reasons may also be applicable to other areas of legal practice, the focus of this appeal is on legal fees in an insolvency.

42 Bilateral relationships are not the norm in an insolvency. In a traditional solicitor/client relationship, there are built-in checks and balances, incentives, and, frequently, prior agreements on fees. These sorts of arrangements are less common in an insolvency. For example, a receiver may not have the ability or incentive to reap the benefit of any pre-agreed client percentage fee discount of the sort that is incorporated from time to time into fee arrangements in bilateral relationships.

43 In a court-supervised insolvency, stakeholders with little or no influence on the fees may ultimately bear the burden of the largesse of legal expenditures. In the case under appeal, the recoveries were sufficient to discharge the debt owed to BNS. As such, it did not bear the cost of the receivership. In contrast, had the receivership costs far exceeded BNS's debt recovery such that in essence it was funding the professional fees, BNS would hold the economic interest and other stakeholders would be unaffected.

44 In a receivership, the duty to monitor legal fees and services in the first instance is on the receiver. Choice of counsel is also entirely within the purview of the receiver. In selecting its counsel, the receiver must consider expertise, complexity, location, and anticipated costs. The responsibility is on the receiver to choose counsel who best suits the circumstances of the receivership. However, subsequently, the court must pass on the fairness and reasonableness of the fees of the receiver and its counsel.

45 In my view, it is not for the court to tell lawyers and law firms how to bill. That said, in proceedings supervised by the court and particularly where the court is asked to give its *imprimatur* to the legal fees requested for counsel by its court officer, the court must ensure that the compensation sought is indeed fair and reasonable. In making this assessment, *all* the *Belyea* factors,

including time spent, should be considered. However, value provided should pre-dominate over the mathematical calculation reflected in the hours times hourly rate equation. Ideally, the two should be synonymous, but that should not be the starting assumption. Thus, the factors identified in *Belyea* require a consideration of the overall value contributed by the receiver's counsel. The focus of the fair and reasonable assessment should be on what was accomplished, not on how much time it took. Of course, the measurement of accomplishment may include consideration of complications and difficulties encountered in the receivership.

46 It is not my intention to introduce additional complexity and cost to the assessment of legal fees in insolvency proceedings. All participants must be mindful of costs and seek to minimize court appearances recognizing that the risk of failing to do so may be borne on their own shoulders.

(e) Application to This Case

47 Applying these principles to the grounds raised, I am not persuaded that the motion judge erred in disallowing counsel's fees.

48 The initial appointment order stating that the compensation of counsel was to be paid at standard rates and the subsequent approval of the Receiver's reports do not oust the need for the court to consider whether the fees claimed are fair and reasonable.

49 As stated in *Bakemates*, at para. 53, there may be cases in which the fees generated by the hourly rates charged by a receiver will be reduced if the application of one or more of the *Belyea* factors so requires. Furthermore, although they would not have been determinative in any event, there is no evidence before this court that the standard rates were ever disclosed prior to the appointment of the receiver. In addition, as stated, while the receiver and its counsel may be entitled to charge their standard rates, the ultimate assessment of what is fair and reasonable should dominate the analysis. I would therefore reject the appellant's argument that the motion judge erred in disallowing BLG's fees at its standard rates.

50 I also reject the appellant's argument that the motion judge erred in fact in concluding that counsel's fees were not fair and reasonable.

51 In this regard, the appellant makes numerous complaints.

52 The appellant submits that the motion judge made a palpable and overriding error of fact in finding that the debtor was cooperative. The appellant relies on the contents of the Receiver's two reports in support of this contention. The first report states that on the date of the initial appointment order, August 20, 2013, the Receiver became aware of an offer to purchase the farm dated August 13, 2013 and reviewed the offer with the debtor's counsel. The report goes on to state that the debtor was not opposed to the Receiver completing that transaction and seeking the court's approval of it. The second report does detail some issues with the debtor such as the movement of certain property and cows to two farms for storage, even though the Receiver had arranged for storage with the purchaser at no cost to the Receiver or the debtor, and the leasing by the debtor of 60 additional cows to increase milk production.

53 While there are certain aspects of the second report indicating that some negotiation with the debtor was required, based on the facts before him, it was open to the motion judge to conclude, overall, that the debtor cooperated. The Receiver and its counsel never said otherwise. Furthermore, this finding was made in the context of the debtor having agreed to continue to operate the farm pursuant to an August 30, 2013 agreement and in the face of little involvement of the Receiver and its counsel in the day-to-day management of the farm. Indeed, in the first report, the Receiver notes the debtor's willingness to carry on the farming operations on a day-to-day basis.

54 In my view, it was also appropriate for the motion judge to question why a senior Toronto partner had to attend court in London to address unopposed motions and, further, to find that the scope of the receivership was modest. Indeed, in his reasons at para. 40, the motion judge wrote that, in the proceedings before him, counsel for the Receiver acknowledged that the receivership was not complex. Based on the record, it was open to him to conclude that the receivership involved "the divestment of the farm and assets with some modest ancillary work."

55 As the motion judge noted at para. 20, the fixing of costs is not an unusual task for the court. Moreover, he was fully familiar with the receivership and was well-placed to assess the value generated by the legal services rendered. He properly considered the *Belyea* factors. While a different judge might have viewed the facts, including the debtor's conduct, differently, the motion judge made findings of fact based on the record and is owed deference. In my view, the appellant failed to establish any palpable and overriding error.

56 Nor did the motion judge focus his decision on what remained to the debtor after the creditors, the Receiver and Receiver's counsel had been paid, as alleged by the appellant. In para. 34 of his reasons, which is the focus of the appellant's complaint on this point, the motion judge correctly considered the size of the estate. He stated that he was persuaded that "the amount of counsel's efforts and work involved may be disproportionate to the size of the receivership." After the size of the estate became known, he concluded that the "standard" rates of counsel were too high relative to the size. As observed in *Belyea*, at para. 9, the "nature, extent and value" of an estate is a factor to be considered in assessing whether fees are fair and reasonable. As such, along with counsel's knowledge, experience and skill and the other *Belyea* factors, it is a relevant consideration.

57 In addition, the motion judge was not bound to accept the affidavit evidence filed by BLG or the two Receiver reports as determinative of the fairness and reasonableness of the fees requested. It is incumbent on the court to look to the record to assess the accounts of its court officer, but it is open to a motion judge to draw inferences from that record. This is just what the motion judge did.

58 Having said that, I do agree with the appellant that there were some unfair criticisms made of counsel. There was no basis to state that counsel had attempted to exaggerate or had conducted himself in a disingenuous manner. I also agree with the appellant that the Receiver and its counsel cannot be faulted for failing to bring the accounts forward for approval at an earlier stage. Costly court appearances should be discouraged not encouraged.

59 I also agree with the appellant that it was inappropriate for the motion judge to adopt a mathematical approach and simply apply the rates of London counsel. However, this was not fatal: the motion judge's decision was informed by the factors in *Belyea*. As he noted, he would have arrived at the same result in any event. He was informed by the correct principles, which led him to conclude that the fees lacked proportionality and reasonableness. This is buttressed by the motion judge's concluding comments, in para. 47 of his reasons, where he made it clear that the driving concern in his analysis was the "overall reasonableness of the fees" and that his decision should not be read as saying that Toronto rates have no application in matters in London or its surrounding areas.

60 While certain of the motion judge's comments were unjustified, I am not persuaded that a different result should ensue.

Disposition

61 For the foregoing reasons, I would dismiss the appeal. As agreed, the appellant shall pay the respondent's costs of the appeal, fixed in the amount of $5,500, together with disbursements and all applicable taxes.

***Alexandra Hoy A.C.J.O.*:**

I agree

***E.A. Cronk J.A.*:**

I agree

Appeal dismissed.