File No. CI 23-01-42328

THE KING'S BENCH
WINNIPEG CENTRE

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

BETWEEN:

PEOPLES TRUST COMPANY,

Applicant,

-and-

BOKHARI DEVELOPMENT INC.,

Respondent.

MOTION BRIEF
HEARING DATE: December 2, 2024 at 10:00 AM
BEFORE THE HONOURABLE JUSTICE J. CHARTIER

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BRIEF OF THE RECEIVER

INDEX

PART I DOCUMENTS AND AUTHORITIES TO BE RELIED UPON

Documents To Be Relied Upon:

1 Affidavit of Brian Jahoor sworn August 23, 2023 (the "**Jahoor Affidavit**");

2 Order (Appointing Receiver) pronounced August 29, 2023 (the **"Receivership Order"**);

3 First Report of the Receiver dated November 16, 2023 (the "**First Report**");

4 Notice of Motion dated November 27, 2024;

5 Second Report of the Receiver dated November 27, 2024 (the "**Second Report**"); and

6 Affidavit of Service of Brittany Chapdelaine, to be sworn ("**Affidavit of Service**")

Cases and Statutory Provisions and Authorities To Be Relied Upon:

TAB

1. *Court of King's Bench Rules*, M.R. 533/88 ("**KB Rules**"), ss. 59.06(2);
2. *The Mortgage Act*, CCSM c M200, section 15;
3. *Danier Leather Inc., Re* 2016 ONSC 1044;
4. *CCM Master Qualified Fund Ltd. v blutip Power Technologies Ltd.,* 2012 ONSC 1750;
5. *BCIMC Construction Fund Corporation et al. v. The Clover on Younge Inc.,* 2020 ONSC 3659;
6. *Rose-Isli Corp. v. Smith,* 2023 ONCA 548;

7. *Rose-Isli Corp v Frame-Tech Structures Ltd*., 2023 ONSC 832;

8. *Re Nishiyama* - Receivership Order pronounced February 14, 2019;

9. *Re Nishiyama* - Order pronounced July 19, 2019 at para 3;

10. *Re Nishiyama* – Notice of Application dated June 3, 2019;

11. *Skeena Resources Ltd. v. Mill*, 2024 BCCA 249;

12. *Sherman Estate v Donovan*, 2021 SCC 25;

13. Just Energy Group Inc. et al. v Morgan Stanley Capital Group Inc. et al, 2022 ONSC 6354;

14. *Target Canada Co (Re),* 2015 ONSC 7574;

15. *Triple-I Capital Partners Limited v 12411300 Canada Inc.*

PART II INTRODUCTION

1. On August 29, 2023, KPMG Inc. was appointed receiver and manager (the "**Receiver**") over the assets, undertakings and property of Bokhari Development Inc. ("**BDI**" or the "**Debtor**") comprising, located at, arising from, or in any way relating to the property commonly known as 1801 – 1825 Park Drive in Portage la Prairie, Manitoba (the "**Project Premises**"), including the development of the project (the "**Project**") located thereon and all proceeds thereof (collectively, the "**Property**") pursuant to the Receivership Order.

First Report at para 1

2. The Project involves the development of a housing complex consisting of 13 mid-rise buildings. Construction on the Project was partially completed, but had halted prior to the Receiver's appointment.

First Report at paras 9 and 22

3. As outlined in the Jahoor Affidavit, by the end of June 2023, the Debtor began to fail to advance funds to the general and sub-contractors working on the Project. As a result, the general and sub-contractors walked off of the Project and abandoned the Project Premises.

Jahoor Affidavit at paras 11(a) and 12

Second Report at paras 33 and 49

4. By Order dated November 20, 2023, NDC Construction Ltd. was engaged as contractor ("**Contractor**") to complete the construction works agreed upon between the Receiver and the Contractor ("**Package A**").

Second Report at para 4

5. The work under Package A is now complete and the Project is ready for sale. Accordingly, the Receiver has brought the within motion for, *inter alia,* the Court's approval and the Sale Process as hereinafter defined.

Second Report at para 20

PART III STATEMENT OF FACTS

1. The relevant facts in respect of the within motion are set out in detail in the Second Report, and are set out, to the extent necessary, in the Argument section below.

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

PART IV ISSUES

The primary issues to be determined by this Honourable Court are:

A. Should the broker selection process and proposed engagement of the Broker be approved?

B. Should the Sale Process in respect of the Project and its implementation in accordance with the Sale Procedures be approved and authorized?

C. Should this Court declare that the Debtor's, or any party through the Debtor, right to redeem the Project shall conclude upon the commencement of the Sale Process?

D. Should this Court amend paragraph 3 of the Receivership Order to empower and authorize the Receiver to take control over the Debtor's RC0001 and RT0001 tax accounts for the purpose of making the necessary filings for the filing periods both prior to and after the Receivership date?

E. Should this Court Amend paragraph 6 of the Receivership Order to add reference to amended paragraph 3(u) of the Receivership Order and should the directors of BDI be ordered to comply with amended paragraph 6?

F. Should this Court order the production of an accounting, together with supporting documentation and invoices, in respect of the Debtor's general account with the Debtor's counsel Knight Law and order the return of non-holdback funds, currently held in trust with Knight Law, to be paid to the Receiver forthwith?

G. Should this Court order and declare that all unresolved claims to materials or equipment that were onsite at the Project Premises as at the date of the Receiver's appointment and in the possession of the Receiver are "Property" under the Receivership Order?

H. Should this Court seal Confidential Appendices No. "1" and "2" until further Order of this Court?

I. Should this Court approve the Second Report of the Receiver and the activities and actions of the Receiver as described therein, including the approval of the Receiver's interim receipts and disbursements?

J. Should this Court approve the fees and disbursements of the Receiver for the period of October 30, 2023 to September 30, 2024, and the fees and disbursements of its legal counsel for the period of November 1, 2023 to October 26, 2024?

PART V ARGUMENT

A. Should the broker selection process and proposed engagement of the Broker be approved?

1. Pursuant to section 3 of the Receivership Order, the Receiver is authorized and empowered to, *inter alia*:

   a. Manage, operate, and carry on the business of the Debtor in relation to the Property, including the powers to enter into any agreements;

   b. Engage consultants, appraisers, agents, experts, auditors, accountants, managers, counsel and such other persons from time to time and on whatever basis, including on a temporary basis, to assist with the exercise of the Receiver's powers and duties; and

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

Receivership Order, para 3(c), (d) and (l)

2. When determining whether the engagement of professionals by a Court officer should be approved, Courts have considered the following factors, *inter alia*:

   a. Whether the court officer overseeing the proceedings believe the quantum and nature of remuneration are fair and reasonable;

   b. Whether the professional has industry experience and/or familiarity with the business of the debtor;

c. Whether a success fee is necessary to incentivize the financial advisor; and

d. Whether the professional has expertise that warrants its engagement.

***Danier Leather Inc., Re,* 2016 ONSC 1044 at paras 47 & 51 [Tab 3]**

3. The Receiver distributed a Request for Proposal to four listing brokers who in the Receiver's view likely to have sufficient market presence and reach, and expertise in the asset class in order to appropriately market the Project for sale and requested that they submit to the Receiver a proposal to market and sell the Project. Three listing brokers responded to the said Request and submitted proposals. Following a review of the said proposals and consultation with the Applicant (the "**Broker Selection Process**") which, in the Receiver's view, was a fair and reasonable process, the Receiver selected Colliers International Group Inc. ("**Colliers**" or the "**Broker**") as the Receiver's proposed exclusive listing agent based on its determination that, *inter alia*: (i) the economic terms of Colliers' proposal were within a narrow competitive range of the proposals received from other brokers; and (ii) in the Receiver's view, Colliers' proposed marketing strategy, strong presence and understanding of the local market, and its market reach with anticipated buyers together with its experience with Court-supervised sale processes make it the best suited to assist the Receiver in conducting a robust and transparent Sale Process that will maximize value.

Second Report, paras 23- 25 & 27

4. The Receiver respectfully submits that the Broker Selection Process and the engagement of the Broker pursuant to the Broker Engagement Letter should be approved based on the foregoing, and specifically because:

   a. The Broker Selection Process, which is detailed in paragraphs 23 – 25 of the Second Report, was a fair and reasonable process;

   b. The Receiver is of the view that the terms of the Broker Engagement Letter are reasonable, including the economic terms, which will properly incentivize the Broker to achieve the best outcome in the Sales Process, as well as any cooperating broker to particulate in the Sale Process;

   c. The Broker has expertise as a listing broker, including experience with Court-supervised sale processes, which warrants its engagement; and

   d. The Broker Engagement Letter provides the appropriate amount of control over the Sale Process to the Receiver.

Second Report at paras 23 – 25 & 27 - 30

B. Should the Sale Process in respect of the Project and its implementation in accordance with the Sale Procedures be approved and authorized?

5. As noted above, pursuant to section 3 of the Receivership Order, the Receiver is authorized and empowered to:

   a. Market and sell the Property including a completed or partially completed Project thereon, as a whole, in accordance with a formal sale process to be

approved by this Court, where the Receiver considers it necessary or desirable.

Receivership Order, paras 3(l) – (m)

6. The test for Court approval of a Sale Process is outlined in *CCM Master Qualified Fund Ltd. v blutip Power Technologies Ltd.:*

   a. The fairness, transparency and integrity of the proposed process;

   b. The commercial efficacy of the proposed process in light of the specific circumstances; 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.

***CCM Master Qualified Fund Ltd. v blutip Power Technologies Ltd.,* 2012 ONSC 1750 at para 6 [Tab 4]**

7. In the current circumstances, the Receiver respectfully submits that the proposed Sale Process meets the above-noted test as, *inter alia*:

   a. The Receiver is of the view that the proposed Sale Agreement is fair, transparent and has integrity;

   b. The Sale Process and the Sale Procedure, which are outlined in detail in paragraph 32 and Appendix “A” of the Second Report, have commercial efficacy in these circumstances. The proposed Sale Process was developed in collaboration with the Broker, who has expertise as a listing

broker and experience with Court-supervised sales process, and the Broker is supportive of the Sale Process; and

c. The Receiver is of the view that the Sale Process and Sale Procedures will optimize the changes of securing the best possible price for the Project, as it is designed to thoroughly test the market in a robust and transparent manner in order to obtain the best value for the Project.

Second Report at paras 23, 31, 32, 32(b) and (c) (on pg. 11) & 27

C. Should this Court declare the Debtor's, or any party through the Debtor, right to redeem the Project shall conclude upon the commencement of the Sale Process?

8. Pursuant to paragraph 10 of the Receivership Order, all rights and remedies against the Debtor in relation to the Property are suspended except with written consent of the Receiver or leave of this Court, precluding the Debtor's right to exercise any right of redemption without written consent of the Receiver or leave of this Court.

Receivership Order, para 10

9. Accordingly, paragraph 10 of the Receivership Order suspends the Debtor's right to redeem the Project Premises under section 15 of *The Mortgage Act*, CCSM c M200.

***The Mortgage Act*, CCSM c M200, section 15 [Tab 2]**

10. Courts have relied on the wording of receivership orders to inform the treatment of the right to redeem in the context of a receivership.

***See for example: BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc*., 2020 ONSC 3659, at paras 33 and 41 [Tab 5]**

Rose-Isli Corp. v. Smith 2023 ONCA 548, at para 7 [Tab 6]

11. In *BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc*. ("***Clover***") Justice Koehnen of the Ontario Superior Court assigned a partially completed condominium construction project (the "**Clover Project**") and its owner (the "**Debtor**") into receivership. Approximately three months later, the receiver of Clover Project made a motion seeking approval of a sale and investor solicitation process (the "**SISP**") in respect of the Clover Project. The SISP included a stalking horse bid a creditor by the Debtor (the "**Mortgagee**"), who had first and third ranking security over the Clover Project.

Clover at paras 1, 2, 5, 10, 14 [Tab 5]

12. The SISP was opposed by, among others, Concord Land Developments ("**Concord**"). Concord purchased all the shares of the Debtors, and then proposed a competing proposal to provide funding to the Debtor to allow it to exercise its right to redeem the Clover Project and then convert the receivership into CCAA proceedings.

Clover at paras 19 & 23 [Tab 5]

13. The Court considered the wording of paragraph 11 of the receivership order in respect of the Clover Project (which is almost identical to the language in paragraph 10 of the Receivership Order in the current matter), which provided:

> 11. THIS COURT ORDERS that **all rights and remedies** against the Debtors, or any of them, the Receiver, **or affecting the Property**, including, without limitation, licences and permits, **are hereby stayed and suspended except with the written consent of the Receiver or leave of this Court**. . . [*Emphasis added*]

Clover at para 33 [Tab 5]

14. The Justice Koehnen found that on its face, paragraph 11 of the receivership order precludes a debtors right to exercise redemption absent leave of the Court.

Clover at para 34 [Tab 5]

15. The Receiver argued that leave to redeem the Clover Project should not be granted, and quoted from *Ron Handelman Investments Ltd. v Mass Properties Inc.* in which the Ontario Superior Court of Justice found:

> In the face of these provisions, Ms. Singh does not have an automatic right to redeem. A mockery would be made of the practice and procedures relating to receivership sales if redemption were permitted at this stage of the proceedings. A Receiver would spend time and money securing an agreement of purchase and sale that was, as is common place, subject to Court approval, and for the benefit of all stakeholders, only for there to be a redemption by a mortgagee at the last minute. This could act as a potential chill on securing the best offer and be to the overall detriment of stakeholders.

Clover at para 35 [Tab 5]

16. Justice Koehnen found that in order to determine whether the Debtor should be granted leave to redeem the Clover Project, a balancing of the competing interests

between: i) preserving the integrity of the receivership process; and (ii) the an owner's right to redeem, which is a core principle of real estate, was required.

Clover at paras 37 & 40 [Tab 5]

See also *Rose-Isli Corp v Frame-Tech Structures Ltd*., 2023 ONSC 832 at para 83 [Tab 7]

17. Justice Koehnen considered the following:

a. Whether the secured creditor was structuring the receivership in a manner that would allow it to acquire the property at an attractive price;

b. The history of the proceedings; and

c. The prejudice to different stakeholders or receivership process / whether anything occurred since the receivership commenced that would make it unfair to any other stakeholder to permit the debtor to redeem.

Clover at paras 44, 47 & 54 [Tab 5]

18. Justice Koehnen found that in the circumstances, there was no evidence before him that it would be prejudicial to the receivership process to allow the Debtor to redeem the Clover Project, as the Debtor was not only prepared to redeem the Clover Project by paying out the Mortgagee in full, but also the entire receivership debt with interest, costs of the receivership and costs of the Mortgagee. Additionally, prior to the hearing, Concord had produced evidence that it had the ability to provide the funding required to redeem the Clover Project.

Clover at paras 19 – 20 & 54 [Tab 5]

19. Based on the balancing of the competing interests, Justice Koehnen granted a limited opportunity for the Debtor to exercise its right of redemption of the Clover Project by providing it **72 hours** to pay the Mortgagee debt, the receivership debt and interest on both. The Debtor would also be required to pay the costs of the applicants of the receivership and the costs of the receivership.

Clover at paras 58 & 77 [Tab 5]

20. The Receiver respectfully submits, that in the current circumstances, upon balancing the competing interests between preserving the integrity of the receivership versus the Debtor's right of redemption, the interests of justice weigh in favour of preserving the integrity of the receivership much more than was the case in Clover, as, *inter alia*:

a. The actions of the secured creditor: In the present circumstances the Receiver is not seeking the approval of a stalking horse bid at all, let alone one that contains a credit bid that would allow the secured creditor to acquire the Project at a favourable price.

b. The history of the proceedings:

i. In the Clover case, the receivership had been ongoing for only about three months. In the current matter, the proceedings have been ongoing for **one year and three months**, during which time there

has been no request of the Receiver to lift the stay to allow redemption or even a request to redeem.

ii. By letter dated November 12, 2024 to the directors of BDI, the Receiver's counsel put BDI on notice that order to maintain the integrity of the sales process and ensure a competitive process that the Receiver would be seeking relief from the Court that the Debtor's right to redemption (if any) conclude upon the commencement of the sale process. No response to the said letter was received.

iii. In addition, the litigation in Suit No. CI 23-01-42219 between the shareholders Darcy Shaver and Syed Bokhari is ongoing. The Statement of Claim, *inter alia,* puts at issue title to the shares in BDI and presumably who could exercise any right redemption.

c. Prejudice to other stakeholders and the receivership process:

i. In the Clover case, in addition to paying the indebtedness owing the Mortgagee in full and providing proof of funds available to do so, the Debtor was required to pay all of the costs of the applicants and the receivership proceedings. The Court found there was no evidence of prejudice to other stakeholders caused by the redemption. Whereas in the current circumstances, preserving the redemption of the Project by BDI would be highly prejudicial to other stakeholders as:

A. There have been significant costs incurred by the receivership estate towards, *inter alia*, improving the Project, including the completion of the Package A work, the cost of which was

$4,909,896.40. If BDI is granted leave to redeem the Project at this stage, it will be unjustly enriched at the expense of BDI's other creditors, including Peoples who has funded these receivership proceedings;

B. To date, BDI has not attempted to exercise a right to redeem the Project, nor has it provided proof that it has funds available to do so. It also has not made any proposal to pay the costs of or the borrowings under these receivership proceedings, which are significant;

C. If BDI's right to redeem is not declared to have concluded upon the commencement of the Sale Process, it may negatively impact the integrity and efficacy of the Sale Process. The Receiver is of the view that the market of potential interested parties may be dissuaded from participating in the Sale Process if there is any indication that BDI or parties related to BDI may regain control of the Project, other than by participating in the Sale Process. That parties will not want to invest time, resources and money in a process that may terminate. The Receiver's view is that BDI's ability to redeem the mortgage held by the Applicant, the sole mortgagee should be concluded in the interest of maximizing the value of the Project and providing full clarity to interested parties; and

D. If this Honourable Court does not declare that BDI's ability to redeem the Project shall conclude upon the commencement of the Sale Process, it may delay the Sale Process. It is urgent that the Sale Process is commenced and completed as quickly as possible.

Second Report, paras 16, 34, 36, 37, 38, 88(h), 90, 94, 95, Appendix C

Jahoor Affidavit para 21, Exh. M

21. Based on the foregoing, the Receiver respectfully submits that this Honourable Court should declare that the right of BDI or any party through the Debtor to redeem the Project shall conclude upon the commencement of the Sale Process.

D. Should this Court amend paragraph 3 of the Receivership Order to empower and authorize the Receiver to take control over the Debtor's RC0001 and RT0001 tax accounts for the purpose of making the necessary filings for the filing periods both prior to and after the Receivership date?

22. The KB Rules provide that an order that requires amendment in any particular on which the Court did not adjudicate can be amended on motion in the proceeding.

KB Rules, s. 59.06(2) [Tab 1]

23. Pursuant to the Receivership Order, the Receiver was appointed as receiver and manager of all the assets and undertakings of the Debtor in respect of the Project,

including the development of the Project and all proceeds thereof. The Receiver was not appointed over the Debtor in its entirety.

Receivership Order

24. To carry out its duties, the Receiver opened a separate GST account (RT0002) with Canada Revenue Agency ("**CRA**") under the Debtor's business number, solely with respect to the Project Premises.

Second Report at para 40

25. To date, the Receiver has filed GST returns for the Project under the RT0002 account for the period from August 29, 2023, to October 31, 2024 (and will continue to file GST returns on a monthly basis during the receivership proceedings).

Second Report at para 41

26. On or about August 19, 2024, CRA issued a GST assessment for the RT0002 GST returns filed, stating that refunds would be held due to non-compliance by the Debtor with respect to their tax accounts, as the Debtor has outstanding returns for their RC0001 account (FY2022 and FY2023 returns) and RT0001 account (since December 2022).

Second Report at para 42

27. Income tax and GST returns will also need to continue to be filed on a timely basis for the period following the Receivership date (August 29, 2023), to remain

compliant with the *Bankruptcy and Insolvency Act,* R.S.C. 1985, c. B-3, the *Income Tax Act*, and the *Excise Tax Act*, R.S.C., 1985, c. E-15.

Second Report, para 48

28. As the Receiver is not appointed over the Debtor in its entirety, it does not have control over the Debtor's RC0001 and RT0001 tax accounts and cannot make filings for periods prior to the Receivership date on the Debtor's behalf.

Second Report, Appendix D

29. Accordingly, on or about September 11, 2024, the Receiver sent the Debtor a letter requesting that the Debtor complete its outstanding RC0001 and RT0001 returns and provide the Receiver with the estimated completion date for these returns. However, to date, the Debtor has not filed the returns and has not provided the Receiver with an update.

Second Report, para 46, Appendix D

30. The Debtor's non compliance with the *Income Tax Act* and the *Excise Tax Act* is impeding access to funds. As at October 25, 2024, the total being withheld by CRA amounts to a sum of $302,847.00 resulting in increased borrowings. The Receiver seeks the power to file the returns in order to receive that withheld amount for the benefit of the Debtor's creditors.

Second Report, para 46

31. After amendment paragraph 3(u) of the Receivership Order would read:

(u) to take control over the Debtor's RC0001 and RT0001 tax accounts for the purpose of making the necessary filings for the filing periods both prior to and after the Receivership date.

E. Should this Court Amend paragraph 6 of the Receivership Order to add reference to amended paragraph 3(u) of the Receivership Order and should the directors of BDI be ordered to comply with amended paragraph 6?

32. Paragraph 6 of the Receivership Order provides, *inter alia*, all Persons (as defined therein) shall advise the Receiver of and provide access to the existence of any books, documents, securities, contracts, orders, corporate and accounting records, and any other papers, record and information of any kind, but is limited in scope to records related relation to the Property.

Receivership Order, para 6

33. The proposed amendment would expand the obligation under paragraph 6 to all records necessary for the Receiver to take control over the Debtor's RC0001 and RT0001 tax accounts and for the preparation and filing for the periods both prior to and after the Receivership. Amended paragraph 6 would read as follows:

> THIS COURT ORDERS that all Persons shall forthwith advise the Receiver of the existence of any books, documents, securities, contracts, orders, corporate and accounting records, and any other papers, records and information of any kind related to the business or affairs of the Debtor in relation to the Property and subparagraph 3(u), and any computer programs, computer tapes, computer disks, or other data storage media containing any such information (the foregoing, collectively, the "**Records**") in that Person's possession or control, and shall provide to the Receiver or permit the Receiver to make, retain and take away copies thereof and grant to the Receiver unfettered access to and use of accounting, computer, software and physical facilities relating

> thereto, provided however that nothing in this paragraph 5 or in paragraph 6 of this Order shall require the delivery of Records, or the granting of access to Records, which may not be disclosed or provided to the Receiver due to the privilege attaching to solicitor-client communication or due to statutory provisions prohibiting such disclosure.

34. This order is necessary because the Receiver does not have the information it requires in order to complete the outstanding RC0001 and RT0001 returns.

Second Report, para 34

35. It is the Receiver's view that this order is necessary to give substantive effect to the amended paragraph 3(u).

Second Report, para 48

F. Should this Court order the production of an accounting, together with supporting documentation and invoices, in respect of the Debtor's general account with the Debtor's counsel Knight Law and order the return of non-holdback funds, currently held in trust with Knight Law, to be paid to the Receiver forthwith?

36. On or around January 9, 2024, counsel for the Debtor provided certain financial records to the Receiver which, *inter alia*, indicated as of January 9, 2024, Knight Law was holding $43,207 in non-holdback funds for the Project.

Second Report, para 85

Records

37. Following receipt of the said records counsel for the Receiver requested further information from Knight Law about the following matters:

a. Certain payments, fees and contracts between the Debtor and various parties; and

b. The reasons for two holdback payments that were released in November 2021 and June 2022.

Second Report, para 86

38. Counsel for the Receiver has made repeated efforts to obtain this information; however, to date the Debtor has not provided the requested information.

Second Report, para 87

39. Pursuant to paragraphs 6 and 7 of the Receivership Order, the Debtor and their legal counsel are obligated to provide access to information and co-operate with the Receiver, giving unfettered access and delivering information of any kind related to the business or affairs of the Debtor in relation to the property.

Receivership Order, paras 6 - 7

Non-holdback Funds

40. On or about January 25, 2024, the Receiver sent to counsel for the Debtor a letter requesting the non-holdback funds be transferred to the designated Receiver's account and provided wire instructions. Counsel for the Receiver thereafter continued to request the non-holdback funds be transferred.

Second Report, para 86

41. To date, the non-holdback funds have not yet been received, despite repeated follow-ups by the Receiver's counsel.

Second Report, para 87

42. Pursuant to paragraph 4 of the Receivership Order, all Persons shall deliver all such Property to the Receiver upon the Receiver's request.

Receivership Order, para 4

G. Should this Court order and declare that all unresolved claims to materials or equipment that were onsite at the Project Premises as at the date of the Receiver's appointment and in the possession of the Receiver are "Property" under the Receivership Order?

43. In or about June 2023, the general and sub-contractors working on the Project walked off the Project, abandoned the Project Premises and did not take any Unresolved Property (as hereinafter defined) with them.

Jahoor Affidavit at paras 11(a) and 12

Second Report at paras 33 and 49

44. Following the pronouncement of the Receivership Order, the Receiver took an inventory of the materials and equipment (the "**Materials and Equipment**") left onsite at the Project Premises, and certain parties claimed (each, a "**Claimant**") ownership of the Materials and Equipment. The Receiver requested that Claimants submit proofs of claim proving ownership of said Materials and Equipment.

Second Report, para 50

45. Among such Claimants, the Receiver has spent significant time reviewing claims made by 6332189 Manitoba Ltd. ("**Gateway**") and SLK Contracting Ltd. ("**SLK**"),

and liaising with Gateway and SLK and other Claimants to seek further substantiation for their claims. Notwithstanding the Receiver's efforts, several claims for ownership remain unresolved (the "**Unresolved Property Claims**").

Second Report, para 51

46. Both Gateway (since January 11, 2024) and SLK (since February 6, 2024) have been advised by the Receiver as to what supporting documentation is required to prove their respective Unresolved Property Claims. Despite having ample time to provide the requires supporting documentation, they have failed and/or refused to produce it to the Receiver.

Second Report, paras 55 & 67, Exh. F

47. In respect to Gateway, the following reasons support the Receiver's position that the Unresolved Property Claims have not been substantiated:

    a. One Gateway claim included an item without supporting documentation that was later substantiated by another party.

    b. One Gateway claim submitted certain invoices for materials that the Receiver determined to be dated during the Loan Advances Period, in which the Applicant was advancing funds to Gateway and ought to have been used to pay for the said materials.

    c. The Gateway claim to Electrical and Fire Alarm Materials, which invoices were similarly dated during the Loan Advances Period.

d. Gateway's claims also included items that were either referenced with insufficient detail to be able to identify them, or not a part of the inventory of Materials and Equipment at the Property.

e. The Receiver sent correspondence to Gateway explaining the information gaps in respect to the Gateway's claim and seeking further documentation to substantiate any and all of these claims. Nearly 11 months have elapsed since said correspondence, and the Receiver has not received the requested documentation.

f. In any event, the Receiver is not in a position to release any further property to Gateway as the company's internal disputes as to ownership, the Receiver is unable to determine who the proper owner of Gateway as between Russell Sawatzky and Karampal Sandhu. As a result, the Receiver is not in a position to release further property for any resolved elements of Gateway's claims until either: (i) a joint direction is given by Mr. Sawatzky and Mr. Sandhu directing to whom any Materials and Equipment to which Gateway has proven its claim should be released; or (ii) the owner of Gateway is definitively determined by this Court.

Second Report, at paras 52 – 64, Appendix F

48. In respect of SLK, the following reasons support the Receiver's position that the Unresolved Property Claims have not been substantiated:

a. SLK submitted invoices for alarm system materials purportedly unpaid by Gateway and stored at the Project Premises.

b. Based on the invoices provided, SLK appears to have been paid.

c. On February 6, 2024, the Receiver requested that SLK provide supporting documentation to substantiate the claim. The Receiver has received no such documentation.

Second Report, at paras 65 – 67

49. If Gateway's and SLK's claims cannot be proven the Materials and Equipment subject to Unresolved Property Claims (the **"Unresolved Property"**) will need to be sold concurrent with or prior to any sale under the Sale Process as they can no longer be stored on the Project Premises. The Receiver therefore recommends the following process to deal with the Unresolved Property Claims:

a. Any Unresolved Property Claims must be proven within 30 days of the hearing of the within motion, being January 2, 2025 (the "**Claims Deadline**");

b. With respect to Gateway, in addition to proving its Claim, by the Claims Deadline it must also: (i) provide a joint direction executed by both Mr. Sawatzky and Mr. Sandhu specifying the individual to whom the Receiver is to release the Unresolved Property; or (ii) provide to the Receiver a certified copy of a Court Order which determines the ownership of Gateway between Mr. Sawatzky and Mr. Sandhu;

c. Should any Claimant dispute the Receiver's determination as to whether third party ownership of Unresolved Property has been proven, the Claimant

will have until January 10, 2025 to file a motion, together with supporting evidence in these proceedings (the **"Motion Deadline"**); and

d. If the Claimants failed to comply with the foregoing the Materials and Equipment shall be Property under the Receivership Order and the Receiver shall be free to deal with the Unresolved Property to maximize the value in the Sale Process.

Second Report, paras 68 – 60

Receivership Order, para 29

50. A similar Order to that sought by the Receiver in respect of the Unresolved Property Claims was granted by the British Columbia Supreme Court in *Re Nishiyama*, British Colombia Supreme Court File No. S-1813807 ("**Re Nishiyama**"). In that case, a receiver was appointed over the property in Canada of Masahiko Nishiyama and was thereafter authorized to market and sell a condominium (the "**Condo**") pursuant to the powers afforded to it under the receivership Order.

***Re Nishiyama* - Receivership Order pronounced February 14, 2019 [Tab 8]**

***Re Nishiyama* - Order pronounced July 19, 2019 at para 3 [Tab 9]**

51. However, prior to selling the Condo, the Receiver took an inventory of personal property in the Condo (the "**Unclaimed Personal Property**"). The Receiver believed that some of the Unclaimed Personal Property may belong to a third party.

The Unclaimed Personal Property needed to be removed from the Condo and dealt with prior to the sale of the Condo.

***Re Nishiyama* – Notice of Application dated June 3, 2019 at paras 48 & 51 [Tab 10]**

52. Accordingly, the Receiver sought and was granted an Order authorizing a process pursuant to which:

a. Any person could file a proof of claim in respect of Unclaimed Personal Property within 30 days of the pronouncement of said Order;

b. Subject to the Receiver's approval of such claims, those parties would have 30 days to recover the Unclaimed Personal Property;

c. In the event of a dispute over ownership between the claimants or the Receiver, the matter could be referred to the Court; and

d. In the event that there are no claims made, or no collection of the Unclaimed Personal Property within 30 days of a claim being accepted, then the Receiver could sell, dispose, or donate all remaining Unclaimed Personal Property in the Condo without recourse.

***Re Nishiyama* - Order pronounced July 19, 2019 at para 7 [Tab 9]**

53. In the current matter, the Receiver submits that the Order it is seeking in respect of the Unresolved Property Claims is just and reasonable because the Unresolved Property has either already been abandoned, or will be considered abandoned following the Claims Deadline.

54. The British Columbia Court of Appeal recently clarified the common law principles of abandonment in *Skeena Resources Ltd. v Mill,* quoting a leading Canadian case *Stewart v. Gustafson* [1999] 4 W.W.R. 695 (Sask. Q.B.) where the Honourable Justice Klebuc summarized the basic principles:

> "*Abandonment occurs when there is "a giving up, a total desertion, and absolute relinquishment" of private goods by the former owner. It may arise when the owner with specific intent of desertion and relinquishment casts away or leaves behind his property*."
> ***Skeena Resources Ltd. v. Mill*, 2024 BCCA 249, at para 69 [Tab 11]**

55. The Court in *Skeena Resources Ltd. v Mill* states that abandonment is a question of fact to be proven by the party relying on the principle of abandonment and suggests the following factors in the appropriate factual context support an inference of intention to abandon: (1) passage of time; (2) nature of the transaction; and (3) the owner's conduct.

***Skeena Resources Ltd. v. Mill*, 2024 BCCA 249, at para 69 [Tab 11]**

56. In these circumstances Gateway and SLK walked off their respective jobs on the Project, abandoned the Project Site, and they did not take the Unresolved Property with them. The Receiver has been in possession and control of the Unresolved Property since August 29, 2023 and no parties other than Gateway or SLK have filed claims for the Unresolved Property. Accordingly, if BDI is not the owner, the Receiver respectfully submits that in this scenario, the Unresolved Property has been abandoned by its owner(s).

57. Gateway, through both Mr. Sawatzky, Mr. Sandhu and/or their respective counsel, and SLK have all been served with the Receiver's within motion and the materials filed in support thereof. Accordingly, they should each be aware what is required to be done on or before the Claims Deadline in order for the Unresolved Property to be returned to them, and that if they fail to do so, their rights in respect of same will be relinquished, as the Receiver submits that they can be considered to have abandoned same.

Affidavit of Service

58. The Claims Deadline and Motion Deadline are necessary and fair to provide Claimants with a final opportunity to prove their claims, but also provides the Receiver with certainty in respect of Materials and Equipment and how they should be handled within the Sale Process. If the Order sought by the Receiver with respect to the Unresolved Property Claims is not granted, it may delay the Sale Process to the prejudice of the Applicant's stakeholders.

Second Report at paras 69, 88(e)

59. Based on the foregoing, the Receiver respectfully submits that If the Claimants failed to comply with the process set out above at paragraph 52 the Materials and Equipment shall be Property under the Receivership Order and the Receiver shall be free to deal with the Unresolved Property to maximize the value in the Sale Process.

H. Should this Court seal Confidential Appendices No. "1" and "2" until further Order of the Court?

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

> The court may order that a document filed in a civil proceeding is confidential, is to be sealed and is not part of the public record of the proceeding.
>
> **KB Act, C.C.S.M. c. C280, s. 77(1) [Tab 1]**

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

a. Court openness poses a serious risk to a competing interest of public importance;

b. The order sought is necessary to prevent this risk; and

c. The benefits of the order restricting Court openness outweighs its negative effects.

Sherman Estate v Donovan, 2021 SCC 25 ("Sherman Estate") at para 38 [Tab 12]

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

Sherman Estate at paras 41 and 43 [Tab 12]

63. In the context of insolvency proceedings, Courts have frequently found that confidential and commercially sensitive information should be sealed, as the public's interest in maintaining the confidentiality of commercially sensitive information creates an important commercial interest.

Just Energy Group Inc. et al. v Morgan Stanley Capital Group Inc. et al, 2022 ONSC 6354 at para 72 [Tab 13]

Broker Comparison Summary

64. Solicited brokers submitted proposals to the Receiver containing sensitive commercial and competitive information. A schedule summarizing and comparing the key terms of the listing proposals (including economic terms) is included in the Second Report redacted as Confidential Appendix "1" (the "**Broker Comparison Summary**").

Second Report, para 26, Confidential Appendix "1"

65. In the Receiver's view, the disclosure of the commercial terms and competitive information contained in the Broker Comparison Summary would have a detrimental impact on (i) each of the applicable Interested Brokers, as it would reveal confidential information, including pricing information, to their competitors, and (ii) efforts to engage a new broker in the future should the need arise.

Second Report, para 26, Confidential Appendix "1"

Broker Engagement Letter

66. As well, the Receiver has engaged the Broker pursuant to the Broker Engagement Letter. The Broker Engagement Letter similarly contains confidential commercial information, including information relating to pricing. The Broker Engagement Letter is attached in a redacted form to the Second Report, with only the commercially sensitive economic terms thereof redacted. .

Second Report, Appendix "B" & Confidential Appendix "2"

67. Based on the foregoing, the Receiver respectfully submits that the Sherman Test and this Honourable Court should seal Confidential Appendices No. "1" and "2".

I. Should this Court approve the Second Report of the Receiver and the activities and action of the Receiver as described therein, including the approval of the Receiver's interim receipts and disbursements?

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

***Target Canada Co (Re),* 2015 ONSC 7574, para 2 [Tab 14]**

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

considered by the Court as against the mandate, powers and authority of that officer."

***Triple-I Capital Partners Limited v 12411300 Canada Inc.,* 2023 ONSC 3400, at paras 65-66 [Tab 15]**

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

71. Based on the foregoing, the Receiver respectfully submits that actions of the Receiver to date in respect of its administration of these receivership proceedings be approved, and the Second Report including the statements of receipts and disbursements and the activities of the Receiver described therein be approved.

J. Should this Court approve the fees and disbursements of the Receiver for the period of October 30, 2023 to September 30, 2024, and the fees and disbursements of its legal counsel for the period of November 1, 2023 to October 26, 2024?

72. Paragraph 19 of the Receivership Order provides 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 unless otherwise ordered by the Court on the passing of accounts*".

Receivership Order, para 19

73. Paragraph 20 of the Amended and Restated Initial Order provides that " *...the Receiver and its legal counsel shall pass their accounts from time to time*."

Receivership Order, para 20

74. The fees and disbursements outlined on the invoices of the Receiver and its counsel are, in each case, reasonable, incurred for services duly rendered in response to their respective required and necessary duties, and at their respective standard rates and charges.

Second Report at para 96, Appendices "H" & "I"

75. The Receiver is seeking approval of its fees and disbursements from October 30, 2023 (the "**Receiver's Fee Period**") to September 30, 2024, and those of the Receiver's Counsel, from November 1, 2023 to October 26, 2024 (the "**Counsel Fee Period**") in connection with the performance of their duties in these Proceedings.

Second Report at para 94, Appendix "H"

76. Total fees and disbursements of the Receiver during the Receiver's Fee Period amount to $486,743 and $11,871, respectively, both excluding sales taxes (collectively, the "**Receiver's Accounts**"). These amounts represent professional fees and disbursements not yet approved by the Court.

Second Report, Appendix "H"

77. The total fees and disbursements of MLT Aikins during the Counsel Fee Period amount to $82,789 and $450, respectively, both excluding sales taxes (collectively, the "**Counsel's Accounts**"). The Receiver has reviewed MLT Aikin's accounts and has confirmed the fees and disbursements of MLT Aikins are reasonable in the Receiver's opinion.

Second Report at paras 94 & 36, Appendix "I"

78. Based on the forgoing, the Receiver respectfully submit that this Honourable Court should approve the fees and disbursements of the Receiver for the period of October 30, 2023 to September 30, 2024 and the fees and disbursements of its counsel for the period of November 1, 2023 to October 26, 2024.

PART V CONCLUSION

1. For the foregoing reasons, the Receiver respectfully submits that the relief sought by the Receiver in this motion should be granted by this Honourable Court.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 28th DAY OF NOVEMBER, 2024.

MLT AIKINS LLP

Per: Anjali Sandhu

J.J. Burnell / Anjali Sandhu
Counsel to the Court-appointed Receiver, KPMG Inc.

THE COURT OF KING'S BENCH ACT
(C.C.S.M. c. C280)

Court of King's Bench Rules

LOI SUR LA COUR DU BANC DU ROI
(c. C280 de la C.P.L.M.)

Règles de la Cour du Banc du Roi

Regulation 553/88
Registered December 13, 1988

Règlement 553/88
Date d'enregistrement : le 13 décembre 1988

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TABLE DES MATIÈRES

(b) requires amendment in any particular on which the court did not adjudicate;

may be amended on a motion in the proceeding.

Setting aside or varying
59.06(2) A party who seeks to,

(a) have an order set aside or varied on the ground of fraud or of facts arising or discovered after it was made;

(b) suspend the operation of an order;

(c) carry an order into operation; or

(d) obtain relief other than that originally awarded;

may make a motion in the proceeding for the relief claimed.

b) doit être modifiée relativement à un point sur lequel le tribunal n'a pas statué,

peut être modifiée par voie de motion dans l'instance.

Annulation ou modification d'une ordonnance
59.06(2) Une partie peut demander, par voie de motion dans l'instance, selon le cas :

a) l'annulation ou la modification d'une ordonnance en raison d'une fraude ou de faits survenus ou découverts après qu'elle a été rendue;

b) un sursis d'exécution d'une ordonnance;

c) l'exécution d'une ordonnance;

d) une mesure de redressement différente de celle qui a déjà été accordée.

SATISFACTION OF ORDER

Notice of satisfaction
59.07(1) A party may acknowledge satisfaction of an order by a notice of satisfaction (Form 59C) signed by the party, or the party's lawyer, before a witness, and the document may be filed in the court office where the order was filed.

Endorsement on order
59.07(2) Upon filing of a notice of satisfaction under subrule (1), the registrar shall note on the order that notice of satisfaction has been filed.

Order declaring earlier order satisfied
59.07(3) If a notice of satisfaction with respect to an order ("earlier order") has not been filed, a judge may, on motion, grant an order declaring that the earlier order has been satisfied where the party against whom the earlier order was made establishes that

(a) the earlier order has been satisfied; and

(b) the party in whose favour the earlier order was granted

EXÉCUTION DE L'ORDONNANCE

Avis d'exécution
59.07(1) Une partie peut reconnaître l'exécution d'une ordonnance au moyen d'un avis d'exécution (formule 59C) signé devant un témoin par la partie ou par son avocat. Le document peut être déposé au greffe où l'ordonnance a été déposée.

Inscription sur l'ordonnance
59.07(2) Suite au dépôt de l'avis d'exécution visé au paragraphe (1), le registraire inscrit sur l'ordonnance que l'avis d'exécution a été déposé.

Ordonnance déclaratoire — exécution d'une ordonnance antérieure
59.07(3) Si un avis d'exécution d'une ordonnance (« ordonnance antérieure ») n'a pas été déposé, un juge peut, sur motion, accorder une ordonnance déclarant que l'ordonnance antérieure a été exécutée lorsque la partie contre laquelle cette ordonnance a été rendue établit :

a) d'une part, qu'elle a été exécutée;

M A N I T O B A

THE MORTGAGE ACT

C.C.S.M. c. M200

LOI SUR LES HYPOTHÈQUES

c. M200 de la *C.P.L.M.*

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

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

"owner" means the registered owner of land or a purchaser of land or the executors, administrators, or assigns, of either; (« propriétaire »)

"purchaser" means any purchaser under, or assignee of, an agreement of sale of land or the executors, administrators, or assigns, of either; (« acheteur »)

"seed grain" means seed of any kind or kinds; (« semences »)

"vendor" means a vendor of land or his executors, administrators, or assigns. (« vendeur »)

S.M. 1992, c. 46, s. 62; S.M. 1993, c. 14, s. 86.

« créancier hypothécaire » Créancier hypothécaire d'un bien-fonds, y compris ses exécuteurs testamentaires, administrateurs, successeurs et ayants droit. ("mortagee")

« propriétaire » Propriétaire inscrit, acheteur d'un bien-fonds, ou leurs exécuteurs testamentaires, administrateurs ou ayants droit. ("owner")

« semences » Semences de toutes espèces. ("seed grain")

« vendeur » Vendeur d'un bien-fonds, ou ses exécuteurs testamentaires, administrateurs ou ayants droit. ("vendor")

L.M. 1992, c. 46, art. 62; L.M. 1993, c. 14, art. 86.

Remedying of default by mortgagor

14 Where default has occurred in making any payment due under any mortgage or in the observance of any covenant contained therein and, under the terms of the mortgage, by reason of the default, the whole principal and interest secured thereby has become due and payable, the mortgagor may, notwithstanding any provisions to the contrary, and at any time prior to sale or foreclosure under a mortgage, perform the covenant or pay such arrears as may be in default under the mortgage, together with costs, and he is thereupon relieved from the consequences of non-payment of so much of the mortgage money as may not then have become payable by reason of lapse of time.

Right to pay off mortgage

15 Where default has occurred in making any payment of original principal due under any mortgage and by reason of the default the mortgagee has taken proceedings by sale or foreclosure, the mortgagor may, notwithstanding any law or statute or any provision in the mortgage to the contrary, at any time prior to sale or foreclosure pay to the mortgagee the full amount of moneys unpaid under and secured by the mortgage as at the date of such payment, together with costs of proceedings to that date, and that payment shall be full payment of the mortgage; and the mortgagee shall, on receiving payment of the conveyancing fee therefor and after the allowance of a reasonable time therefor, give a discharge thereof, or if required by the mortgagor or

Rectification du défaut du débiteur hypothécaire

14 Lorsqu'il y a eu défaut de faire un paiement prévu par une hypothèque ou d'observer un engagement stipulé dans celle-ci et que, selon les modalités de l'hypothèque, la totalité du principal et de l'intérêt ainsi garantie devient due et exigible en raison du défaut, le débiteur hypothécaire peut, malgré les dispositions à l'effet contraire et à tout moment avant la vente ou la forclusion, remplir l'engagement ou payer les arriérés qui peuvent être en défaut aux termes de l'hypothèque ainsi que les frais. Dès lors, le débiteur hypothécaire est libéré des conséquences du défaut de paiement jusqu'à concurrence de la somme hypothéquée qui n'est pas devenue exigible en raison de l'écoulement du temps.

Acquittement de l'hypothèque

15 Lorsqu'il y a eu défaut de faire un paiement du principal initial dû conformément à une hypothèque et qu'en raison du défaut, le créancier hypothécaire a entamé une instance pour vente ou en forclusion, le débiteur hypothécaire peut, malgré toute loi ou règle de droit à l'effet contraire de l'hypothèque et à tout moment avant la vente ou la forclusion, payer au créancier hypothécaire le plein montant des sommes jusque-là impayées conformément à l'hypothèque et garanties par celle-ci, ainsi que les frais déjà engagés au titre de l'instance. Ce paiement purge l'hypothèque. Sur réception des droits de transfert applicables et après avoir disposé d'un délai raisonnable pour ce faire, le créancier hypothécaire donne mainlevée de

subsequent purchaser, an assignment or transfer of the mortgage to any third person as the mortgagor or subsequent purchaser directs.

Effect of mortgagee, etc., becoming owner

16 Where the mortgagee or the encumbrancer under a mortgage or encumbrance of land or an interest therein becomes the owner of that land or that interest therein by virtue of a final order of foreclosure made by any court in the province, or under *The Real Property Act*, or otherwise, the rights of the mortgagee or the encumbrancer, as the case may be, and of any person claiming under him, in any covenant under the mortgage or encumbrance, or under any bond or collateral security or obligation for the payment of the mortgage debt or any debt under the encumbrance, are extinguished, and any judgment obtained for enforcement of the covenant is also extinguished.

l'hypothèque ou, à la demande du débiteur hypothécaire ou de l'acheteur postérieur, cède ou transfère l'hypothèque à un tiers que désigne le débiteur hypothécaire ou l'acheteur postérieur.

Créancier hypothécaire devenant propriétaire

16 Les droits du créancier hypothécaire ou du bénéficiaire de charge, selon le cas, et de ses ayants droit, que prévoit un engagement stipulé dans l'hypothèque ou la charge, ou un cautionnement, une garantie subsidiaire ou un engagement de payer la dette hypothécaire ou une dette découlant de la charge s'éteignent lorsque le créancier hypothécaire ou le bénéficiaire de la charge aux termes d'une hypothèque ou d'une charge grevant un bien-fonds, ou d'un intérêt dans celui-ci, devient le propriétaire du bien-fonds ou de l'intérêt en vertu d'une ordonnance définitive de forclusion rendue par un tribunal de la province en vertu de la *Loi sur les biens réels*, ou d'une autre manière. S'éteignent également les jugements obtenus pour exécuter l'engagement.

PART II

PARTIE II

Mortgages, how affected by conveyances subsequently registered

17 To remove doubts, every mortgage duly registered against the lands comprised therein is, and, subject to section 31 of *The Builders' Liens Act*, shall be deemed to be, as against the mortgagor, his heirs, executors, administrators, assigns and every other person claiming by, through, or under him, a security upon the lands to the extent of the moneys or money's worth actually advanced or supplied to the mortgagor under the mortgage (not exceeding the amount for which the mortgage is expressed to be a security), notwithstanding that the moneys or money's worth, or some part thereof, were advanced or supplied after the registration of any certificate of judgment or of any conveyance, mortgage, or other instrument, affecting the mortgaged lands, executed by the mortgagor or his heirs, executors, or administrators, and registered subsequently to the first-mentioned mortgage, unless before advancing or supplying the moneys or money's worth the mortgagee in the first-mentioned mortgage had actual notice of the registration of the certificate of

Effets des transferts enregistrés postérieurement

17 Pour dissiper les doutes et sous réserve de l'article 31 de la *Loi sur le privilège du constructeur*, chaque hypothèque de bien-fonds dûment enregistrée grève le bien-fonds d'une sûreté jusqu'à concurrence des sommes ou des valeurs en argent effectivement avancées ou fournies au débiteur hypothécaire aux termes de l'hypothèque (n'excédant pas le montant pour lequel il est stipulé que l'hypothèque constitue une sûreté). Cette sûreté est opposable au débiteur hypothécaire, à ses héritiers, exécuteurs testamentaires, administrateurs et ayants droit. Elle est valable bien que la totalité ou une partie des sommes ou des valeurs en argent ait été avancée ou fournie après l'enregistrement d'un certificat de jugement ou d'un transfert, d'une hypothèque ou autre instrument visant le bien-fonds hypothéqué, signé par le débiteur hypothécaire ou par ses héritiers, exécuteurs testamentaires ou administrateurs et enregistré postérieurement à l'hypothèque initiale, à moins qu'avant d'avancer ou de fournir les sommes ou les valeurs en argent, le créancier hypothécaire de l'hypothèque initiale n'ait eu

2016 ONSC 1044
Ontario Superior Court of Justice

Danier Leather Inc., Re

2016 CarswellOnt 2414, 2016 ONSC 1044, 262 A.C.W.S. (3d) 573, 33 C.B.R. (6th) 221

In the Matter of Intention to Make a Proposal of Danier Leather Inc.

Penny J.

Heard: February 8, 2016
Judgment: February 10, 2016
Docket: 31-CL-2084381

Counsel: Jay Swartz, Natalie Renner, for Danier
Sean Zweig, for Proposal Trustee
Harvey Chaiton, for Directors and Officers
Jeffrey Levine, for GA Retail Canada
David Bish, for Cadillac Fairview
Linda Galessiere, for Morguard Investment, 20 ULC Management, SmartReit and Ivanhoe Cambridge
Clifton Prophet, for CIBC

Subject: Civil Practice and Procedure; Estates and Trusts; Insolvency

MOTION to, inter alia, approve stalking horse agreement and SISP.

***Penny J.*:**

The Motion

1 On February 8, 2016 I granted an order approving a SISP in respect of Danier Leather Inc., with reasons to follow. These are those reasons.

2 Danier filed a Notice of Intention to make a proposal under the BIA on February 4, 2016. This is a motion to:

(a) approve a stalking horse agreement and SISP;

(b) approve the payment of a break fee, expense reimbursement and signage costs obligations in connection with the stalking horse agreement;

(c) authorize Danier to perform its obligations under engagement letters with its financial advisors and a charge to secure success fees;

(d) approve an Administration Charge;

(e) approve a D&O Charge;

(f) approve a KERP and KERP Charge; and

(g) grant a sealing order in respect of the KERP and a stalking horse offer summary.

Background

3 Danier is an integrated designer, manufacturer and retailer of leather and suede apparel and accessories. Danier primarily operates its retail business from 84 stores located throughout Canada. It does not own any real property. Danier employs approximately 1,293 employees. There is no union or pension plan.

4 Danier has suffered declining revenues and profitability over the last two years resulting primarily from problems implementing its strategic plan. The accelerated pace of change in both personnel and systems resulting from the strategic plan contributed to fashion and inventory miscues which have been further exacerbated by unusual extremes in the weather and increased competition from U.S. and international retailers in the Canadian retail space and the depreciation of the Canadian dollar relative to the American dollar.

5 In late 2014, Danier implemented a series of operational and cost reduction initiatives in an attempt to return Danier to profitability. These initiatives included reductions to headcount, marketing costs, procurement costs and capital expenditures, renegotiating supply terms, rationalizing Danier's operations, improving branding, growing online sales and improving price management and inventory mark downs. In addition, Danier engaged a financial advisor and formed a special committee comprised of independent members of its board of directors to explore strategic alternatives to improve Danier's financial circumstances, including soliciting an acquisition transaction for Danier.

6 As part of its mandate, the financial advisor conducted a seven month marketing process to solicit offers from interested parties to acquire Danier. The financial advisor contacted approximately 189 parties and provided 33 parties with a confidential information memorandum describing Danier and its business. Over the course of this process, the financial advisor had meaningful conversations with several interested parties but did not receive any formal offers to provide capital and/or to acquire the shares of Danier. One of the principal reasons that this process was unsuccessful is that it focused on soliciting an acquisition transaction, which ultimately proved unappealing to interested parties as Danier's risk profile was too great. An acquisition transaction did not afford prospective purchasers the ability to restructure Danier's affairs without incurring significant costs.

7 Despite Danier's efforts to restructure its financial affairs and turn around its operations, Danier has experienced significant net losses in each of its most recently completed fiscal years and in each of the two most recently completed fiscal quarters in the 2016 fiscal year. Danier currently has approximately $9.6 million in cash on hand but is projected to be cash flow negative every month until at least September 2016. Danier anticipated that it would need to borrow under its loan facility with CIBC by July 2016. CIBC has served a notice of default and indicate no funds will be advanced under its loan facility. In addition, for the 12 months ending December 31, 2015, 30 of Danier's 84 store locations were unprofitable. If Danier elects to close those store locations, it will be required to terminate the corresponding leases and will face substantial landlord claims which it will not be able to satisfy in the normal course.

8 Danier would not have had the financial resources to implement a restructuring of its affairs if it had delayed a filing under the BIA until it had entirely used up its cash resources. Accordingly, on February 4, 2016, Danier commenced these proceedings for the purpose of entering into a stalking horse agreement and implementing the second phase of the SISP.

The Stalking Horse Agreement

9 The SISP is comprised of two phases. In the first phase, Danier engaged the services of its financial advisor to find a stalking horse bidder. The financial advisor corresponded with 22 parties, 19 of whom had participated in the 2015 solicitation process and were therefore familiar with Danier. In response, Danier received three offers and, with the assistance of the financial advisor and the Proposal Trustee, selected GA Retail Canada or an affiliate (the "Agent") as the successful bid. The Agent is an affiliate of Great American Group, which has extensive experience in conducting retail store liquidations.

10 On February 4, 2016, Danier and the Agent entered into the stalking horse agreement, subject to Court approval. Pursuant to the stalking horse agreement, the Agent will serve as the stalking horse bid in the SISP and the exclusive liquidator for the purpose of disposing of Danier's inventory. The Agent will dispose of the merchandise by conducting a "store closing" or similar sale at the stores.

11 The stalking horse agreement provides that Danier will receive a net minimum amount equal to 94.6% of the aggregate value of the merchandise, provided that the value of the merchandise is no less than $22 million and no more than $25 million. After payment of this amount and the expenses of the sale, the Agent is entitled to retain a 5% commission. Any additional proceeds of the sale after payment of the commission are divided equally between the Agent and Danier.

12 The stalking horse agreement also provides that the Agent is entitled to (a) a break fee in the amount of $250,000; (b) an expense reimbursement for its reasonable and documented out-of-pocket expenses in an amount not to exceed $100,000; and (c) the reasonable costs, fees and expenses actually incurred and paid by the Agent in acquiring signage or other advertising and promotional material in connection with the sale in an amount not to exceed $175,000, each payable if another bid is selected and the transaction contemplated by the other bid is completed. Collectively, the break fee, the maximum amount payable under the expense reimbursement and the signage costs obligations represent approximately 2.5% of the minimum consideration payable under the stalking horse agreement. Another liquidator submitting a successful bid in the course of the SISP will be required to purchaser the signage from the Agent at its cost.

13 The stalking horse agreement is structured to allow Danier to proceed with the second phase of the SISP and that process is designed to test the market to ascertain whether a higher or better offer can be obtained from other parties. While the stalking horse agreement contemplates liquidating Danier's inventory, it also establishes a floor price that is intended to encourage bidders to participate in the SISP who may be interested in going concern acquisitions as well.

The SISP

14 Danier, in consultation with the Proposal Trustee and financial advisor, have established the procedures which are to be followed in conducting the second phase of the SISP.

15 Under the SISP, interested parties may make a binding proposal to acquire the business or all or any part of Danier's assets, to make an investment in Danier or to liquidate Danier's inventory and furniture, fixtures and equipment.

16 Danier, in consultation with the Proposal Trustee and its financial advisors, will evaluate the bids and may (a) accept, subject to Court approval, one or more bids, (b) conditionally accept, subject to Court approval, one or more backup bids (conditional upon the failure of the transactions contemplated by the successful bid to close, or (c) pursue an auction in accordance with the procedures set out in the SISP.

17 The key dates of the second phase of the SISP are as follows:

(1) The second phase of the SISP will commence upon approval by the Court

(2) Bid deadline: February 22, 2016

(3) Advising interested parties whether bids constitute "qualified bids": No later than two business days after bid deadline

(4) Determining successful bid and back-up bid (if there is no auction): No later than five business days after bid deadline

(5) Advising qualified bidders of auction date and location (if applicable): No later than five business days after bid deadline

(6) Auction (if applicable): No later than seven business days after bid deadline

(7) Bringing motion for approval: Within five business days following determination by Danier of the successful bid (at auction or otherwise)

(8) Back-Up bid expiration date: No later than 15 business days after the bid deadline, unless otherwise agreed

(9) Outside date: No later than 15 business days after the bid deadline

18 The timelines in the SISP have been designed with regard to the seasonal nature of the business and the fact that inventory values will depreciate significantly as the spring season approaches. The timelines also ensure that any purchaser of the business as a going concern has the opportunity to make business decisions well in advance of Danier's busiest season, being fall/winter. These timelines are necessary to generate maximum value for Danier's stakeholders and are sufficient to permit prospective bidders to conduct their due diligence, particularly in light of the fact that is expected that many of the parties who will participate in the SISP also participated in the 2015 solicitation process and were given access to a data room containing non-public information about Danier at that time.

19 Danier does not believe that there is a better viable alternative to the proposed SISP and stalking horse agreement.

20 The use of a sale process that includes a stalking horse agreement maximizes value of a business for the benefit of its stakeholders and enhances the fairness of the sale process. Stalking horse agreements are commonly used in insolvency proceedings to facilitate sales of businesses and assets and are intended to establish a baseline price and transactional structure for any superior bids from interested parties, *CCM Master Qualified Fund Ltd. v. blutip Power Technologies Ltd.*, 2012 ONSC 1750 (Ont. S.C.J. [Commercial List]) at para. 7.

21 The Court's power to approve a sale of assets in a proposal proceeding is codified in section 65.13 of the BIA, which sets out a list of non-exhaustive factors for the Court to consider in determining whether to approve a sale of the debtor's assets outside the ordinary course of business. This Court has considered section 65.13 of the BIA when approving a stalking horse sale process under the BIA, *Colossus Minerals Inc., Re*, 2014 CarswellOnt 1517 (Ont. S.C.J.) at paras. 22-26.

22 A distinction has been drawn, however, between the approval of a sale process and the approval of an actual sale. Section 65.13 is engaged when the Court determines whether to approve a sale transaction arising as a result of a sale process, it does not necessarily address the factors a court should consider when deciding whether to approve the sale process itself.

23 In *Brainhunter Inc., Re*, the Court considered the criteria to be applied on a motion to approve a stalking horse sale process in a restructuring proceeding under the *Companies' Creditors Arrangement Act*. Citing his decision in *Nortel*, Justice Morawetz (as he then was) confirmed that the following four factors should be considered by the Court in the exercise of its discretion to determine if the proposed sale process should be approved:

(1) Is a sale transaction warranted at this time?

(2) Will the sale benefit the whole "economic community"?

(3) Do any of the debtors' creditors have a bona fide reason to object to a sale of the business?

(4) Is there a better viable alternative?

Brainhunter Inc., Re, 2009 CarswellOnt 8207 (Ont. S.C.J. [Commercial List]) at paras. 13-17); *Nortel Networks Corp., Re*, 2009 CarswellOnt 4467 (Ont. S.C.J. [Commercial List]) at para. 49.

24 While *Brainhunter* and *Nortel* both dealt with a sale process under the CCAA, the Court has recognized that the CCAA is an analogous restructuring statute to the proposal provisions of the BIA, *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60 (S.C.C.) at para 24; *Indalex Ltd., Re*, [2013] 1 S.C.R. 271 (S.C.C.) at paras. 50-51.

25 Furthermore, in *Mustang*, this Court applied the *Nortel* criteria on a motion to approve a sale process backstopped by a stalking horse bid in a proposal proceeding under the BIA, *Mustang GP Ltd., Re*, 2015 CarswellOnt 16398 (Ont. S.C.J.) at paras. 37-38.

26 These proceedings are premised on the implementation of a sale process using the stalking horse agreement as the minimum bid intended to maximize value and act as a baseline for offers received in the SISP. In the present case, Danier is seeking approval of the stalking horse agreement for purposes of conducting the SISP only.

27 The SISP is warranted at this time for a number of reasons.

28 First, Danier has made reasonable efforts in search of alternate financing or an acquisition transaction and has attempted to restructure its operations and financial affairs since 2014, all of which has been unsuccessful. At this juncture, Danier has exhausted all of the remedies available to it outside of a Court-supervised sale process. The SISP will result in the most viable alternative for Danier, whether it be a sale of assets or the business (through an auction or otherwise) or an investment in Danier.

29 Second, Danier projects that it will be cash flow negative for the next six months and it is clear that Danier will be unable to borrow under the CIBC loan facility to finance its operations (CIBC gave notice of default upon Danier's filing of the NOI). If the SISP is not implemented in the immediate future, Danier's revenues will continue to decline, it will incur significant costs and the value of the business will erode, thereby decreasing recoveries for Danier's stakeholders.

30 Third, the market for Danier's assets as a going concern will be significantly reduced if the SISP is not implemented at this time because the business is seasonal in nature. Any purchaser of the business as a going concern will need to make decisions about the raw materials it wishes to acquire and the product lines it wishes to carry by March 2016 in order to be sufficiently prepared for the fall/winter season, which has historically been Danier's busiest.

31 Danier and the Proposal Trustee concur that the SISP and the stalking horse agreement will benefit the whole of the economic community. In particular:

(a) the stalking horse agreement will establish the floor price for Danier's inventory, thereby maximizing recoveries;

(b) the SISP will subject the assets to a public marketing process and permit higher and better offers to replace the Stalking horse agreement; and

(c) should the SISP result in a sale transaction for all or substantially all of Danier's assets, this may result in the continuation of employment, the assumption of lease and other obligations and the sale of raw materials and inventory owned by Danier.

32 There have been no expressed creditor concerns with the SISP as such. The SISP is an open and transparent process. Absent the stalking horse agreement, the SISP could potentially result in substantially less consideration for Danier's business and/or assets.

33 Given the indications of value obtained through the 2015 solicitation process, the stalking horse agreement represents the highest and best value to be obtained for Danier's assets at this time, subject to a higher offer being identified through the SISP.

34 Section 65.13 of the BIA is also indirectly relevant to approval of the SISP. In deciding whether to grant authorization for a sale, the court is to consider, among other things:

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

(b) whether the trustee approved the process leading to the proposed sale or disposition;

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

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

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

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

35 In the present case, in addition to satisfying the *Nortel* criteria, the SISP will result in a transaction that is at least capable of satisfying the 65.13 criteria. I say this for the following reasons.

36 The SISP is reasonable in the circumstances as it is designed to be flexible and allows parties to submit an offer for some or all of Danier's assets, make an investment in Danier or acquire the business as a going concern. This is all with the goal of improving upon the terms of the stalking horse agreement. The SISP also gives Danier and the Proposal Trustee the right to extend or amend the SISP to better promote a robust sale process.

37 The Proposal Trustee and the financial advisor support the SISP and view it as reasonable and appropriate in the circumstances.

38 The duration of the SISP is reasonable and appropriate in the circumstances having regard to Danier's financial situation, the seasonal nature of its business and the fact that many potentially interested parties are familiar with Danier and its business given their participation in the 2015 solicitation process and/or the stalking horse process.

39 A sale process which allows Danier to be sold as a going concern would likely be more beneficial than a sale under a bankruptcy, which does not allow for the going concern option.

40 Finally, the consideration to be received for the assets under the stalking horse agreement appears at this point, to be *prima facie* fair and reasonable and represents a fair and reasonable benchmark for all other bids in the SISP.

The Break Fee

41 Break fees and expense and costs reimbursements in favour of a stalking horse bidder are frequently approved in insolvency proceedings. Break fees do not merely reflect the cost to the purchaser of putting together the stalking horse bid. A break fee may be the price of stability, and thus some premium over simply providing for out of pocket expenses may be expected, Daniel R. Dowdall & Jane O. Dietrich, "Do Stalking Horses Have a Place in Intra-Canadian Insolvencies", 2005 ANNREVINSOLV 1 at 4.

42 Break fees in the range of 3% and expense reimbursements in the range of 2% have recently been approved by this Court, *Nortel Networks Corp., Re*, [2009] O.J. No. 4293 (Ont. S.C.J. [Commercial List]) at paras. 12 and 26; *W.C. Wood Corp., Re*, [2009] O.J. No. 4808 (Ont. S.C.J. [Commercial List]) at para. 3, where a 4% break fee was approved.

43 The break fee, the expense reimbursement and the signage costs obligations in the stalking horse agreement fall within the range of reasonableness. Collectively, these charges represent approximately 2.5% of the minimum consideration payable under the stalking horse agreement. In addition, if a liquidation proposal (other than the stalking horse agreement) is the successful bid, Danier is not required to pay the signage costs obligations to the Agent. Instead, the successful bidder will be required to buy the signage and advertising material from the Agent at cost.

44 In the exercise of its business judgment, the Board unanimously approved the break fee, the expense reimbursement and the signage costs obligations. The Proposal Trustee and the financial advisor have both reviewed the break fee, the expense reimbursement and the signage costs obligations and concluded that each is appropriate and reasonable in the circumstances. In reaching this conclusion, the Proposal Trustee noted, among other things, that:

(i) the maximum amount of the break fee, expense reimbursement and signage costs obligations represent, in the aggregate 2.5% of the imputed value of the consideration under the stalking horse agreement, which is within the normal range for transactions of this nature;

(ii) each stalking horse bidder required a break fee and expense reimbursement as part of their proposal in the stalking horse process;

(iii) without these protections, a party would have little incentive to act as the stalking horse bidder; and

(iv) the quantum of the break fee, expense reimbursement and signage costs obligations are unlikely to discourage a third party from submitting an offer in the SISP.

45 I find the break fee to be reasonable and appropriate in the circumstances.

Financial Advisor Success Fee and Charge

46 Danier is seeking a charge in the amount of US$500,000 to cover its principal financial advisor's (Concensus) maximum success fees payable under its engagement letter. The Consensus Charge would rank behind the existing security, *pari passu* with the Administration Charge and ahead of the D&O Charge and KERP Charge.

47 Orders approving agreements with financial advisors have frequently been made in insolvency proceedings, including CCAA proceedings and proposal proceedings under the BIA. In determining whether to approve such agreements and the fees payable thereunder, courts have considered the following factors, among others:

> (a) whether the debtor and the court officer overseeing the proceedings believe that the quantum and nature of the remuneration are fair and reasonable;
>
> (b) whether the financial advisor has industry experience and/or familiarity with the business of the debtor; and
>
> (c) whether the success fee is necessary to incentivize the financial advisor.

Sino-Forest Corp., Re, 2012 ONSC 2063 (Ont. S.C.J. [Commercial List]) at paras. 46-47; *Colossus Minerals Inc., Re*, *supra*.

48 The SISP contemplates that the financial advisor will continue to be intimately involved in administering the SISP.

49 The financial advisor has considerable experience working with distressed companies in the retail sector that are in the process of restructuring, including seeking strategic partners and/or selling their assets. In the present case, the financial advisor has assisted Danier in its restructuring efforts to date and has gained a thorough and intimate understanding of the business. The continued involvement of the financial advisor is essential to the completion of a successful transaction under the SISP and to ensuring a wide-ranging canvass of prospective bidders and investors.

50 In light of the foregoing, Danier and the Proposal Trustee are in support of incentivizing the financial advisor to carry out the SISP and are of the view that the quantum and nature of the remuneration provided for in the financial advisor's engagement letter are reasonable in the circumstances and will incentivize the Financial advisor.

51 Danier has also engaged OCI to help implement the SISP in certain international markets in the belief that OCI has expertise that warrants this engagement. OCI may be able to identify a purchaser or strategic investor in overseas markets which would result in a more competitive sales process. OCI will only be compensated if a transaction is originated by OCI or OCI introduces the ultimate purchaser and/or investor to Danier.

52 Danier and the Proposal Trustee believe that the quantum and nature of the success fee payable under the OCI engagement letter is reasonable in the circumstances. Specifically, because the fees payable to OCI are dependent on the success of transaction or purchaser or investor originated by OCI, the approval of this fee is necessary to incentivize OCI.

53 Accordingly, an order approving the financial advisor and OCI engagement letters is appropriate.

54 A charge ensuring payment of the success fee is also appropriate in the circumstances, as noted below.

Administration Charge

55 In order to protect the fees and expenses of each of the Proposal Trustee, its counsel, counsel to Danier, the directors of Danier and their counsel, Danier seeks a charge on its property and assets in the amount of $600,000. The Administration Charge would rank behind the existing security, *pari passu* with the Consensus Charge and ahead of the D&O Charge and KERP Charge. It is supported by the Proposal Trustee.

56 Section 64.2 of the BIA confers on the Court the authority to grant a charge in favour of financial, legal or other professionals involved in proposal proceedings under the BIA.

57 Administration and financial advisor charges have been previously approved in insolvency proposal proceedings, where, as in the present case, the participation of the parties whose fees are secured by the charge is necessary to ensure a successful proceeding under the BIA and for the conduct of a sale process, *Colossus Minerals Inc., Re*, 2014 CarswellOnt 1517 (Ont. S.C.J.) at paras. 11-15.

58 This is an appropriate circumstance for the Court to grant the Administration Charge. The quantum of the proposed Administration Charge is fair and reasonable given the nature of the SISP. Each of the parties whose fees are to be secured by the Administration Charge has played (and will continue to play) a critical role in these proposal proceedings and in the SI. The Administration Charge is necessary to secure the full and complete payment of these fees. Finally, the Administration Charge will be subordinate to the existing security and does not prejudice any known secured creditor of Danier.

D&O Charge

59 The directors and officers have been actively involved in the attempts to address Danier's financial circumstances, including through exploring strategic alternatives, implementing a turnaround plan, devising the SISP and the commencement of these proceedings. The directors and officers are not prepared to remain in office without certainty with respect to coverage for potential personal liability if they continue in their current capacities.

60 Danier maintains directors and officers insurance with various insurers. There are exclusions in the event there is a change in risk and there is potential for there to be insufficient funds to cover the scope of obligations for which the directors and officers may be found personally liable (especially given the significant size of the Danier workforce).

61 Danier has agreed, subject to certain exceptions, to indemnify the directors and officers to the extent that the insurance coverage is insufficient. Danier does not anticipate it will have sufficient funds to satisfy those indemnities if they were ever called upon.

62 Danier seeks approval of a priority charge to indemnify its directors and officers for obligations and liabilities they may incur in such capacities from and after the filing of the NOI. It is proposed that the D&O Charge be in an amount not to exceed $4.9 million and rank behind the existing security, the Administration Charge and the Consensus Charge but ahead of the KERP Charge.

63 The amount of the D&O Charge is based on payroll obligations, vacation pay obligations, employee source deduction obligations and sales tax obligations that may arise during these proposal proceedings. It is expected that all of these amounts will be paid in the normal course as Danier expects to have sufficient funds to pay these amounts. Accordingly, it is unlikely that the D&O charge will be called upon.

64 The Court has the authority to grant a directors' and officers' charge under section 64.1 of the BIA.

65 In *Colossus Minerals* and *Mustang*, *supra*, this Court approved a directors' and officers' charge in circumstances similar to the present case where there was uncertainty that the existing insurance was sufficient to cover all potential claims, the directors and officers would not continue to provide their services without the protection of the charge and the continued involvement of the directors and officers was critical to a successful sales process under the BIA.

66 I approve the D&O Charge for the following reasons.

67 The D&O Charge will only apply to the extent that the directors and officers do not have coverage under the existing policy or Danier is unable to satisfy its indemnity obligations.

68 The directors and officers of Danier have indicated they will not continue their involvement with Danier without the protection of the D&O Charge yet their continued involvement is critical to the successful implementation of the SISP.

69 The D&O Charge applies only to claims or liabilities that the directors and officers may incur after the date of the NOI and does not cover misconduct or gross negligence.

70 The Proposal Trustee supports the D&O Charge, indicating that the D&O Charge is reasonable in the circumstances.

71 Finally, the amount of the D&O Charge takes into account a number of statutory obligations for which directors and officers are liable if Danier fails to meet these obligations. However, it is expected that all of these amounts will be paid in the normal course. Danier expects to have sufficient funds to pay these amounts. Accordingly, it is unlikely that the D&O charge will be called upon.

Key Employee Retention Plan and Charge

72 Danier developed a key employee retention plan (the "KERP") that applies to 11 of Danier's employees, an executive of Danier and Danier's consultant, all of whom have been determined to be critical to ensuring a successful sale or investment transaction. The KERP was reviewed and approved by the Board.

73 Under the KERP, the key employees will be eligible to receive a retention payment if these employees remain actively employed with Danier until the earlier of the completion of the SISP, the date upon which the liquidation of Danier's inventory is complete, the date upon which Danier ceases to carry on business, or the effective date that Danier terminates the services of these employees.

74 Danier is requesting approval of the KERP and a charge for up to $524,000 (the "KERP Charge") to secure the amounts payable thereunder. The KERP Charge will rank in priority to all claims and encumbrances other than the existing security, the Administration Charge, the Consensus Charge and the D&O Charge.

75 Key employee retention plans are approved in insolvency proceedings where the continued employment of key employees is deemed critical to restructuring efforts, *Nortel Networks Corp., Re supra.*

76 In *Grant Forest Products Inc., Re*, Newbould J. set out a non-exhaustive list of factors that the court should consider in determining whether to approve a key employee retention plan, including the following:

> (a) whether the court appointed officer supports the retention plan;
>
> (b) whether the key employees who are the subject of the retention plan are likely to pursue other employment opportunities absent the approval of the retention plan;
>
> (c) whether the employees who are the subject of the retention plan are truly "key employees" whose continued employment is critical to the successful restructuring of Danier;
>
> (d) whether the quantum of the proposed retention payments is reasonable; and
>
> (e) the business judgment of the board of directors regarding the necessity of the retention payments.

Grant Forest Products Inc., Re, [2009] O.J. No. 3344 (Ont. S.C.J. [Commercial List]) at paras. 8-22.

77 While *Grant Forest Products Inc., Re* involved a proceeding under the CCAA, key employee retention plans have frequently been approved in proposal proceedings under the BIA, see, for example, *In the Matter of the Notice of Intention of Starfield Resources Inc.*, Court File No. CV-13-10034-00CL, Order dated March 15, 2013 at para. 10.

78 The KERP and the KERP Charge are approved for the following reasons:

(i) the Proposal Trustee supports the granting of the KERP and the KERP Charge;

(ii) absent approval of the KERP and the KERP Charge, the key employees who are the subject of the KERP will have no incentive to remain with Danier throughout the SISP and are therefore likely to pursue other employment opportunities;

(iii) Danier has determined that the employees who are the subject of the KERP are critical to the implementation of the SISP and a completion of a successful sale or investment transaction in respect of Danier;

(iv) the Proposal Trustee is of the view that the KERP and the quantum of the proposed retention payments is reasonable and that the KERP Charge will provide security for the individuals entitled to the KERP, which will add stability to the business during these proceedings and will assist in maximizing realizations; and

(v) the KERP was reviewed and approved by the Board.

Sealing Order

79 There are two documents which are sought to be sealed: 1) the details about the KERP; and 2) the stalking horse offer summary.

80 Section 137(2) of the *Courts of Justice Act* provides the court with discretion to order that any document filed in a civil proceeding can be treated as confidential, sealed, and not form part of the public record.

81 In *Sierra Club of Canada v. Canada (Minister of Finance)*, the Supreme Court of Canada held that courts should exercise their discretion to grant sealing orders where:

(1) the order is necessary to prevent a serious risk to an important interest, including a commercial interest, because reasonable alternative measures will not prevent the risk; and

(2) the salutary effects of the order outweigh its deleterious effects, including the effects on the right of free expression, which includes the public interest in open and accessible court proceedings.

[2002] S.C.J. No. 42 (S.C.C.) at para. 53.

82 In the insolvency context, courts have applied this test and authorized sealing orders over confidential or commercially sensitive documents to protect the interests of debtors and other stakeholders, *Stelco Inc., Re*, [2006] O.J. No. 275 (Ont. S.C.J. [Commercial List]) at paras. 2-5; *Nortel Networks Corp., Re*, *supra*.

83 It would be detrimental to the operations of Danier to disclose the identity of the individuals who will be receiving the KERP payments as this may result in other employees requesting such payments or feeling underappreciated. Further, the KERP evidence involves matters of a private, personal nature.

84 The offer summary contains highly sensitive commercial information about Danier, the business and what some parties, confidentially, were willing to bid for Danier's assets. Disclosure of this information could undermine the integrity of the SISP. The disclosure of the offer summary prior to the completion of a final transaction under the SISP would pose a serious risk to the SISP in the event that the transaction does not close. Disclosure prior to the completion of a SISP would jeopardize value-maximizing dealings with any future prospective purchasers or liquidators of Danier's assets. There is a public interest in maximizing recovery in an insolvency that goes beyond each individual case.

85 The sealing order is necessary to protect the important commercial interests of Danier and other stakeholders. This salutary effect greatly outweighs the deleterious effects of not sealing the KERPs and the offer summary, namely the lack of immediate public access to a limited number of documents filed in these proceedings.

86 As a result, the *Sierra Club* test for a sealing order has been met. The material about the KERP and the offer summary shall not form part of the public record pending completion of these proposal proceedings.

Order accordingly.

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

Subject: Insolvency; Civil Practice and Procedure

MOTION by receiver 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 its First Report.

***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).

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2020 ONSC 3659
Ontario Superior Court of Justice

BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc.

2020 CarswellOnt 8665, 2020 ONSC 3659, 322 A.C.W.S. (3d) 75, 81 C.B.R. (6th) 283

BCIMC CONSTRUCTION FUND CORPORATION and BCIMC SPECIALTY FUND CORPORATION (Applicants) and THE CLOVER ON YONGE INC., THE CLOVER ON YONGE LIMITED PARTNERSHIP, 480 YONGE STREET INC. and 480 YONGE STREET LIMITED PARTNERSHIP (Respondents)

BCIMC CONSTRUCTION FUND CORPORATION and OTERA CAPITAL INC. (Applicants) and 33 YORKVILLE RESIDENCES INC. and 33 YORKVILLE RESIDENCES LIMITED PARTNERSHIP (Respondents)

Koehnen J.

Heard: June 4, 2020
Judgment: June 15, 2020
Docket: CV-20-00637301-00CL, CV-20-00637297-00CL

Counsel: Geoff R. Hall, Heather Meredith, Alexander Steele for Receiver, PricewaterhouseCoopers Inc.
David Bish, Adam M. Slavens, Jeremy Opolsky for Applicants, BCMIC
Virginie Gauthier for Applicant, Otera Capital Inc.
David Gruber for Concord Land Developments Limited
Steven Graff, Ian Aversa, Jeremy Nemers for Respondents
Jonathan Rosenstein for Aviva Insurance Company of Canada and Westmount Guarantee Services Inc.
Kenneth Kraft for certain Clover Purchasers
Dominique Michaud for a Group of Halo Unit Purchasers
Fred Tayar, Colby Linthwaite for OTB Capital Inc.
Ryan Hanna for 2379646 Ontario Inc.
Maria Konyukhova for PJD Developments
Christopher J. Henderson for City of Toronto
Haddon Murray for Tarion Warranty Corporation
Shara Roy, Sahar Talibi for Homelife New World Realty Inc., Paul Lam, Homelife Landmark Realty Inc., TradeWorld Realty Inc., Landpower Real Estate Ltd., Master's Choice Realty Inc., formerly known as Re/Max Master's Choice Realty Inc. and Michael Chen
Patricia Joseph for GFL Infrastructure Group Inc.
Ben Goodis for Quality Sterling Group
Rob Moubarak, Jonathan Frustaglio, Marissa Rebane for Strada Aggregates
Paul Guaragna for Global Precast Inc. and Affinity Aluminum Systems Ltd.
Nick Stanoulis for Stancorp Properties Inc.

Subject: Corporate and Commercial; Insolvency

APPLICATION by receiver for approval of sale plan.

***Koehnen J.*:**

1 At the request of BCIMC Construction Fund Corporation and BCIMC Specialty Fund Corporation (collectively "BCIMC" or the "Applicants") I assigned three large condominium construction projects in Toronto into receivership at the end of March

2020, the reasons for which are indexed at 2020 ONSC 1953 (Ont. S.C.J. [Commercial List]). More precisely put, each project is owned by a single purpose, project specific general partner on behalf of a limited partnership. The general partner and the limited partnership of each of the three projects were assigned into receivership.

2 The Receiver of those projects now brings a motion to approve a Sale and Investor Solicitation Process ("SISP") for each of the projects. For the reasons set out below, I grant the SISP for the Yorkville project as requested, decline to approve the SISP for the Clover project and approve the SISP for the Halo project as amended.

3 I heard the motions on Thursday June 4, 2020, and released a dispositive order on Sunday June 7 with reasons to follow. I set out my reasons below.

The Yorkville Project

4 The Yorkville project is located at 33 Yorkville Ave between Bay and Yonge Streets in Toronto. It was envisaged as two condominium towers, one 43 storeys, the other 69 storeys with 1,079 residential units. Excavation is well underway but no construction of the towers has begun.

5 As of March 2, 2020, BCIMC had advanced $122,432,764.85 to the Yorkville Project under various loan facilities as well as $79,592,744.24 in letters of credit. In addition, a co-applicant in respect of Yorkville, Otera Capital, had also advanced funds to Yorkville.

6 There are 918 purchasers of units in Yorkville who have paid a total of approximately $160 million in deposits.

7 BCIMC has first ranking security. There are three other major secured creditors on the project. Aviva Insurance Company of Canada has second and fourth priority mortgages. KingSett Capital Inc. has third ranking mortgages. Construction liens have also been registered against the properties.

8 Aviva, KingSett and a lawyer for a group of unitholders appeared on the motion. None opposed the relief sought. The debtor and titleholder of the Yorkville Project did not oppose the relief sought either. As a result, I granted the relief on June 4.

The Clover Project

9 The relief sought with respect to Clover is more controversial.

10 The Clover project is located at 595 Yonge St., north of Wellesley St. in Toronto. It comprises two towers; one 44 storeys, the other 18 storeys containing a total of 522 residential units. Clover is the most advanced of the three projects. Building is well underway with the higher floors now under construction.

11 As of March 2, 2020, BCIMC had advanced over $143,000,000 on various loan facilities plus approximately $3,000,000 in letters of credit on Clover. In addition, BCIMC has advanced funding during the course of the receivership.

12 BCIMC has both first and third ranking security against the Clover project.

13 There are 499 purchasers of units in Clover who have paid a total of approximately $49 million in deposits.

14 The proposed SISP in respect of Clover includes a stalking horse bid by a BCIMC fund other than the ones that have advanced money to date. The stalking horse bid includes a break fee of 1% and would take out all secured debt except that held by OTB Capital. The OTB Capital debt reflects a mortgage originally held by the developer, Cresford Group which it assigned to OTB after Clover was placed into receivership. The stalking horse bid does not address other debts such as those of suppliers to the project.

15 The Receiver's SISP proposal is supported by BCIMC, counsel for the unitholders and counsel for one potential bidder apart from the stalking horse bidder.

16 The Receiver's proposal is opposed by Cresford, Concord Land Developments, OTB capital and at least one unsecured creditor. Opposition to the SISP is based on a proposal by Concord to pay out immediately the BCIMC debt, all of its costs and all of the receivership costs.

17 The Receiver and those who support the SISP object to the Concord proposal on three grounds: (i) Concord has no standing; (ii) the proposal is too unclear; and (iii) the proposal improperly interferes with the receivership process.

(i) Concord's Standing

18 Proponents of the SISP submit that Concord has no standing to pay out the BCIMC debt because it is a stranger to the receivership. If Concord wants to acquire Clover, it should participate in the SISP like any other potential bidder.

19 While it was referred to as the "Concord Proposal" during the hearing, it is more properly the debtor's proposal. Concord is proposing to lend money to the debtor to enable the debtor to pay out BCIMC. It matters little whether the funds are coming from the debtor directly or from a party financing the debtor, like a bank or Concord. The point is that the debtor, through whatever means, is ready willing and able to pay out the entirety of the BCIMC debt.

20 Before the hearing, Concord had sent me banking information that demonstrated its ability to pay out the debt immediately.

21 During the course of the initial receivership application in March, I was advised that Concord and Cresford were about to enter into a transaction at any moment that would see Concord assume ownership of all of the shares of the Clover debtor. At that time, there was, however, no consummated transaction nor was Concord then prepared to pay out the BCIMC debt.

22 To the extent Concord's status is an issue, it changed approximately 10 minutes into the hearing when I was advised that Concord had completed a transaction pursuant to which it had become the sole shareholder of Clover.

(ii) Lack of Clarity in the Concord Proposal

23 The Receiver opposes the Concord proposal because it is not sufficiently clear.

24 Concord says that after paying off the BCIMC debt, it would move to convert the receivership into a CCAA proceeding. In the course of the CCAA proceeding, Concord would want to disclaim the unit purchasers' agreements and negotiate new agreements. Unit holders who did not want to renegotiate would recover their deposits in full.

25 While a CCAA proceeding does pose some lack of clarity for the purchasers, any bidder in the SISP would also be looking to disclaim and renegotiate the unit purchase agreements. The Receiver submits that the SISP is likely to produce a better result for unit purchasers because it entails a competitive bidding process at the end of which the Receiver will select qualified bidders to participate in a further auction for the project. The Receiver says that the competitive nature of the bidding and auction process is likely to produce a better result for unit purchasers than would a two-party negotiation in a CCAA proceeding.

26 Mr. Kraft acts for approximately 200 unit purchasers. He submits that the unitholders want to: have certainty, move forward and avoid further delay. In his view, the SISP currently offers more certainty than does a CCAA proceeding because the SISP is associated with tighter timelines. Mr. Kraft volunteers, however, that this might not be the case in a week from now if Concord is permitted to convert the receivership into a CCAA proceeding and moves promptly to renegotiate.

27 The fact that the unitholders might obtain a better result in a competitive bidding and auction process is a fair one. There are however competing considerations to balance that potential benefit. By way of example, the bidding and auction process is likely to involve many moving parts. One readily foreseeable scenario is that the bids are relatively complex and that the process will not necessarily focus solely on the renegotiation of unitholder agreements. There are a significant number of other creditors involved who will need to be dealt with in the SISP. That would make choosing between bids potentially complex and would reduce the unitholders ability to negotiate. As noted, Concord envisages paying all creditors in full which may make renegotiation of purchase contracts a more central feature of the CCAA than it would be in the receivership.

28 The unitholders have also expressed an interest in speed and certainty. The stalking horse bid would give the stalking horse bidder two years to decide whether it will complete the project as a condominium. If so, the stalking horse bidder will offer purchasers a discount of $100 per square foot from the market price at the time the units are resold as condominiums. While I appreciate that the stalking horse bid may not succeed (and indeed, if it works properly will not be the successful bid), the two years it contemplates nevertheless offers neither speed nor certainty. Having Concord assume carriage of the project can occur as soon Concord pays out the debt. A successful bidder under the SISP is not likely to assume carriage of the project before the middle or end of September at the earliest.

29 Concord is one of Canada's largest and most experienced condominium developers and builders. It has developed over 150 condominium towers with over 39,000 units in Canada. It currently has more than 50 development projects at various stages of planning and development in Canada, the United States and the United Kingdom. If Concord is allowed to assume carriage of the project it will likely want to complete construction and sale of units as quickly as possible to avoid the cost of having large amounts of financing or capital locked up in the project.

30 The duration of the CCAA proceeding is one over which the court has some influence. The court can also assist in ensuring a level playing field for the renegotiation of purchase agreements. By way of example, counsel for the unit purchasers has asked the Receiver to produce information it has about costs of construction. The Receiver has declined to produce that information because of confidentiality concerns. That makes good sense in the context of a bidding process. If there is no bidding process for Clover, the Receiver may be more willing to share its cost information with counsel for the unit holders or it may be more appropriate to order that it be shared. I underscore, however, that I have made no decision on that issue and have not even heard argument on it. The possibility of sharing that information does, however, offer an opportunity to create a more level playing field in the renegotiation of the purchase contracts.

31 Mr. Hanna appeared for an unsecured creditor owed approximately $3.5 million. He supports the Concord proposal because Concord intends to pay all construction suppliers fully in the course of completing Clover. Other bids may not necessarily do that. The stalking horse bid does not.

(iii) Interference with the Receivership Process

32 The Receiver submits that it would create a dangerous precedent to give a debtor a preferential right to redeem property well into a receivership. Mr. Hall submits that the purpose of a receivership is to have the Receiver take control of the entire process and that it would be inappropriate to permit others to do an "end run around" the receivership.

33 The Receiver's submission is in part, reflected in a standard provision in receivership orders which is found in paragraph 11 of the Clover order. It provides:

> 11. THIS COURT ORDERS that **all rights and remedies** against the Debtors, or any of them, the Receiver, or **affecting the Property**, including, without limitation, licences and permits, **are hereby stayed and suspended except with the written consent of the Receiver or leave of this Court**, . . . (Emphasis added)

34 On its face, the bolded language in paragraph 11 would appear to preclude the debtor's right to exercise its equity of redemption without leave of the court.

35 The Receiver points to *Ron Handelman Investments Ltd. v. Mass Properties Inc.*, 2009 CanLII 37930 [2009 CarswellOnt 4257 (Ont. S.C.J. [Commercial List])], where Pepall J. (as she then was) dealt with language similar to paragraph 11 and held:

> In the face of these provisions, Ms. Singh does not have an automatic right to redeem. A mockery would be made of the practice and procedures relating to receivership sales if redemption were permitted at this stage of the proceedings. A Receiver would spend time and money securing an agreement of purchase and sale that was, as is common place, subject to Court approval, and for the benefit of all stakeholders, only for there to be a redemption by a mortgagee at the last minute. This could act as a potential chill on securing the best offer and be to the overall detriment of stakeholders.

Business Development Bank of Canada v. Marlwood Golf & Country Club Inc., 2015 ONSC 3909 (Ont. S.C.J. [Commercial List]) and *Home Trust Co. v. 2122775 Ontario Inc.*, 2014 ONSC 1039 (Ont. S.C.J. [Commercial List]) are to similar effect.

36 The Receiver fairly volunteers that the issue arose in *Handelman* and the cases that follow it at a much later stage than it does with respect to Clover. In *Handelman*, the Receiver had already run a bid process, had selected a purchaser and was moving to approve the purchase. Different considerations arise at that late a stage. Allowing debtors to redeem property on the sale approval motion would discourage potential purchasers from submitting bids in the first place and threaten the utility of the receivership process more generally. Here the debtor is seeking to redeem before a SISP is approved.

37 A competing consideration to the concerns raised in *Handelman*, is the debtor's right to exercise its equity of redemption, that is to say to pay out the debt and retain its property.

38 Numerous courts have commented on the importance of the equity of redemption. The contemporary starting point of the analysis is the Supreme Court of Canada's decision in *Petranik v. Dale*, 1976 CanLII 34 (SCC), (1976), [1977] 2 S.C.R. 959 (S.C.C.) where Chief Justice Laskin held at p. 969:

> What emerges from the *DeBeck* case is a reassertion of the well-established proposition that the equitable right to redeem is more than a mere equity but is, indeed, an interest in the mortgaged land which is not lightly to be put aside and which is enforceable by courts of equity: see Falconbridge, *Law of Mortgages* (3rd. ed. 1942), pp. 50-53. I question, therefore, whether it can be put aside by a rule of practice that would preclude a Court from considering all the circumstances that may support a discretion to allow redemption, albeit on terms.

39 Dickson J. (as he then was) echoed similar sentiments at page 995:

> I conclude by reiterating that an equity of redemption is an interest in land, which the mortgagor can convey, devise, settle, lease or mortgage like any other interest in land (Megarry and Wade, *The Law of Real Property* (3rd ed.) at p. 885, and Cheshire's *Modern Real Property* (10th ed.) at p. 568) and that equity has always jealously guarded the mortgagor's right to redeem.

40 An owner's right to redeem remains a core principle of real estate law. See for example: *3072453 Nova Scotia Co. v. 1623242 Ontario Inc.*, 2015 ONSC 2105 (Ont. S.C.J.) paras. 75, 98 — 100; *Textron Financial Canada Ltd. v. Chetwynd Motels Ltd.*, 2010 BCSC 477 (B.C. S.C. [In Chambers]) paras. 58 — 74.

41 How then should I balance these competing interests in this case and determine whether I should grant leave under paragraph 11 of the receivership order to allow the debtor to exercise its equity of redemption?

42 Supporters of the Receiver's motion point to my findings about the debtor's misconduct in my reasons assigning the projects into receivership. They submit that a debtor who has misled its mortgagee should not be entitled to redeem.

43 While I did make adverse findings against the debtor's conduct in those reasons, misconduct by a debtor gives rise to that degree of remedy necessary to correct the harm done by the misconduct. It does not necessarily mean that the debtor will be deprived of its property.

44 While courts should be mindful of the clean hands principle when considering requests by the debtor in these circumstances, they should be equally mindful of a potentially underlying commercial reality: the possibility that the creditor may have an interest in structuring a receivership to allow it to acquire the property at an attractive price which would enable the creditor to make considerably more money by depriving the debtor of its property than the creditor would ever earn by way of interest under a mortgage.

45 While I am not saying that this is occurring here, there are circumstances that give rise to the potential for it to occur. By way of example, although BCIMC stated on the receivership motion at it wanted nothing further to do with the project and just wanted its money back, it has put in a stalking horse bid on the Clover and Halo projects which would see it paid a break

fee. The Receiver has acknowledged that the properties are well known to the most logical potential purchasers and that there is considerable interest in them. If there is considerable interest, one might ask whether a stalking horse bid is truly necessary. At the same time, the timelines in the SISP, 60 days to gather bids and conduct an auction, are those that one would see in usual times. These are not, however, usual times. The SISP arises in the midst of a worldwide pandemic which has seen many businesses, and particularly financial institutions, operating virtually. Most bank offices remain closed. Operating virtually makes it more time-consuming to conduct due diligence and obtain financing, especially given that financing for a project like this would likely be syndicated. BCIMC is unlikely, however, to require the same sort of time to conduct due diligence because it is already familiar with the project as its long-term financer. In addition, BCIMC, is a large government pension fund that does not require syndicated financing. It already has large pools of capital available for investment. These factors give BCIMC advantages over other bidders that translate into the potential to acquire the property in a receivership at an attractive price.

46 In considering these factors, I am not saying that they are present here nor am I suggesting that it would be improper for BCIMC to try to acquire the property at an attractive price in the receivership. Those are commercial opportunities that BCIMC is fully entitled to pursue. I am simply saying that these factors are part of the equities to consider before depriving a debtor of title to its property in circumstances where it is ready willing and able to pay out the creditor entirely.

47 The history of the proceedings and prejudice to different stakeholders are two further factors to consider when determining whether the debtor should have the right to redeem.

48 With respect to the history of the proceedings, on the initial receivership application, the debtor proposed a CCAA proceeding. BCIMC opposed because it would end up remaining in the project longer than it wanted to. At the time, BCIMC indicated that it simply wanted its money back and wanted nothing more to do with the project: see the receivership reasons 2020 ONSC 1953 (Ont. S.C.J. [Commercial List]) at para. 56. The debtor now proposes to give BCIMC its money back pretty much immediately.

49 My reasons for assigning the project into receivership were driven in large part by the right of BCIMC to be repaid, the absence of any concrete proposal to do so and the unfairness of tying BCIMC to a debtor in whom it no longer had confidence: see for example paras. 64 — 69, 89, 91. The thrust of my reasons, and in particular of the paragraphs just referred, to was to leave open the possibility of the debtor resuming carriage of the projects by paying out BCIMC. The debtor is now able to do so unconditionally with respect to Clover.

50 Has anything occurred since assigning Clover into receivership on March 27, 2020 that would make it unfair to any other stakeholder to permit the debtor to exercise its equity of redemption?

51 BCIMC submits that it has funded the receivership and has spent time, money and energy into submitting a stalking horse bid.

52 In the circumstances of this case, those factors do not outweigh the debtor's equity of redemption. In addition to paying out the original BCIMC debt, the debtor has offered to pay out the entire receivership debt, interest on the receivership debt, the costs of the receivership and the costs of BCIMC. This includes reasonable costs that BCIMC has incurred to prepare the stalking horse bid. I have made myself available for a speedy determination of what those costs should be in the event the parties disagree.

53 Ms. Konyakhova appeared on behalf of PJD Developments, a potential bidder. She submits that Concord should not be given any privileges over other bidders who have waited patiently for the bidding process to occur. She underscores forcefully that bidding is the way to obtain the best offer.

54 The concern that Concord receive no privileges over other bidders misconceives Concord's role. As noted earlier, Concord is not a bidder, it is the debtor's source of financing and is now the debtor's sole shareholder. While I can understand a potential bidder's frustration at being deprived of the opportunity to bid on a project, that is not enough to quash a debtor's right to redeem. There is no evidence before me that it would be prejudicial to receivership processes at large to allow the Clover debtor to

redeem. I appreciate that the possibility of a pay out arose at the last moment but no one sought an adjournment to file evidence to respond to the proposed redemption.

55 PJD had hoped to be able to bid on the property and has been denied that chance. That puts PJD and other potential bidders into a significantly less prejudicial position than if they had spent the time and money to submit a compliant bid only to lose out to another bidder in the competitive process.

56 The parties most likely to suffer prejudice by allowing the debtor to redeem are the unit purchasers. They believe they can achieve a better result in the competitive bidding process of a SISP than they can in a CCAA proceeding. To my mind that, however, is not, the real question.

57 There is no doubt that the debtor would have had the right to pay out BCIMC on the initial receivership application. Had it done so, the debtor would have had relatively free rein to bring a CCAA proceeding. In those circumstances it is unlikely that unit purchasers could have prevented a CCAA process by arguing that a receivership sale was preferable to CCAA. The unit purchasers have suffered no change of position since March 27 that would make the analysis any different today. To the extent they have, they can still raise those arguments if the debtor moves to convert the receivership into a CCAA proceeding.

58 As a result of the foregoing, I decline to approve the SISP for Clover and order that the debtor should have the opportunity to pay out the BCIMC debt, the receivership debt, and interest on both within 72 hours of receiving a pay out statement in respect of those debts.

Halo Project

59 The Halo project is located at 480 Yonge St. south of Wellesley St. in Toronto. Its plans call for a 39-storey tower with 413 residential units. Halo is in early stages of construction.

60 As of March 2, 2020, BCIMC had advanced approximately $73,000,000 in financing and $1,500,000 in letters of credit to the Halo project.

61 BCIMC has first and third-ranking charges/mortgages in respect of real property.

62 There are 388 purchasers of units in Halo who have paid a total of approximately $43 million in deposits.

63 The Receiver proposes a SISP for Halo that mirrors the proposal for Clover. Mr. Michaud appeared to make submissions on behalf of the 140 purchasers of Halo units who have retained him. They support the SISP.

64 The debtor seeks a four-week adjournment of the Halo SISP motion to allow it to finalize financing. During the hearing, Concord offered to finance the receivership during the adjournment period if BCIMC declined to do so. Concord's financing would be on the same terms as that of BCIMC. If the debtor does not come up with financing during the four week adjournment, Concord and the debtor agree that the SISP should proceed as presented.

65 I declined to grant the adjournment and authorized the SISP to proceed in respect of Halo.

66 The distinguishing feature between Halo and Clover is that the debtor and Concord are not presently prepared to or able to pay out the BCIMC debt on Halo.

67 The animating principle behind my reasons for assigning the projects into receivership was that BCIMC had advanced money, had been misled about the risk profile of the projects, had been misled, in part, about the use of funds, and, having been misled, should have the right to take control of the projects to protect its interests. That was subject to the debtor's right to pay out BCIMC in full if it were able to do so before any other party had relied on the receivership to an extent that would make it inequitable for the debtor to end the receivership by paying out BCIMC's debt.

68 The debtor is still not in a position to pay out the debt on Halo. Concord clearly has the financial resources to do so but has chosen not to. This means that, for whatever reason, Concord prefers not to expose itself to the risk of the Halo in the present circumstances. Concord is fully entitled to make that choice. Concord is entirely at liberty to use or not use its assets for whatever purpose it wants.

69 However, in the absence of assuming any of the risk, Concord is not in a position to direct the terms that govern the administration of Halo either through receivership or otherwise. Given that BCIMC continues to bear the risk of Halo, the process that it has chosen to manage that risk, the Receivership, should continue to govern.

70 Nothing in the equities between the parties has changed with respect to the Halo project since it was assigned into receivership on March 27, 2020. BCIMC continues to hold a significant debt, indeed the debt is larger now than it was on March 27. For all the reasons that I articulated in my judgment with respect to the receivership order, BCIMC continues to have the right to enforce its debt as it sees fit. It has chosen to do so by way of receivership. Nothing has changed to make that inappropriate.

71 The SISP does not preclude the debtor or Concord from participating in the project going forward. It can participate as a bidder as can any other party.

72 The Clover and Halo bids were initially accompanied by a stalking horse bid by BCIMC with a break fee of 1%. During argument, the Receiver and BCIMC indicated that the stalking horse bid was a package deal, that is to say it was a bid on both projects or none. As counsel for BCIMC put it, Clover was the more desirable asset. If BCIMC could not maintain the stalking horse bid on Clover, it had no interest in continuing a standalone stalking horse bid on Halo. Given that the SISP on Clover will not proceed, the stalking horse bid on Halo has disappeared as a result of which I need not address the objections that certain parties raised about the break fee.

Communications

73 The Receiver seeks to include a provision in the Halo order that precludes communications between bidders and other stakeholders without the Receiver's consent. I have declined to include such a provision in the Halo SISP.

74 The unit purchasers represented at the hearing oppose the provision as do Concord and the debtor. They submit that a key component of any workout is the ability of stakeholders to reach agreements with each other. That is best achieved with unfettered communication.

75 The Receiver justifies the request by submitting that it is important that the Receiver have visibility into conversations between stakeholders and that it is problematic if the Receiver is not aware of the contents of those communications. The Receiver provided no detail about why it was problematic for discussions to occur without the Receiver knowing about the contents or the fact of those discussions. The Receiver offered no authority in support of its position apart from stating that a similar provision had been included in an order of this court in another proceeding. In the absence of reasons for that order I cannot determine whether it was on consent, unopposed or whether the circumstances in that case made the order otherwise appropriate.

76 Although the Yorkville order contains a restriction on communication, that provision was unopposed, including by counsel for the purchasers of Yorkville units.

Disposition

77 For the reasons set out above, I dispose of the motions as follows:

(a) With respect to Yorkville, the SISP order is approved as requested.

(b) With respect to Clover:

(i) The debtor or anyone acting on its behalf shall have the right within 72 hours of receiving a statement of the amount owing, pay-out the BCIMC, debt, including receivership lending plus interest. (I have been advised that the debtor paid out the debt in full since the hearing but before these reasons were issued.)

(ii) In addition, the debtor will be liable for the applicants' costs including receivership costs. I assume it may take more than 72 hours for BCIMC and the receiver to present their costs breakdown to the debtor, as a result of which the costs need not be paid within 72 hours of receiving the statement of the amount owing on the debt. If there is a dispute about costs, I will resolve the dispute and determine the amount of costs payable. The debtor shall pay the applicants' costs within 72 hours of my determining the amount payable.

(iii) If the debtor pays the amounts set out in sub-paragraph (i) within 72 hours then the debtor may move to dissolve the receivership or for any other relief it seeks with respect to Clover.

(c) With respect to Halo:

(i) The SISP is approved but, given that BCIMC has advised that there will be no stalking horse bid on Halo if the debtor pays out the Clover debt, the Halo SISP will proceed without the stalking horse bid.

(ii) Communication amongst bidders and stakeholders (including unit purchasers) will not require the consent of or notice to the Receiver.

(iii) The disposition in the preceding paragraph may raise privacy or fairness issues with respect to communications with unit holders. By way of example, it might not be appropriate to allow bidders to contact unrepresented unitholders without having unitholders provide consent in advance. Similarly, it might not be fair to the bidding process to allow the debtor, who presumably has contact information for unitholders, to contact them while other bidders without contact information have no ability to contact unit holders. If there are concerns about the logistics of such communication, I will make myself available to resolve those during a case conference.

Application granted in part.

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2023 ONCA 548
Ontario Court of Appeal

Rose-Isli Corp. v. Smith

2023 CarswellOnt 12803, 2023 ONCA 548, 2023 A.C.W.S. 4149, 9 C.B.R. (7th) 53

Rose-Isli Corp., 2631214 Ontario Inc., Seaside Corporation and 2735440 Ontario Inc. (Applicants / Appellants) and Michael J. Smith, Frank Servello, 2735447 Ontario Inc., Capital Build Construction Management Corp. and Frame-Tech Structures Ltd. (Respondents / Respondents)

C.W. Hourigan, David Brown, P.J. Monahan JJ.A.

Heard: August 14, 2023
Judgment: August 21, 2023
Docket: CA COA-23-CV-0222

Proceedings: affirming *Rose-Isli Corp. v. Frame-Tech Structures Ltd.* (2023), 6 C.B.R. (7th) 129, 2023 CarswellOnt 1532, 2023 ONSC 832, Kimmel J. (Ont. S.C.J. [Commercial List])

Counsel: Jason Wadden, Carlos Sayao, Theodore Milosevic, for Appellants
Mordy Mednick, for Respondents, Frame-Tech Structures Ltd., Frank Servello, Capital Build Construction Management Corp. and 2735447 Ontario Inc.
Sharon Kour, Brendan Bissell, for Receiver, Ernst & Young Inc.
Nathaniel Read-Ellis, for Ora Acquisitions Inc.

Subject: Corporate and Commercial; Insolvency

APPEAL by creditor from order approving sale of property reported at *Rose-Isli Corp. v. Frame-Tech Structures Ltd.* (2023), 2023 ONSC 832, 2023 CarswellOnt 1532, 6 C.B.R. (7th) 129 (Ont. S.C.J. [Commercial List]).

***Per curiam*:**

1 The appellants appeal the approval and vesting order issued by the motions judge that authorized the receiver, Ernst & Young Inc., to proceed with a sale of the property in receivership, as well as a related ancillary order.

2 The appellants had sought the appointment of the Receiver over the property. One of the appellants, 2735440 Ontario Inc. ("273 Ontario"), held a second mortgage on the property. The order appointing the Receiver contemplated it would engage in a sales process for the property. The Receiver secured court approval for a sales process, conducted a sales process, and then sought court approval of the successful bid.

3 At this point, the appellants opposed the proposed sale and, instead, sought an order that 273 Ontario could redeem the first mortgage or, alternatively, be recognized as a successful creditor bidder. The motions judge granted the Receiver's approval motion and dismissed the appellants' cross-motion for redemption. The appellants submit the motions judge erred in so doing.

4 As an initial matter, it is worth recalling how the judge who granted the appointment order described the "lay of the land" at the time the appellants requested the appointment of a receiver over the property. At para. 11 of his reasons, *Rose-Isli Corp. v. Frame-Tech Structures Ltd.*, 2022 ONSC 4135, the appointment judge stated:

> It is common ground that the relationship between and among the parties has irrevocably broken down... Indeed, the fact that the relationship has broken down is reflected in the relief sought, one way or the other, by all parties today: they all agree that the Rosehill Project should be sold, and that the sale process should be undertaken by a court-appointed officer.

5 The appellants submit the motions judge erred in dismissing their cross-motion because the second mortgagee, 273 Ontario, pursuant to s. 2 of the Mortgages Act, R.S.O. 1990, c. M.40, had an absolute right to redeem the first mortgage at any time, even where a court-approved sales process had been undertaken and the receiver was seeking court approval of a bid.

6 We disagree.

7 273 Ontario, as one of the applicants for the appointment of a receiver, consented to the Appointment Order. Section 9 of the Appointment Order qualified any encumbrancer's right to redeem a mortgage on the properties under receivership. The section states that "all rights and remedies against the Company, the Receiver, or affecting the Property, are hereby stayed and suspended except with the written consent of the Receiver or leave of this Court." See also: BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc., 2020 ONSC 3659, at paras. 33 and 41.

8 The motions judge recognized that the issue for determination was not whether 273 Ontario had a right to redeem but the more pragmatic issue of whether it should be permitted to exercise that right once the court-approved sales process had run its course and the Receiver had entered into an agreement with the successful bidder: Reasons, at paras. 73-74. This properly framed the issue: the appellants had sought the appointment of the Receiver; the Receiver had undertaken the sales process approved by the court; and the Receiver had not been discharged. Accordingly, the ability of 273 Ontario to exercise a right of redemption had to take into account the reality that the property remained subject to an active receivership, which engaged interests beyond those of the second mortgagee.

9 We see no error in the motions judge applying the following principles to guide her consideration of whether, in the specific circumstances, 273 Ontario should be granted leave to redeem:

> • In considering a request by an encumbrancer to redeem a mortgage on property in receivership, a court should consider the impact that allowing the encumbrancer to exercise its right of redemption would have on the integrity of a court-approved sales process;
>
> • Usually, if a court-approved sales process has been carried out in a manner consistent with the principles set out in *Royal Bank of Canada v. Soundair Corp.*, (1991), 4 O.R. (3d) 1 (C.A.), a court should not permit a latter attempt to redeem to interfere with the completion of the sales process. In our view, the reason the *Soundair* principles apply to circumstances where an encumbrancer seeks to redeem a mortgage is that once the court's process has been invoked to supervise the sale of assets under receivership, the process must take into consideration all affected economic interests in the properties in question, not just those of one creditor; and
>
> • In dealing with the matter, a court should engage in a balancing analysis of the right to redeem against the impact on the integrity of the court-approved receivership process.

10 We adopt the rationale for those guiding principles articulated in Ron Handelman Investments Ltd. v. Mass Properties Inc.200955 C.B.R. (5th) 271 (Ont. S.C.J. [Commercial List]), where the court stated, at para. 22:

> A mockery would be made of the practice and procedures relating to receivership sales if redemption were permitted at this stage of the proceedings. A receiver would spend time and money securing an agreement of purchase and sale that was, as is common place, subject to Court approval, and for the benefit of all stakeholders, only for there to be a redemption by a mortgagee at the last minute. This could act as a potential chill on securing the best offer and be to the overall detriment of stakeholders.

11 We see no error in the motions judge's identification of the interests at play in the required balancing exercise: Reasons, at paras. 84-95.

12 The appellants repeat before us the numerous complaints they made below about the lack of fairness in the sales process. The motions judge canvassed those complaints in considerable detail and found no merit in any of them. Her conclusion that the conduct of the sales process met the *Soundair* criteria was reasonable and free of palpable and overriding error, anchored as it was in the specific evidence before her: Reasons, at paras. 97-131.

13 Finally, we see no reversible error in the motions judge's conclusion that the balance favoured protecting the integrity of the sales process over 273 Ontario's request to redeem, including her treatment of the last-second assignment of the first mortgage to 273 Ontario's financier, Toronto Capital.

14 The appeal is dismissed.

15 The appellants shall pay the Receiver its costs of the appeal fixed in the amount of $35,000.00, inclusive of disbursements and applicable taxes.

Appeal dismissed.

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2023 ONSC 832
Ontario Superior Court of Justice [Commercial List]

Rose-Isli Corp. v. Frame-Tech Structures Ltd.

2023 CarswellOnt 1532, 2023 ONSC 832, 2023 A.C.W.S. 469, 6 C.B.R. (7th) 129

ROSE-ISLI CORP., 2631214 ONTARIO INC., SEASIDE CORPORATION, and 2735440 ONTARIO INC. (Applicants) and FRAME-TECH STRUCTURES LTD., MICHAEL J. SMITH, FRANK SERVELLO, CAPITAL BUILD CONSTRUCTION MANAGEMENT CORP., and 2735447 ONTARIO INC. (Respondents)

Kimmel J.

Heard: December 15, 2022; January 6, 26, 2023
Judgment: February 2, 2023
Docket: CV-22-00682959-00CL

Counsel: Jason Wadden, Carlos Sayao for Plaintiff, Applicant, Moving Party, Crown, Rose-Isli Corp., 2631214 Ontario Inc., Seaside Corporation, 2735440 Ontario Inc.
Sharon Kour, Caitlin Fell, Shaun Parson for Receiver, Ernst & Young Inc.
Nathaniel Read-Ellis, Sean Pierce for Purchaser, Ora Acquisitions Inc.
Adam Wygodny for Purchasers of Unit No. 604
Cameron Neil for KNYMH lien claimant

Subject: Corporate and Commercial; Insolvency

MOTION by receiver for approval of sale and related relief; CROSS-MOTION by creditor to redeem mortgage.

***Kimmel J.*:**

1 The court appointed receiver, Ernst & Young Inc., (the "Receiver") of 2735447 Ontario Inc. (the "Company") brings this motion for an approval and vesting order ("AVO") and an order for ancillary relief. This proceeding has a unique procedural history that has resulted in several court attendances and interim endorsements.

2 The circumstances are unusual because of the dealings between 2735440 Ontario Inc. ("273 Ontario") and the Receiver, as well as the different interests that 273 Ontario has in the Property (defined below). 273 Ontario is both a second mortgagee that wants to be paid and a joint venture participant in the Rosehill Project that was to be developed on the Property. The Receiver was appointed upon 273 Ontario's application under the oppression remedy, s. 248 of the Business Corporations Act, R.S.O. 1990, c. B-16.

3 This is the court's final decision on the Receiver's motion. It is also the final decision on 273 Ontario's cross-motion to redeem the Property or, in the alternative, for an order approving its credit bid in the court ordered sales process. [1]

4 For the reasons that follow, the Receiver's motion is granted and the cross-motion is dismissed.

Prior Court Orders

5 Ernst & Young Inc. was appointed as the Receiver and manager over all the assets, undertakings and properties of the Company by order dated July 8, 2022 (the "Appointment Order"). This included the real property municipally described as 177, 185 and 197 Woodbridge Avenue, Vaughan, Ontario, and all proceeds thereof (the "Property"). These are the lands upon which the proposed "Rosehill Project" was to be constructed.

6 The Receiver's powers under paragraph 3 of the Appointment Order include:

> (j) [T]o market any or all of the Property, including advertising and soliciting offers in respect of the Property or any part or parts thereof and negotiating such terms and conditions of sale as the Receiver in its discretion may deem appropriate, and without limiting the generality of the foregoing, to take into account any offers to purchase the Lands or other assets of the Company that have been received and/or accepted to date as part of the sales process described in the Grossi Affidavit;
>
> (k) [W]ith the approval of this Court, to sell, convey, transfer, lease or assign the Property or any part or parts thereof out of the ordinary course of business; provided, however, that in each such case notice under subsection 63(4) of the *Ontario Personal Property Security Act*, or section 31 of the Ontario *Mortgages Act*, as the case may be, shall not be required;

7 The Appointment Order contemplates that the Receiver may seek court approval to convey, transfer or sell the Property and seek vesting or other orders as may be needed to convey the Property to a purchaser free and clear of any liens, encumbrances or other instruments affecting it.

8 The prescribed responsibilities and powers of the Receiver under the Appointment Order are similar to those prescribed in insolvency situations when a receiver is appointed under the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3. However, the Appointment Order was not predicated upon any finding that the Company was insolvent. It was made in the context of the within oppression remedy application commenced by 273 Ontario and others as a result of a breakdown in the relationship between the joint venture participants in the Rosehill Project.

9 While the Company has not been declared insolvent, the Receiver suggests that it may now be. In any event, that issue is not before the court.

10 When the Receiver was appointed, there appeared to be a consensus that the Property would be sold. While a credit bid from 273 Ontario was not ruled out, it declined to make a stalking horse bid.

11 The Receiver developed a sale and marketing process in consultation with, among others, 273 Ontario. Although not required in light of the powers granted to it under the Appointment Order, the Receiver sought, and was granted, an order approving its proposed sale and marketing process. No party opposed the requested order and it was granted on September 12, 2022 (the "Sale Process Order"). The Sale Process Order authorized and directed the Receiver to commence the Sale Process (described in the Receiver's First Report) for the purpose of soliciting interest in and opportunities for a sale of the Property.

12 The approved Sale Process was to proceed on an estimated timeline of 60 days and included the following: the retention of a listing broker, the establishment of a data room, the preparation of a confidential information memorandum, form of confidentiality agreement, teaser for prospective purchasers, the broker contacting potentially interested parties, a bid deadline of approximately 45-50 days for submissions by interested parties of a binding, irrevocable and unconditional asset purchase agreement (the "Binding APA") that was to comply with specified requirements (including a ten percent deposit, proof of financing and a closing date within five days of court approval, among other things) and the eventual selection of a successful bidder.

13 The Receiver had the authority to extend the Sale Process timeline, acting reasonably, with a view to securing a fair and reasonable bid for the Property. The Receiver also had the authority to extend the bid deadline or cancel the Sale Process.

14 Under the Sale Process, the successful bid and transaction would require court approval to transfer of the Property free and clear of all liens and claims, subject to any permitted encumbrances, pursuant to an approval and vesting order.

15 The Sale Process allowed that "[i]f the Receiver receives one or more Binding APAs, it may, in the Receiver's sole discretion, negotiate with such bidders with a view to improving the bids received."

16 The Sale Process required the Receiver to consider and review each Binding APA based on several factors, including:

Items such as the proposed purchase price and the net value provided by such bid, the claims likely to be created by such bid in relation to other bids, the counterparties to such transactions, the proposed transaction documents, other factors affecting the speed and certainty of the closing of the transaction, the value of the transaction, any related transaction costs, the likelihood and timing of consummating such transactions, and such other matters as the Receiver may determine.

17 The bid deadline was November 25, 2022.

The Motions

18 The procedural history is somewhat lengthy but provides important context. It was detailed in the court's January 18, 2023 endorsement and is repeated, with necessary additions and amendments, for ease of reference herein. Capitalized terms not defined herein shall have the meaning ascribed to them in the Receiver's Reports filed in connection with these motions: the Second Report filed December 11, 2022, the First Supplement to the Second Report filed December, 19, 2022 ("Supplementary Report"), and the Second Supplement to the Second Report Filed January 25, 2023 ("Second Supplementary Report").

19 The Receiver seeks an AVO, *inter alia*:

a. approving the agreement of purchase and sale dated December 9, 2022 (the "APS") between the Receiver and ORA Acquisitions Inc. ("Ora" or the "Purchaser") for the purchase and sale of the assets, undertakings and properties of the Company (the "Purchased Assets"), including but not limited to the Property, and authorizing the Receiver to complete the transaction contemplated therein (the "Transaction");

b. vesting the Purchased Assets in the Purchaser upon the closing of the Transaction, free and clear of all security interests, liens and the like, whether secured or unsecured; and

c. ordering that immediately after the delivery of the Receiver's certificate confirming the closing of the Transaction, each of the Unit Purchaser Agreements (as defined hereinafter) shall be deemed to have been terminated by the Receiver and any rights or claims thereunder or relating thereto are not continuing obligations effective against the Property or binding on the Purchaser.

20 The Receiver is also asking the court to grant an ancillary order (the "Ancillary Order") for, *inter alia*, the approval of: (i) the Receiver's actions and activities and statement of receipts and disbursements described in its Second Report, (ii) the creation of appropriate reserves for the fees of the Receiver and its counsel, future anticipated receivership expenses and a reserve for Registered Lien Claims (defined hereinafter), (iii) proposed distributions that would satisfy the first mortgage charge in favour of Trez Capital Limited Partnership ("Trez") [2] and the Receiver's Borrowings Charge (as defined in the Appointment Order), and (iv) a limited sealing order in respect of certain identified confidential exhibits to the Receiver's Second Report dated December 11, 2022.

21 The Receiver's motion was originally returnable on December 22, 2022. It was adjourned to January 6, 2023 at the request of 273 Ontario. 273 Ontario, as a secured creditor of the Company, a joint venture participant and a bidder for the purchase of the Property, wanted the opportunity to make submissions on a more fulsome record regarding, among other things, the factors set out in *Royal Bank of Canada v. Soundair Corp.*, (1991), 4 O.R. (3d) 1 (C.A.). *Soundair* sets out the legal framework for the court to determine whether to approve the APS and Transaction.

22 At the January 6, 2023 return date, 273 Ontario also brought its own cross-motion for an order permitting it to redeem the Property upon payment of the amounts found owing in priority to its second mortgage and asked the court to schedule a motion to disallow the Registered Lien Claims. Alternatively, 273 Ontario's cross-motion seeks an order approving its bid submitted on December 9, 2022 and supplemented on December 12, 2022 (the "Credit Bid").

23 During the January 6, 2023 hearing, the court raised a question about the aspect of the relief sought by the Receiver that would deem the condominium unit purchase agreements (the "Unit Purchaser Agreements") to be terminated upon the closing

of the Transaction. The Unit Purchaser Agreements were entered into by the Company prior to the receivership with purchasers of pre-sale residential and commercial condominium units (the "Unit Purchasers").

24 Specifically, the court asked for the authority upon which the Receiver asserted that the interests of the Unit Purchasers are not affected by the requested order. The Receiver said (for example, in paragraph 94 of its Second Report) that this was predicated upon these Unit Purchasers having no interest in (or any claim to) the Property. This was also the basis upon which the Receiver determined that the Unit Purchasers did not need to be served with the Receiver's motion. The Receiver argued that the legal rights of the Unit Purchasers are protected by its proposal that deposits paid pursuant to the Unit Purchaser Agreements, and held by the law firm Schneider Ruggiero Spencer Milburn LLP, will be returned if the Unit Purchaser Agreements are terminated after the closing of the Transaction.

25 At the court's request, further written submissions (reflecting inputs from both the Receiver and 273 Ontario) on this point were provided to the court on January 13, 2023.

26 By an endorsement dated January 18, 2023, the court reluctantly further adjourned the Receiver's motion and 273 Ontario's cross-motion, for, among others, the following reasons:

a. There may have been a misunderstanding between the Receiver and 273 Ontario about the importance and timeliness of the request by 273 Ontario for the Receiver to determine the validity of 273 Ontario's security and confirm the accepted amount of the 273 Ontario Loan and to determine the Registered Lien Claims. 273 Ontario considered both requests to be essential to its ability to exercise its right of redemption and/or make a Credit bid and to determine its essential conditions and structure. Once received, the prospect of an alternative transaction emerged (under the 273 Ontario Credit Bid or by virtue of the exercise of a right of redemption, if permitted) that does not terminate or disclaim the Unit Purchaser Agreements, albeit proposing to treat other stakeholders, such as the Registered Lien Claimants, less favourably than under the Transaction. The full implications of this have not been canvassed.

b. Thus far, 273 Ontario's position on the cross-motion had been that its Credit Bid (or terms of redemption) will not include sufficient cash to establish a reserve for the Registered Lien Claims pending their final adjudication or resolution. Under these circumstances, the court would like to be satisfied that both Registered Lien Claimants are on notice of that position and have been given the opportunity to address the court on that issue in light of the cross-motion.

c. While it may be reasonable to infer what the Registered Lien Claimants would prefer (to have a reserve established to protect their Registered Lien Claims until they have been determined), the court will not presume to know what the Unit Purchasers might say or what outcome they might prefer (particularly in light of the falling real estate market).

d. There is a strong argument in favour of the Receiver's position that the Unit Purchasers have no interest in the Property and no right to any remedy other than the return of their deposits. However, this is not an absolute or guaranteed outcome. Cases on this point indicate that prejudice to those purchasers can be a relevant consideration. Even if their legal rights are determined by the Unit Purchaser Agreements, there are stakeholders whose interests (which can extend beyond strict legal rights) may also be relevant when the court decides whether to allow 273 Ontario to redeem the Property or to grant the requested AVO and Ancillary Order.

e. Given that the termination of the Unit Purchaser Agreements is an explicit condition of the APS and sought as part of the AVO, and in the particular circumstances of this case, the Unit Purchasers should have been given notice of the Receiver's motion and the opportunity to respond to it. They may not oppose, or, their opposition may not be successful; however, they should be given the opportunity to be heard.

f. The court would also prefer to be fully informed about whether the Receiver has valid contractual grounds upon which to terminate the Unit Purchase Agreements that it relies upon.

g. Not every situation involving a deemed termination or approval of disclaimer of purchase agreements in pre-sale condominium projects in receivership will necessarily require notifying purchasers. Each case must be considered on its

own facts. As noted, the legal rights of these purchasers may be limited, even if their interests are not necessarily limited to their strict legal rights.

h. Prejudice (if it can be established) is also a relevant consideration. It is not just the prejudice to the Unit Purchasers, but also to the Registered Lien Claimants and to the Purchaser, that must be considered and balanced (along with the interests of the secured creditors and any other creditors that the court is typically concerned with on these types of approval motions).

i. The Receiver will need to determine the most efficient way to put the Unit Purchasers (and perhaps the Registered Lien Claimants) on notice of the next return date and to set out a process for their positions, if any, to be coherently and efficiently put before the court.

j. Pending the input of the Unit Purchasers, if any, the satisfaction of the condition of the APS that the Unit Purchaser Agreements be terminated or disclaimed remains uncertain.

27 In the court's January 18, 2023 endorsement, the court cautioned that the Unit Purchaser's positions would not be the only, or determinative, factor. It was noted that when the matter returned to court on January 26, 2023, the determination of the two remaining substantive issues: a) the purported exercise of 273 Ontario's right to redeem, and b) the approval of the APS, Transaction and proposed AVO, will involve, among other things, the court's consideration of the interests of, and prejudice to, all of the different stakeholders whose rights and interests are impacted differently by the different potential outcomes: see Kruger v. Wild Goose Vintners Inc., 2021 BCSC 1406, at para. 74; BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc., 2020 ONSC 3659, at para. 47; *Royal Bank of Canada* ; Ravelston Corp. Re.200524 C.B.R. (5th) 256 (Ont. C.A.), at para. 40.

28 The court foreshadowed in the January 18, 2023 endorsement that the ultimate consideration, involving the balancing of interests and alleged prejudices, may still favour approval of the APS, Transaction and AVO. That is in fact what has been decided.

Factual Background

29 Much of the factual background was reviewed in the court's January 18, 2023 endorsement. Relevant portions, not addressed elsewhere in this endorsement, are recapped below in this section for ease of reference. [3]

The Project, Existing Mortgages and Sales Efforts Around the Time of the Appointment Order and Sale Process Order

30 The Purchased Assets and the Property were part of the Rosehill Project, a joint venture between the applicants and the respondents for the development of a proposed six-story mixed use residential and commercial development. The Rosehill Project is anticipated to comprise of approximately 80 condominium units. The Company is the entity through which the joint venture was developing the Rosehill Project and is the registered owner of the Property. As at the date of the Appointment Order, 60 residential suites and one commercial unit had been pre-sold.

31 Trez (an arm's length third party lender) provided mortgage financing to the Company, secured by a first charge on the Property that initially went into default and then matured in August and September of 2022.

32 273 Ontario provided mortgage financing to the Company secured by a second charge on the Property.

33 Prior to the Appointment Order, the Company had begun marketing the Rosehill Project for sale. After the Appointment Order, the Receiver's efforts to re-engage with a pre-appointment prospective purchaser were unsuccessful.

34 Before the court approved the Sale Process, the Receiver and 273 Ontario discussed the possibility of 273 Ontario being a stalking horse bidder or assuming the Trez first mortgage loan. 273 Ontario did not pursue either option at that time. The Sale Process did not foreclose the possibility of 273 Ontario making a bid.

The Registered Lien Claims

35 The Receiver's First Report filed in connection with its motion to approve the Sale Process identified a construction lien registered by Capital Build on title to the Property for over $2 million (the "Capital Build Lien"). When the Sale Process was approved, the Receiver had not completed an analysis to validate the work performed to support the Capital Build Lien or its priority.

36 In addition to the Capital Build Lien, another lien is registered on title to the Property by an architect (the "KNYMH Lien"). The KNYMH Lien and the Capital Build Lien comprise the "Registered Lien Claims" and "Registered Lien Claimants" as the case may be.

37 273 Ontario indicated to the Receiver that it challenged the legitimacy of the Registered Lien Claims and its priority over 273 Ontario's second mortgage. 273 Ontario wanted the Receiver to determine the validity of the Registered Lien Claims before it made its bid.

38 In October 2022, 273 Ontario made a specific request of the Receiver to review and determine the validity of the Registered Lien Claims. The Receiver reviewed the supporting documents for the Capital Build Lien and concluded that it was insufficient. The Receiver has advised that it intends to bring a motion for court approval to disallow that claim. The Receiver also reviewed the KNYMH Lien Claim, but allowed it. The Receiver understands that parties interested in the Registered Lien Claims may dispute the Receiver's determinations of their respective validity and priority. Moreover, it is expected that the court will eventually have to adjudicate their validity, amount and priority.

The 273 Security and Loan Amount

39 On October 14, 2022, counsel for 273 Ontario requested that the Receiver review 273 Ontario's security based on the supporting documentation 273 Ontario had provided. On or around November 15, 2022, counsel for 273 Ontario asked the Receiver to confirm whether 273 Ontario's security was valid and enforceable. On November 18, 2022, counsel for the Receiver confirmed with counsel for 273 Ontario that its security was valid and enforceable, and that the Receiver accepted $6,389,204 as owing to 273 Ontario, assuming a payout as of December 31, 2022.

40 On November 21, 2022, counsel for 273 Ontario wrote to the Receiver objecting to that amount. 273 Ontario claimed that it was owed $7,047,395.23, which included, among other things, interest to the July 16, 2023 maturity date of its loan (the "273 Ontario Loan").

The Bidding Process

a) The 273 Ontario Bid

41 The Receiver advised counsel for 273 Ontario that any Credit bid made by 273 Ontario must provide cash in the amount of the Registered Liens Claims. That cash was to be set aside until the final determination of the validity and priority of the Registered Lien Claims, or the settlement thereof.

42 273 Ontario had concerns about submitting a Binding APA containing a Credit bid by the bid deadline given that: a) the Registered Lien Claims, which 273 Ontario did not believe were legitimate, had not been determined and 273 Ontario was not certain it could raise sufficient financing to satisfy both the Trez mortgage as well as the Registered Lien Claimants; and b) there was a discrepancy between the calculations of the Receiver and 273 Ontario as to the amount outstanding of the 273 Ontario Loan and that could be applied to the Credit bid.

43 Counsel for 273 Ontario asked that the Receiver take no steps to "declare a winning bid or disregard [his] client's bid" until the hearing of a proposed motion to extend the bid deadline, proposed to be scheduled on November 29, 2022. Counsel for the Receiver advised counsel for 273 Ontario that the Receiver had discretion to extend the November 25, 2022 bid deadline if necessary.

44 Regardless of what may, or may not, have transpired in the lead up to the November 25, 2022 bid deadline, counsel for the Receiver worked with counsel for 273 Ontario to attempt to address 273 Ontario's concerns thereafter. This included a suggestion that 273 Ontario submit a Credit bid which: (i) was conditional on the Registered Lien Claims being resolved to its satisfaction, and (ii) provided for a Credit bid of 273 Ontario's debt of not less than a specified amount. Counsel for the Receiver advised counsel for 273 Ontario that the Receiver would consider any written offer made by 273 Ontario by the bid deadline, and that no motion was necessary to extend the bid deadline.

45 273 Ontario submitted a non-binding letter of intent on the bid deadline. Even though it did not satisfy the requirements for bids under the Sale Process (nor was it accompanied by a commitment for firm irrevocable financing or a deposit), the Receiver received and considered its terms and continued discussions with 273 Ontario thereafter.

46 By December 2, 2022, the amount in dispute between the Receiver's alleged amount owed under the 273 Ontario Loan, and 273 Ontario's alleged amount owed, was about $700,000. The Receiver advised 273 Ontario that it would accept, for the sole purpose of 273 Ontario's Credit bid, 273 Ontario's claim that $7,047,395.23 was owed under the 273 Ontario Loan.

b) Ora and other Bids

47 Ora and two other bidders submitted bids compliant with the requirements under the Sale Process on the bid deadline of November 25, 2022. The Receiver negotiated with Ora with respect to various terms of its bid. The result was that the Ora submitted an unconditional, all cash, Binding APA on December 7, 2022 (the "Ora Binding APA"), a requirement of which is that all Unit Purchaser Agreements and the unit deposits received thereunder be excluded from the Purchased Assets (as defined in the Ora Binding APA).

c) Request for Binding APA from 273 Ontario

48 After receiving the unconditional, executed Ora Binding APA on December 7, 2022, the Receiver asked 273 Ontario to submit a Binding APA with proof of financing and a deposit by December 9, 2022.

49 On Friday December 9, 2022, 273 Ontario submitted its Credit Bid. The bid was conditional on financing (but accompanied by a commitment letter) and was submitted with an unconditional Binding APA that the Receiver could accept.

d) The Receiver's Decision

50 The Receiver evaluated the Credit Bid and determined that it had significant risk around both the certainty of closing and 273 Ontario's ability to pay the cash component of the purchase price that was dependent on financing, which was itself contingent.

51 The Receiver thereafter decided to accept the Ora Binding APA, as it contained fewer conditions, carried less closing risk and had a greater certainty of recovery for creditors generally. The Receiver considers the Ora Binding APA to represent the best executable offer received in the Sale Process. The Receiver accepted the Ora Binding APA on December 10, 2022. [4]

52 On Monday, December 12, 2022, 273 Ontario supplemented its Credit Bid with financing commitments sufficient to pay certain priority payables, including the Trez Loan and the Receiver's Borrowing Charge, but not the Registered Lien Claims. Rather, the Credit Bid contains a closing condition that requires the Registered Lien Claims to be withdrawn or declared by the court to be invalid or dismissed. The Credit Bid does not require the termination or vesting out of the Unit Purchaser Agreements.

53 After accepting the Ora Binding APA, the Receiver received and considered some additional material and terms presented by 273 Ontario. The Receiver attempted to facilitate a settlement between Ora and 273 Ontario that involved 273 Ontario paying a break fee to Ora. There appeared to be a settlement but 273 subsequently advised that it was not prepared to proceed with that settlement in advance of the initial return date of the Receiver's motion on December 15, 2022. This led to the request by 273 Ontario for an adjournment so that it could bring its cross-motion and make further submissions in opposition to the Receiver's motion (that procedural history is discussed above).

The APS

54 The APS (comprised of the Ora Binding APA accepted by the Receiver) requires that title to the Property be vested in the Purchaser free and clear of the Unit Purchaser Agreements. As such, the proposed AVO vests out the Unit Purchaser Agreements.

55 The net sale proceeds under the APS are expected to repay the first mortgage in full, and, subject to the final determination of the Registered Lien Claims, part of the 273 Ontario mortgage.

56 Since the Property is to be transferred free and clear of all encumbrances and the Registered Lien Claims have not been finally determined, the Receiver seeks approval to hold back the following amounts comprising a proposed reserve for Registered Lien Claims (the "Reserve") until the Registered Lien Claims have been finally determined or resolved:

a. Until such time that the KNYMH Lien is resolved, the Receiver proposes to hold a cash reserve of $259,211 from the net sale proceeds of the proposed Transaction, being the full amount of the KNYMH Lien, pending further order of the court.

b. Until such time as the validity and priority of the Capital Build Lien has been resolved, the Receiver proposes to hold a cash reserve of $2,000,665 from the net sale proceeds of the proposed Transaction, being the full amount of the Capital Build Lien, pending further order of the court.

57 Ora has permitted its ten percent deposit to be held in a non-interest bearing account pending the court's determination of these motions. It has also kept liquid cash available so that it can close (with payment of its all cash purchase price) within five days of any court approval of the Transaction.

The Assignment of the Trez First Mortgage Position

58 Trez gave notice of default under its first mortgage in August 2022. The mortgage loan matured and became due and payable in September 2022. The net proceeds from the Transaction are projected to exceed the amounts owing to Trez. As noted above, the AVO contemplates paying out this first mortgage in full.

59 273 Ontario advised the court that, since the hearing on January 6, 2023, it continued to work with its financier, Toronto Capital Corp. ("Toronto Capital"), towards redeeming the Property. To that end, Toronto Capital and Trez entered into a Loan Sale Agreement (and ancillary agreements) whereby Trez assigned the first mortgage charge to Toronto Capital (the "Toronto Capital Assignment").

60 Pursuant to the Toronto Capital Assignment, Trez was paid out in full on the first mortgage and Toronto Capital became the first priority secured creditor. This transaction closed, and the security was transferred from Trez to Toronto Capital on the morning of January 26, 2023, just prior to the hearing.

61 Toronto Capital opposes the sale to Ora, among other things. As such, both the first-ranking (Toronto Capital) and second-ranking (273 Ontario) secured creditors now oppose the sale to Ora, and support either (i) the completion of the redemption of the Property by effecting a transfer of the Property to 273 Ontario; or (ii) the approval of the Credit Bid to effect a sale of the Property to 273 Ontario, both with the assumption of Toronto Capital's interest such that it is preserved.

62 273 Ontario has advised that it incurred financing fees of approximately $235,000 to arrange for the Toronto Capital Assignment, plus legal costs. These expenses are in addition to the amounts it has already spent funding the receivership and these proceedings.

Issues to be Decided

63 The issues to be determined on the Receiver's motion and 273 Ontario's cross-motion were outlined in the January 18, 2023 endorsement to be as follows:

a. Are there stakeholders who should have been served with the motions:

i. The Unit Purchasers?

ii. The Registered Lien Claimants?

b. Does 273 Ontario have the right to redeem the Property?

c. Should the Transaction and the APS be approved and the proposed AVO be granted?

d. Should the Ancillary Order be granted?

Analysis

Preliminary Issues Regarding Service and Notice, and Updated Positions Regarding the Unit Purchasers and Registered Lien Claimants

64 The service issues were addressed in the January 18, 2023 endorsement. The Receiver's Second Supplement to the Second Report provided the following updates and information arising out of that endorsement:

a. The Receiver made efforts to contact the Unit Purchasers and their counsel of record to notify them of the motions and provide them with the link to access the court materials by email and phone. They were invited to respond to the Receiver if they wished to put their positions before the court.

b. Some Unit Purchasers contacted the Receiver and all who expressed a desire to attend the January 26, 2023 hearing were provided with the video link.

c. A number of Unit Purchasers attended the hearing (approximately 30), and three requested and were given the opportunity to address the court.

d. As at January 24, 2023, of the 62 residential and commercial Unit Purchasers contacted by the Receiver, 32 indicated that they would prefer their Unit Purchaser Agreements be terminated, 9 indicated they would prefer their Unit Purchaser Agreements be maintained, and 21 did not respond, or responded without indicating a preference.

e. The Registered Lien Claimants are represented by counsel on the Service List and both were served prior to the motion dates on December 22, 2022 and January 6, 2023. Capital Build's Bankruptcy Trustee, and the Trustee's counsel, were also served with the motion materials. KNYMH's counsel attended the January 26, 2023 hearing.

f. The Receiver does not rely on the contractual provisions of the Unit Purchaser Agreements to terminate those contracts. The Receiver relies on the powers granted to it under paragraph 3(c) of the Appointment Order "to manage, operate, and carry on the business of the Company, including the powers to enter into any agreements, incur any obligations in the ordinary course of business, cease to carry on all or any part of the business, or cease to perform any contracts of the Company", as well as the court's inherent jurisdiction as the basis for terminating the contracts and returning deposits to the Unit Purchasers.

65 At the January 26, 2023 hearing, some Unit Purchasers expressed the view that they would like to receive their deposits back and to have their Unit Purchaser Agreements terminated, having lost faith in the Rosehill Project coming to fruition. Others indicated that they would like to see the Rosehill Project built and to proceed with their purchase. One purchaser in particular (who also provided a statutory declaration) emphasized the attractive location, its proximity to amenities and services for seniors in the area and the enhancements to their unit to accommodate their particular needs. This purchaser expressed concerns about retirement plans and the detriment to purchasers and the community over the loss of the Rosehill Project.

66 In its submission to the court on January 26, 2023, 273 Ontario advised that if it is permitted to redeem or has its Credit Bid approved, it will provide the Unit Purchasers with 30 days to advise whether they wish to have their units put back into the pool of units to be sold by 273 Ontario going forward, and if such sales are achieved (without loss) then 273 Ontario will cancel their contracts without cost or penalty to them. 273 Ontario is prepared to have any court order approving the redemption or acceptance of its Credit Bid incorporate such a provision into the order.

67 273 Ontario also indicated that it is prepared to have any court order approving the redemption or acceptance of its Credit Bid contain the following mechanisms to preserve the rights of the Registered Lien Claimants pending the determination of their rights by the court as follows:

> 273 is prepared to bond off 10 percent of the respective amount of the Capital Build and KNYMH Liens. Alternatively, in the event the Court approves the 273 Credit Bid or permits 273 to redeem the Property, the resulting order can provide that KNYMH's and Capital Build's rights under the Liens are preserved in the Property to the extent they are found to be in priority to the 273 mortgage following the closing of the transaction.

68 Counsel for KNYMH indicated at the hearing that as long as its rights under s. 44(1) of the Construction Act, R.S.O. 1990, c. C.30 are preserved, and its lien is terminated on the basis of the payment of appropriate funds into court (the entire amount of the lien plus 25 percent for costs), or alternatively, its lien is preserved in the Property until such time as any process for the determination of the Registered Lien Claims has run its course, it takes no position on the motions.

Does 273 Ontario Have the Right to Redeem the Property and Should the Court Permit it to do so?

The Right to Redeem

69 273 Ontario argues that s. 2 of the Mortgages Act, R.S.O. 1990, c. M.40 guarantees a secured creditor's right to redeem. According to 273 Ontario, "[i]t permits the mortgagor or any 'encumbrancer', such as 273 [Ontario] as [a] secured creditor, to 'assign the mortgage debt and convey the mortgaged property' to any person."

70 Section 2(1) of the Mortgages Act entitles the mortgagor to require the mortgagee to assign the mortgage debt and convey the property as the mortgagor directs. The mortgagee is bound to assign and convey accordingly. Section 2(2) of the Act allows that right to be enforced by each encumbrancer. A requisition of an encumbrancer prevails over that of the mortgagor.

71 The right to redeem is a right of a debtor, upon payment of a debt, to recovery the property pledged to a creditor as security for payment of a debt: see *Wild Goose*, at para. 69.

72 In this case, 273 Ontario seeks to convey the Property to itself (and would have sought to assign the first mortgage debt to its financier, Toronto Capital, but that has now preemptively occurred).

73 Neither the Receiver nor Ora appear to disagree with 273 Ontario's theoretical right to redeem the Property as the second mortgagee. While this typically arises in foreclosure or court ordered sales (under, for example, r. 64 of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194), 273 Ontario's request to redeem it is not opposed on the basis that no such right could ever arise in the context of a court ordered sale process in a receivership.

74 Rather, what the Receiver and Ora oppose is the timing of 273 Ontario's purported exercise of this right. They maintain that the court should not exercise its discretion to allow a creditor to exercise a right of redemption after a court-ordered Sale Process is in place and a bid has been accepted. Particularly in this case, a Sale Process that the creditor (273 Ontario) was consulted about and did not oppose when it was approved by the court.

Should 273 Ontario be Permitted to Redeem the Property?

75 The Receiver relies on Ron Handelman Investments Ltd. v. Mass Properties Inc.200955 C.B.R. (5th) 271 (Ont. S.C.J. [Commercial List]) (Ont. S.C.) to argue that 273 Ontario should not be permitted to exercise its right of redemption at this stage in the proceedings.

76 In *B&M Handelman*, the court relied on the wording of the order authorizing the receiver to sell the subject property to preclude an automatic right to redeem. The court noted that in each case where the Receiver took steps to market the Property and to sell it in the ordinary course of business with the approval of the court, "it was exclusively authorized and empowered to do so, to the exclusion of all other persons including debtors and without interference from any other person": *B&M Handelman* , at para. 21. It was "[i]n the face of these provisions", that the court precluded an automatic right to redeem. [5]

77 The Receiver argues that the Appointment Order and Sale Process Order in this case should be read as containing similar language that precludes a right of redemption. I have not found similarly prescriptive language in the court orders in this case.

78 Of more direct concern in this case is the impact that allowing 273 Ontario to exercise its right of redemption would have on the integrity of the court approved Sales Process. The policy considerations that weighed heavily on the court in *B&M Handelman*, at para. 22 are of equal concern in this case:

> A mockery would be made of the practice and procedures relating to receivership sales if redemption were permitted at this stage of the proceedings. A receiver would spend time and money securing an agreement of purchase and sale that was, as is common place, subject to Court approval, and for the benefit of all stakeholders, only for there to be a redemption by a mortgagee at the last minute. This could act as a potential chill on securing the best offer and be to the overall detriment of stakeholders.

79 These policy considerations are discussed in many of the cases decided after the case that 273 Ontario relies upon most heavily, *Bank of Montreal v. Hester Creek Estate Winery Ltd.*, 2004 BCSC 724, 2004 B.C.L.R. (4th) 149. They do not appear to have factored in the court's decision in *Hester*, in which the court was unequivocal on the use of a redemption in a sales process:

> [t]he integrity of the court process is not compromised by allowing a debtor or its trustee in bankruptcy to redeem the mortgaged property on the eve of an application to approve a sale of the property. Whenever there is a court-ordered sale process, it is always implicit that the conduct of the sale is subject to the debtor being able to pay off the secured creditor before a sale is approved by the court.

80 The policy considerations inform the analysis in the cases decided after *Hester*, starting with *B&M Handelman* . Most recently, in *Wild Goose* at para. 74, the court noted that "[i]n a case in which a debtor seeks to redeem security after a sale has been negotiated by a receiver before a sale has been approved, consideration of the purchaser's interest and the efficacy and the integrity of the process by which an offer was obtained *may* favour approval of the sale" (emphasis added).

81 While the court in *Wild Goose*, at para. 78 distinguishes *Hester* on the basis that all the secured creditors were protected by the redemption in *Hester*, the decision on whether to allow a redemption in *Wild Goose* still appears to have turned on the integrity of the sales process. At para. 80 the court notes, "[i]n my view, protecting the integrity of the sales process contemplated by the sale solicitation order outweighs Wild Goose's claim that it should be entitled to redeem the petitioner's security in the circumstances of the case."

82 What emerges from these more recent cases is that the integrity of a court approved sale process is an important consideration. If a sale process is found to be sound, it should not be permitted to be interfered with by a later attempt to redeem. Further support for this approach can be found in the court's reasoning in *BDC v.* Marlwood Golf & Country Club,2015 ONSC 3909, 27 C.B.R. (6th) 166, at para. 27: "[i]n this case, the sales process was properly run. Redemption of its mortgage by Marlwood in these circumstances would interfere with the integrity of that process."

83 The court engages in a balancing analysis of the right to redeem against the impact on the integrity of the court approved receivership process: see BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc., 2020 ONSC 3659, at para.

41. The importance of the timing of the process in relation to the purported exercise of the right to redeem is emphasized at para. 36:

> In [*B&M*] *Handelman*, the Receiver had already run a bid process, had selected a purchaser and was moving to approve the purchase. Different considerations arise at that late a stage. Allowing debtors to redeem property on the sale approval motion would discourage potential purchasers from submitting bids in the first place and threaten the utility of the receivership process more generally.

The Balancing of Interests

84 The rights enunciated in *Hester* and relied upon by 273 Ontario must be balanced with the integrity of the court approved sale process. That in turn requires a consideration of whether that sale process was carried out in a procedurally fair manner, with a view towards achieving the best (and not an improvident) price, and with regard to the interests of all stakeholders. That consideration is part of the analysis that the court must engage in under the *Soundair* principles when deciding whether to approve the Transaction and grant an AVO, discussed in the next section of this endorsement.

85 The potential for prejudice to the different stakeholders is another consideration that is to be factored into the balancing exercise undertaken by the court in determining whether to permit the exercise of a right to redeem: see *Wild Goose*, at para. 74; *BCIMC* , at para. 47.

86 The stakeholder interests identified in this case include:

a. The interest of 273 Ontario, a joint venture and the fulcrum creditor, in acquiring the Property to try to preserve its debt and equity in the Rosehill Project (and avoid the losses that it will suffer if the Transaction is approved), as manifested by the relief sought in its cross-motion for the court's approval of its request to redeem or its Credit Bid.

b. The interest of the Receiver, in its capacity as the court appointed officer that sought the Sale Process Order and carried out the Sale Process, to protect the integrity of the court approved Sale Process.

c. The Purchaser is also invested in the integrity of the Sale Process, having participated in it in good faith. It also has a financial interest not only in the acquisition of the Property at the price agreed to under the Ora Binding APA, but in the lost opportunity costs by allowing its deposit to be held in a non-interest bearing account since November 25, 2022 and by maintaining sufficient liquidity to close the all-cash Transaction within five days of any court approval. While it engaged with the Receiver knowing that the Sale Process could be terminated by the Receiver, that never happened.

d. The priority interests of the first mortgagee (previously Trez and now Toronto Capital) and the Registered Lien Claimants are now protected under both the Ora Transaction and the redemption/Credit Bid scenario, so they have no prejudice to be considered. Any prejudice to Toronto Capital in respect of its plans to finance 273 Ontario has been created after the Receiver accepted the Ora Binding APA and is not a relevant consideration.

e. The Unit Purchasers whose Unit Purchase Agreements will be terminated (and deposits returned) under the proposed Transaction, if approved. They have now been given notice and have not come forward with a strong voice of opposition to the termination of those agreements by the court. [6] Of those who have expressed a view, more prefer this than oppose it, and more still were silent on the point. The number and substance of the opposition is underwhelming, given how far away the Rosehill Project is from completion. [7]

f. Any other remaining unsecured creditors are unlikely to recover under either scenario and are not being directly impacted beyond the non-recovery of their debt.

87 The court recognizes that all stakeholder interests may not be equal: "[a]lthough the interests of the debtor and purchaser are also relevant, on a sale of assets, the receiver's primary concern is to protect the interests of the debtor's creditors": Skyepharma PLC v. Hyal Pharmaceutical Corp.199912 C.B.R. (4th) 87 (Ont. S.C.J. [Commercial List]) (Ont. S.C.), at para. 6.

88 The other stakeholder interests in this case are either neutral or militate in favour of preserving the integrity of the Sale Process, which is what is stacked up against 273 Ontario's interests as a secured creditor and joint venture participant that will not fully recover its debt, investment or costs of the receivership if the Transaction is approved and is completed.

89 While the situation in this case is distinguishable from most of the decided cases in that it is a secured fulcrum creditor, rather than the debtor company in default, seeking to redeem, that does not diminish the importance of the integrity of the court approved Sale Process.

90 The normal course would be for the Credit Bid to be made at the outset of the Sale Process as the stalking horse bid. However, 273 Ontario was not willing or able to put forward a bid at the outset of the process. Asking the court to consider an improved Credit Bid (as of January 26, 2023) that may now be executable more than a month after the extended bid deadline under the Sale Process (and almost two months after the original bid deadline) undermines the integrity of the Sale Process.

91 Similarly, 273 Ontario only sought to redeem at the end of the court approved Sale Process that it was consulted on and participated in, after it became apparent that it was not able to make a competitive bid by the time of the extended bid deadline it was given of December 9, 2022. Allowing this right to be exercised at that late stage also undermines the Sale Process. If 273 Ontario had wanted to reserve its right to redeem to the end of the Sale Process, that is something that should have been expressly addressed at the time the Sale Process Order was made.

92 To be clear, it is not, as was suggested by 273 Ontario, the mere fact that the Receiver decided to accept the Ora Binding APA on December 10, 2023 that the court is looking at when considering whether the right to redeem is available. It is the fact that there was a court approved Sale Process that 273 Ontario was consulted about, did not oppose and participated in and only sought to override by a redemption when it was unable to make a competitive bid.

93 The existence of the APS (accepted Ora Binding APA) was always subject to court approval. If not approved, or if the court was not prepared to order the deemed termination of the Unit Purchase Agreements (with the result that the condition of the APS would have failed unless waived by both the Receiver and Ora) then 273 Ontario might have been permitted to step in with its redemption or Credit Bid. But that has not transpired.

94 The court has the jurisdiction to approve the deemed termination of the Unit Purchaser Agreements. The proposed treatment of the Unit Purchasers upon said termination is consistent with their contractual remedies for a breach of their agreements. No compelling reason has been presented not to approve this, if it is otherwise determined that the *Soundair* principles are satisfied (discussed in the next section).

95 The weighing of the interests (and prejudice) of all stakeholders is also an integral part of the consideration of the *Soundair* principles. If the Receiver is found to have carried out the court approved Sale Process in a manner consistent with the *Soundair* principles, the balance will favour protecting the integrity of the Sale Process over 273 Ontario's right of redemption.

Should the Transaction and APS be Approved and the Proposed AVO Granted?

96 The proposed sale to Ora must be demonstrated to meet the sale approval test from *Soundair*. To do so, the Receiver must demonstrate that:

a. sufficient effort was made to obtain the best price and that the receiver has not acted improvidently;

b. it has considered the interests of all stakeholders;

c. the process under which offers were obtained and the sale agreement was arrived at was consistent with commercial efficacy and integrity; and

d. there has not been any unfairness in the working out of the process.

a) The Receiver's Efforts and Actions Were Provident

97 According to the Court of Appeal in *Soundair*,

> [W]hen 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.
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>
> 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.

98 The Receiver consulted with stakeholders, including 273 Ontario, in developing the Sale Process, which was followed. The confidential exhibits filed indicate a range of bid prices with differing conditions. Even the pre-Sale Process bid was conditional on due diligence and was withdrawn. Aside from that one withdrawn pre-Sale Process bid, the Ora Binding APA reflects a purchase price within the range of other all cash bids received and within the (low end of the) range of estimates of value from three independent brokers.

99 If there was a subsequent bid that demonstrates that Ora's price was improvidently low, that might be a relevant *ex post facto* consideration, but there is no comparable bid in this case. What we have is just a willingness on the part of 273 Ontario, a second mortgagee and investor who stands to lose a lot under the Ora Transaction to take on the risk and burden of the first mortgage, the Registered Lien Claims (to the extent they are ultimately determined to be valid and payable) and other expenses that will rank ahead of the second mortgage. 273 Ontario argues that its bid is almost 50 percent higher than the Ora Binding APA purchase price. However, that is not a reasonable comparison as the 273 Ontario Credit Bid is not a market bid that reflects any independent value assessment to which the court could compare the Ora bid. It is more appropriately characterized as the by-product of the value of the registered security on the Property.

100 Some of the other criticisms of 273 Ontario about the Receiver's conduct and actions are addressed under the third category of *Soundair* (process related) considerations, although there may be some overlap between the first and third categories.

101 For purposes of this first part of the analysis, the Ora Binding APA has not been demonstrated to be improvident.

b) Consideration of Stakeholder Interests

102 Under the second consideration, I agree with 273 Ontario that the court should be primarily concerned with the interests of creditors. It is secondarily concerned with the process considerations and the interests of other stakeholders: see *Soundair*, citing *Crown Trust Co. et al. v. Rosenberg et al.*, (1986), 60 O.R. (2d) 87 (H.C.).

103 The fact that the secured creditor (273 Ontario now effectively operating from the first and second secured positions) supports its own bid is not surprising or a particularly weighty factor. However, as was observed in the concurring opinion in the Court of Appeal's decision in *Soundair*,

> 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 therefrom), the wishes of the interested creditors should be very seriously considered by the receiver.

104 The court understands that 273 Ontario stands to lose a great deal if the Transaction and the Ora Binding APA are approved. There can be no doubt that the interests of the creditors are an important consideration and that the opinion of the creditors as to which offer ought to be accepted is something to be taken into account. However, that should not be at the expense of the integrity of the Sale Process.

105 273 Ontario's desire to have the opportunity to make a Credit Bid was facilitated by the Receiver in the accommodations it afforded to 273 Ontario up to December 9, 2022. The Receiver went to great lengths to accommodate 273 Ontario, but 273 Ontario was not able to put together a firm unconditional bid by December 9, 2022, when it was told it had to.

106 At that time, the Receiver also had to consider the interests of Trez (the first priority secured creditor) and make a business judgment about whether to proceed with the Ora Binding APA or 273 Ontario's Credit Bid after it was received on December 9, 2022. That decision was made with regard to the factors that were outlined in the court approved Sale Process, including the relative closing and execution risks associated with each.

107 273 Ontario complains that the Receiver rushed to accept the Ora Binding APA on December 10, 2022 rather than continuing to engage with a view to receiving an unconditional Credit Bid from 273 Ontario, after it threatened to exercise its right to redeem the Property. However, by December 10, 2022, the Receiver was in the position of having to accept the Ora Binding APA or risk losing the Transaction. The Ora Binding APA was the only available closable deal at the time that had a certain outcome of full recovery for the first secured creditor, Trez. This is owing to the fact that 273 Ontario did not have firm financing to satisfy the first priority secured loan, whether by redemption or through a Credit Bid.

108 The Receiver, in its discretion, determined that there was a risk of losing the Ora Binding APA and that is what led to the decision to accept it after evaluating the two options available. The Receiver's judgment at the time, for which no grounds have been suggested as warranting a lack of deference, was that Ora could walk from the Transaction if the Receiver did not sign back the Ora Binding APA. The Receiver was worried about the terms and conditions of the Credit Bid and its conditional financing at the time. [8] The Receiver's business judgment about the potential loss of the Ora Binding APA, weighed against the inability of 273 Ontario to come forward with a firm Credit Bid, is not something that the court should second guess.

109 As was observed in the earlier discussion about balancing stakeholder interests, in this case it largely comes down to a balancing of the integrity of the Sale Process against 273 Ontario's interests. The following passage from *Soundair* is instructive:

> 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.

110 The integrity of the Sale Process is not just about the fact that the Ora Binding APA had been accepted, for reasons indicated earlier.

111 The record is clear that consideration was given to all stakeholders' interests. The Purchaser's interests were not given more or undue weight over the interests of secured creditors. If anything, it was the interests of Trez, the first secured lender at the time, that the Receiver was, justifiably, concerned about if the Transaction was lost. The second secured lender's interests were not disregarded, ignored or given unfair consideration; they just did not tip the balance in the ultimate decision by the Receiver to accept the Binding Ora APA.

112 Similarly, the interests of the Unit Purchasers, whose agreements the court is being asked to deem to have been terminated, were considered. It was determined that they were being treated in accordance with their contractual rights upon any breach or termination of the Unit Purchase Agreements by the Company. Although their contractual remedies upon termination are not being compromised (they are getting their deposits back as they would be entitled to on any breach), a minority of them, when given the opportunity, expressed disappointment that their expectation of purchasing a completed unit in the Rosehill Project will not be met. The majority appear to be content with the preservation of their contractual remedies upon termination or breach and the return of their deposits, a reasonable expectation that will be met if the Transaction is approved.

113 In the end, what is important is that all relevant stakeholder interests were considered and balanced by the Receiver, including those of 273 Ontario. I am satisfied that they were.

c) The Commercial Efficacy and Integrity of the Sale Process

114 273 Ontario has criticized the manner in which the Receiver reached out to some prospective bidders (and failed to follow-up directly with one of the known pre-Sale Process bidders), as well as the fact that an outdated draft non-reliance appraisal report was not in the data room. The Receiver has explained its actions with reference to these criticisms in a manner that satisfies the court. They do not diminish the integrity of the Sale Process that the Receiver followed.

115 273 Ontario also criticizes the Receiver for running a "fire sale" because it was mentioned in its materials for the Sale Process that the Rosehill Project had "fallen into receivership," thereby suggesting there was an insolvency situation. Having considered all the evidence about the implementation of the Sale Process, I do not consider this to be a fair characterization of the Receiver's conduct during the Sale Process. Nor was it improper for the fact that the Rosehill Project was in receivership to have been mentioned; the Receiver has to identify itself as such when engaging with prospective purchasers.

116 It has not been suggested that the court approved Sale Process itself lacked commercial efficacy or integrity. Nor has it been demonstrated that the Receiver failed to follow that process. I am satisfied that the process under which bids were obtained and the APS was arrived at was consistent with commercial efficacy and integrity.

d) No Unfairness in the Working out of the Process

117 The Receiver engaged with 273 Ontario and made efforts to take its interest in making a bid into account. Even after it missed the bid deadline, 273 Ontario's offer letter was received and considered and 273 Ontario was encouraged and given time to compile a bid.

118 Further, the Receiver treated 273 Ontario fairly in receiving and considering the bid it eventually made, which was not accompanied by proof of financing and was no accompanied by a Binding APA. Whereas the Receiver could have rejected this for non-compliance, it did not do so.

119 273 Ontario complains that it was "jammed" because of the Receiver's delay in confirming the validity, enforceability and amount owing under the 273 Ontario Loan and in dealing with the Registered Lien Claims, both of which 273 Ontario maintains impacted its ability to submit a Binding APA. The Receiver maintains that it responded in a timely manner to requests from 273 Ontario about these matters. It even eventually agreed to allow 273 Ontario's second mortgage claim to be valued at the full amount 273 Ontario submitted, and not at the lesser amount that the Receiver had valued it at for other purposes.

120 273 Ontario also complains that the Receiver first invited it to make its Credit Bid conditional upon the resolution of the Registered Lien Claims to 273 Ontario's satisfaction and then gave as one of its reasons for preferring the Ora Binding APA that 273 Ontario's Credit Bid was conditional upon the Registered Lien Claims being withdrawn or found to be invalid. The suggestion that a bid could be made conditional upon a satisfactory resolution of these claims does not mean that this condition would not be factored into the evaluation of the bid, it just meant that the requirement that the bid be unconditional for it to even be considered was being waived (as an accommodation to 273 Ontario, something that the Receiver did not have to do).

121 It is suggested that the Receiver should have started to validate 273 Ontario's mortgage security in July 2022, and that its delay until its final confirmation of the amount on December 3, 2022 was unreasonable. The Receiver has explained the normal course approach to validating a security. Moreover, the record demonstrates a timely response to 273 Ontario's request that it do so when made in October 2022, including allowance for a higher amount than what the Receiver considered appropriate for the purposes of the Credit Bid that it permitted 273 Ontario to make after the bid deadline had already passed.

122 Similar criticisms are made about the Receiver's failure to prioritize the evaluation of the Capital Build Lien (which 273 Ontario had maintained was fraudulent from the outset). Yet, when asked to prioritize this, the Receiver did so and made the decision to seek approval from the court to disallow it. The timing of 273 Ontario's requests for the security review (and

subsequent request for confirmation of the accepted amount of the 273 Loan) and for the determination of the Registered Lien Claims have been addressed earlier in this endorsement. 273 Ontario suggests that, because it was funding the receivership, its requests should have been given priority by the Receiver. The Receiver's duties are to the court and all stakeholders. But it did prioritize issues when they were raised by 273 Ontario, so these complaints are unfounded both legally and factually.

123 If 273 Ontario had wanted its mortgage security validated and the Registered Lien Claims dealt with before the bid deadline under the Sale Process, it could have asked that this be done at the time of the court's approval of the Sale Process Order. It did not do so. Now it suggests that the Receiver was remiss in not appreciating how important this was to 273 Ontario's participation in the Sale Process. I do not accept that to be a valid criticism of the Receiver.

124 At worst, there appears to have been a misunderstanding between the Receiver and 273 Ontario about whether the Receiver was working on evaluating 273 Ontario's security and the Registered Lien Claims prior to the specific requests from 273 Ontario that it do so commencing in October 2022. The Receiver addressed these points during the Sale Process when it was asked to do so in October 2022. The real issue is that 273 Ontario did not agree with, and was perhaps surprised by, the Receiver's assessments once received. The court does not accept the assertion by 273 Ontario that the Receiver did not address these matters in a timely and diligent manner. Even if 273 Ontario had thought, or hoped, they were being addressed earlier, that possible misunderstanding does not rise to the level of a failing on the Receiver's part.

125 273 Ontario argues that, but for the Receiver's artificial and aggressive deadlines, and its failure to address the two issues 273 Ontario requested it to take care of well before the bid deadline, the Toronto Capital funding commitment would have been provided to the Receiver before the bid deadline and its bid would not have suffered from the identified execution risks. I have difficulty with the position that this delay was the Receiver's fault. The deadlines were prescribed under the Sale Process. It is not lost on the court that 273 Ontario was engaged in a Sale Process that was primarily directed to prospective third-party purchasers. It declined to put in a stalking horse bid in advance of the Sale Process Order and then had to scramble when it decided to do so once the Sale Process was underway.

126 273 Ontario, at some point in the process, became concerned about the value of the bids that might materialize and began to work on its Credit Bid. 273 Ontario then found itself scrambling to find financing for a Credit Bid and was not able to do so even by the extended deadline of December 9, 2022. I am not persuaded that this was a function of any unfairness in the Sale Process that the Receiver followed, or its conduct in dealing with requests from 273 Ontario to review its security and determine the Registered Lien Claims.

127 273 Ontario then complains that after it submitted its Credit Bid, it was rejected out of hand without any further negotiation after the Receiver rushed to accept the Ora Binding APA. 273 Ontario complains that the Receiver did not contact it to invite it to remove conditions before accepting the Ora Binding APA. 273 Ontario suggests that this was done for Ora between November 25 and December 6. In fact, it was done for both Ora and 273 Ontario before the December 9, 2022 deadline. Suggestions were made in an effort to assist 273 Ontario in putting in its Credit Bid despite the challenges it was facing. 273 Ontario did not raise concerns about conditions on its financing with the Receiver before submitting its Credit Bid on December 9, 2022.

128 The Receiver extended an accommodation to 273 Ontario by allowing it to continue in the Sale Process after the November 25, 2022 Bid Deadline and to work forward from its offer letter to its Credit Bid on the same time line as it afforded to Ora to move forward from its initial Bid to the Binding Ora APA that was submitted on December 7, 2022, and then 273 Ontario was given two days after that to submit its Credit Bid. 273 Ontario was not treated unfairly in this process. Ora and 273 Ontario were both afforded opportunities to improve their bids after November 25, 2022 and were treated equitably during that period.

129 Events that occurred after the Ora Binding APS was accepted on December 10, 2022 are of marginal relevance, unless they shed light upon matters that were known or ought to have been known at the relevant time. In the category of marginal relevance would be the assignment of the Trez first priority mortgage to Toronto Capital that has alleviated some of the execution risk associated with the 273 Ontario Credit Bid that the Receiver had identified when it decided to accept the Ora Binding APA. The fact that almost two months later, 273 Ontario was able to get financing in place to take out the first secured mortgage does not

diminish the legitimacy of the Receiver's concerns about the relatively more significant execution risk associated with the Credit Bid when it was considering which bid was in the best interests of the stakeholders of the Company on December 10, 2022.

130 Lastly, I do not find there to have been anything unfair about the Receiver's efforts to facilitate a commercial resolution between 273 Ontario and Ora after the Ora Binding APA had been accepted and 273 Ontario was able to obtain financing. No one tried to hold 273 Ontario to that resolution, even though it agreed to it and later indicated that it had felt pressured to enter into it and was not prepared to follow through with it.

131 The fact that the terms and limitations on the 273 Credit Bid ultimately submitted were less favourable in the Receiver's assessment than other bids does not mean it was not properly considered. I find that 273 Ontario was treated fairly by the Receiver in the working out of the Sale Process.

e) Approval of the APS, Transaction and AVO

132 Accordingly, the *Soundair* principles having been satisfied, the APS and Transaction are approved and the AVO is granted.

Should the Ancillary Order be Granted?

133 Counsel for 273 Ontario suggested that the requested ancillary relief should be delayed, regardless of the outcome of the decision on the AVO because there are concerns about fees that 273 Ontario has not had time to address. However, the Receiver is not seeking approval of its fees under the Ancillary Order. The relief it is seeking is related to the AVO.

134 If the *Soundair* requirements are found to have been met and the Receiver's conduct in carrying out the Sale Process is not impugned, it should not be open to further challenge. The Receiver's actions and activities during the relevant period should be approved. The approval of the statement of receipts and disbursements is simply a recognition of what amounts were received and paid. It is not an approval of any amounts that may have been paid to the Receiver and its counsel. The Receiver will still be required to seek those approvals in the normal course with the appropriate fee affidavits.

135 In the meantime, establishing a reserve or holdback from the sale proceeds to satisfy the fees, in such amounts as may ultimately be approved, is a prudent and reasonable thing to do, particularly given the breakdown in the relationship between the Receiver and 273 Ontario.

136 The proposed distributions, to the first mortgagee and on account of the Receiver's Borrowing Charge (for amounts borrowed and previously approved) appear to be reasonable. If the new first mortgagee, Toronto Capital, does not want to be paid out then that can be addressed in the context of the Ancillary Order being settled. I will hold off in signing it for now, but if it does want to be paid out, I would approve that distribution.

137 Finally, the requested sealing order is appropriate.

138 The requested partial sealing order is limited in its scope (only specifically identified confidential exhibits) and in time (until the Transaction is completed). It is necessary to protect commercially sensitive information that could negatively impact the Company and its stakeholders if this transaction is not completed and further efforts to sell the property must be undertaken.

139 The proposed partial sealing order appropriately balances the open court principle and legitimate commercial requirements for confidentiality. It is necessary to avoid any interference with subsequent attempts to market and sell the property, and to avoid any prejudice that might be caused by publicly disclosing confidential and commercially-sensitive information prior to the completion of the now approved Ora Transaction.

140 These salutary effects outweigh any deleterious effects, including the effects on the public interest in open and accessible court proceedings. I am satisfied that the limited nature and scope of the proposed sealing order is appropriate and satisfies the *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522 requirements, as modified by the reformulation of the test in Sherman Estate v. Donovan, 2021 SCC 25, 458 D.L.R. (4th) 361, at para. 38.

141 Granting this order is consistent with the court's practice of granting limited partial sealing orders in conjunction with approval and vesting orders.

142 The Receiver is directed to ensure that the sealed confidential exhibits are provided to the court clerk at the filing office in an envelope with a copy of this endorsement and the signed order with the relevant provisions highlighted so that the confidential exhibits can be physically sealed. At the appropriate time, the Receiver shall also seek an unsealing order.

Costs and Final Disposition

143 The Receiver's Motion for an AVO and Ancillary Order is granted on the terms indicated herein. 273 Ontario's cross-motion is dismissed.

144 There was not sufficient time booked at any of the hearings to address the issue of costs. The parties should exchange cost outlines and try to reach an agreement on costs. If they are unable to do so they are directed to arrange a scheduling appointment before me so that an efficient procedure can be established for the costs of these motions to be determined.

145 Before signing the proposed AVO and Ancillary Order, I wanted to give the parties the opportunity to consider if anything further needs to be changed in the forms that were originally submitted by the Receiver, given the passage of time and with the benefit of the court's endorsement. Updated forms of orders may be submitted to me for consideration (with blacklines to indicate changes made) by emailing them to my judicial assistant: *lina.bunoza@ontario.ca*

146 The court recognizes that this decision will have significant implications for 273 Ontario and the Rosehill Project. However, after permitting the adjournments to allow for a full airing of the multitude of issues raised on the merits, this is the outcome that has been reached. I am appreciative of the efforts and helpful submissions provided by all counsel.

SUPERIOR COURT OF JUSTICE

COUNSEL SLIP

COURT FILE NO.:	*CV-22-00682959-00CL*	*HEARING DATE: 26 JANUARY 2023*
	.....	.....

NO. ON LIST: 3

TITLE OF PROCEEDING: ROSE-ISLI CORP. et al v. FRAME-TECH STRUCTURES LTD. et al

BEFORE JUSTICE: MADAM JUSTICE KIMMEL

PARTICIPANT INFORMATION

For Plaintiff, Applicant, Moving Party, Crown:

Name of Person Appearing	***Name of Party***	***Contact Info***
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CARLOS SAYAO *(counsel)*		csayao@tyrllp.com

For Other:

Name of Person Appearing	*Name of Party*	*Contact Info*
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CAMERON NEIL (counsel)	KNYMH lien claimant	neilc@simpsonwigle.com

In total there were approximately 38 observers and participants at the hearing, including the above named counsel and a number of individual purchasers. Three purchasers, *MARY RAPPULO, NICOLA LACANTORE*, and *VINCENZO PATERINO* addressed the court.

Motion granted; cross-motion dismissed.

Appendix

Footnotes

1 It was noted that, as a practical matter, the latest version of 273 Ontario's credit bid would form the basis for the implementation of the right of redemption if that relief were to be granted.

2 After the court's endorsement of January 18, 2023, and just prior to the re-attendance of the parties on January 26, 2023, the Trez first mortgage was paid out and assigned to Toronto Capital. Toronto Capital is now the first ranking creditor on the Project. Unlike Trez, it supports the position of 273 Ontario and the redemption right that 273 Ontario seeks to exercise. However, the court assumes that, if the AVO is granted and the Transaction with Ora is approved, Toronto Capital, now standing in the position of Trez, will want to receive the same proposed distributions that the Receiver had sought the court's approval to make to Trez to satisfy the first mortgage charge. That should be clarified before the final draft of the AVO is provided to the court to be signed.

3 Counsel for 273 Ontario pointed out at the January 26, 2023 hearing (and counsel for the Receiver did not disagree) certain inaccuracies contained in the court's January 18, 2023 endorsement regarding the timing of registration of the Registered Lien Claims which are corrected herein.

4 There was some discrepancy in the evidence about the date on which the Ora Binding APA was accepted, but it was confirmed during the January 26, 2023 hearing to have been accepted on December 10, 2022.

5 As a result of *B&M Handelman* , the court in *Wild Goose*, at para. 67 expressly reserved in the court order Wild Goose's right to redeem "that might otherwise be lost on the reasoning in [*B&M Handelman*,]."

6 The purpose of requiring that the Unit Purchasers be given notice of the relief sought was so that they were made aware and given the opportunity to make submissions about whether the court could or should make the requested order deeming the Unit Purchaser Agreements to have been terminated..

7 After the Unit Purchaser feedback was received and reported, 273 Ontario argued that only the interests of those who want to continue with their Unit Purchase Agreements should be considered. This was said to be logical because the court is being asked to allow the Receiver to break those agreements, whereas the Unit Purchasers in favour of that happening do not have a right themselves to break their agreements. That takes too narrow a view of the Unit Purchasers' interests. They all have an interest in what happens to their Unit Purchase Agreements as a consequence of the Transaction that the court is being asked to approve, even if they do not have the right to break, or specifically enforce, their agreements because of the terms of the Appointment Order.

8 273 Ontario suggested that the Receiver should have known, or could have asked and been told, that the financing would be waived by the lender, despite what the commitment letter said. If that was the case, that was something 273 Ontario could have conveyed to the Receiver, but did not do so.

End of Document

No. S1813807
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA
IN BANKRUPTCY AND INSOLVENCY

IN THE MATTER OF THE PART XIII OF THE
BANKRUPTCY AND INSOLVENCY ACT, R.S.C. 1985,
C. B-6, AS AMENDED

AND

IN THE MATTER OF MASAHIKO NISHIYAMA,
BANKRUPT UNDER THE LAWS OF JAPAN

ORDER

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File No. V49403 JDB/msh

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ORDER MADE AFTER APPLICATION

BEFORE THE HONOURABLE	)	THURSDAY, THE 14TH DAY
	)	
MR. JUSTICE VOITH	)	OF FEBRUARY, 2019

ON THE APPLICATION of Hiroshi Morimoto, Foreign Representative in these proceedings (the "**Trustee**") for an Order pursuant to Section 272(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "**BIA**") appointing Alvarez & Marsal Canada Inc. as Receiver (in such capacity, the "**Receiver**") without security, of all or any of the assets, undertakings and property in Canada of Masahiko Nishiyama (the "**Debtor**"), coming on for hearing this day at Vancouver, British Columbia.

AND ON READING the Affidavits #1 and #2 of Hiroshi Morimoto sworn December 20, 2018 and February 6, 2019 respectively and the consent of Alvarez & Marsal Canada Inc. to act as the Receiver; AND ON HEARING Colin D. Brousson, Counsel for the Applicant and other counsel as listed on Schedule "A" hereto, and no one else appearing, although duly served.

THIS COURT ORDERS AND DECLARES that:

APPOINTMENT

1. Pursuant to Section 272(1) of the BIA Alvarez & Marsal Canada Inc. is appointed Receiver, without security, of all or any of the assets, undertakings and property legally or beneficially owned by the Debtor in Canada, including all proceeds (the "**Property**").

2. The term of this appointment shall continue until further order of this Court.

RECEIVER'S POWERS

3. The Receiver is empowered and authorized, but not obligated, to act at once in respect of the Property and, without in any way limiting the generality of the foregoing, to do any of the following where the Receiver and the Trustee consider it necessary or desirable:

   (a) to take possession of and exercise control over the Property and any and all receipts and disbursements arising out of or from the Property, including, but not limited to the contents of the safety deposit box of the Debtor located at the Royal Bank of Canada, Transit 10, Royal Centre, 1025 West Georgia Street, Vancouver, BC, V6E 3N9 (the "**SDB**") notwithstanding an order made November 30, 2018 in connection with the SDB in an action commenced by The Resolution and Collection Corporation ("**RCC**") against the Debtor in the Vancouver Registry of this Court, Action No. S162298 (the "**RCC Action**");

   (b) to receive, preserve and protect the Property, or any part or parts thereof, including, but not limited to, changing locks and security codes, relocation of Property, engaging independent security personnel, taking physical inventories and placing insurance coverage;

   (c) to engage consultants, appraisers, agents, experts, auditors, accountants, managers, counsel and such other persons from time to time and on whatever basis, including on a temporary basis, to assist with the exercise of the Receiver's powers and duties (including but not limited to the engagement of independent legal counsel to review all Records (as defined below) for solicitor client privilege), including, without limitation, those conferred by this Order;

(d) to purchase or lease such any equipment, supplies, premises or other assets to receive, preserve and protect the Property, or any part or parts thereof;

(e) to receive and collect all monies and accounts now owed or hereafter owing to the Debtor and to exercise all remedies of the Debtor in collecting these amounts, including, without limitation, enforcement of any security held by the Debtor;

(f) to execute, assign, issue and endorse documents of whatever nature in respect of any of the Property, whether in the Receiver's name or in the name and on behalf of the Debtor, for any purpose pursuant to this Order;

(g) to market any or all of the Property, including advertising and soliciting offers in respect of the Property or any part or parts thereof and negotiating such terms and conditions of sale as the Receiver considers appropriate;

(h) to sell, convey, transfer, lease or assign the Property or any part or parts thereof and in each such case notice under Section 59(10) of the *Personal Property Security Act*, R.S.B.C. 1996, c. 359 shall not be required;

(i) to apply for any vesting order or other orders necessary to convey the Property or any part or parts thereof to a purchaser or purchasers, free and clear of any liens or encumbrances;

(j) to report to, meet with and discuss with such affected Persons (as defined below) as the Receiver considers appropriate on all matters relating to the Property and the receivership, and to share information, subject to confidentiality terms as the Receiver considers appropriate and as permitted by law;

(k) to register a copy of this Order and any other Orders in respect of the Property against title to any of the Property;

(l) to exercise any shareholder, partnership, joint venture or other rights which the Debtor may have; and

(m) to take any steps reasonably incidental to the exercise of these powers or the performance of any statutory obligations,

and in each case where the Receiver takes any such actions or steps, it shall be exclusively authorized and empowered to do so, to the exclusion of all other Persons (as defined below), including the Debtor, but excluding the Trustee, and without interference from any other Person.

DUTY TO PROVIDE ACCESS AND CO-OPERATION TO THE RECEIVER

4. Each of (i) the Debtor; (ii) all of the Debtor's current and former agents, accountants, legal counsel, and all other persons acting on its instructions or behalf; and (iii) all other individuals, firms, corporations, governmental bodies or agencies, or other entities having notice of this Order (collectively, "**Persons**" and each a "**Person**") shall forthwith advise the Receiver of the existence of any Property in such Person's possession or control, shall grant immediate and continued access to the Property to the Receiver, and shall deliver all such Property (excluding Property subject to liens the validity of which is dependent on maintaining possession) to the Receiver upon the Receiver's request.

5. All Persons, other than governmental authorities, shall forthwith advise the Receiver of the existence of any books, documents, securities, contracts, orders, corporate and accounting records, and any other papers, records and information of any kind related to the Property or affairs of the Debtor, and any computer programs, computer tapes, computer disks, or other data storage media containing any such information (collectively, the "**Records**") in that Person's possession or control. The Records shall include all of the contents of the SDB. Upon request, governmental authorities shall advise the Receiver of the existence of any Records in that Person's possession or control.

6. Upon request, all Persons shall provide to the Receiver or permit the Receiver to make, retain and take away copies of the Records and grant to the Receiver unfettered access to and use of accounting, computer, software and physical facilities, provided however that nothing in paragraphs 4, 5 or 6 of this Order shall require the delivery of Records, or the granting of access to Records, which may not be disclosed or provided to the Receiver due to solicitor client privilege or statutory provisions prohibiting such disclosure.

7. If any Records are stored or otherwise contained on a computer or other electronic system of information storage, whether by an independent service provider or otherwise, all Persons in possession or control of such Records shall forthwith give unfettered access to the Receiver for the purpose of allowing the Receiver to recover and fully copy all of the information contained therein whether by way of printing the information or making copies of computer disks or such other manner of retrieving and copying the information as the Receiver in its discretion deems expedient, and shall not alter, erase or destroy any Records without the prior written consent of the Receiver. Further, for the purposes of this paragraph, all Persons shall provide the Receiver with all such assistance in gaining immediate access to the information in the Records as the Receiver may require including, without limitation, providing the Receiver with instructions on the use of any computer or other system and providing the Receiver with any and all access codes, account names and account numbers that may be required to gain access to the information.

8. The Receiver shall take reasonable steps to protect any solicitor client privilege claimed or claimable by the Debtor with respect to any Records and, in particular, the contents of the SDB.

9. The Receiver is authorized to provide RCC with access to any Records and to the contents of the SDB that are requested by RCC, and any implied undertaking of confidentiality of the part of the Receiver is waived in respect of the Records and to the contents of the SDB, provided that the Receiver shall not provide any records or other documents that are or may be subject to solicitor client privilege without further order of the Court.

NO PROCEEDINGS AGAINST THE RECEIVER

10. No proceeding or enforcement process in any court or tribunal (each, a "**Proceeding**"), shall be commenced or continued against the Receiver except with the written consent of the Receiver or with leave of this Court.

RECEIVER TO HOLD FUNDS

11. All funds, monies, cheques, instruments, and other forms of payments received or collected by the Receiver from and after the making of this Order from any source whatsoever including, without limitation, the SDB, the sale of all or any of the Property

and the collection of any accounts receivable, in whole or in part, whether in existence on the date of this Order or hereafter coming into existence, shall be deposited into one or more new accounts to be opened by the Receiver (the "**Post-Receivership Accounts**") and the monies standing to the credit of such Post-Receivership Accounts from time to time, net of any disbursements provided for herein, shall be held by the Receiver to be paid in accordance with the terms of this Order or any further order of this Court.

PERSONAL INFORMATION

12. Pursuant to Section 7(3)(c) of the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5 or Section 18(1)(o) of the *Personal Information Protection Act*, S.B.C. 2003, c. 63, the Receiver may disclose personal information of identifiable individuals to prospective purchasers or bidders for the Property and to their advisors, but only to the extent desirable or required to negotiate and attempt to complete one or more sales of the Property (each, a "**Sale**"). Each prospective purchaser or bidder to whom such personal information is disclosed shall maintain and protect the privacy of such information and limit the use of such information to its evaluation of the Sale, and if it does not complete a Sale, shall return all such information to the Receiver, or in the alternative destroy all such information. The purchaser of any Property shall be entitled to continue to use the personal information provided to it, and related to the Property purchased, in a manner which is in all material respects identical to the prior use of such information by the Debtor, and shall return all other personal information to the Receiver, or ensure that all other personal information is destroyed.

LIMITATION ON ENVIRONMENTAL LIABILITIES

13. Nothing in this Order shall require the Receiver to occupy or to take control, care, charge, possession or management (separately and/or collectively, "**Possession**") of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release, or deposit of a substance contrary to any federal, provincial or other law relating to the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination (collectively "**Environmental**

Legislation"), provided however that nothing herein shall exempt the Receiver from any duty to report or make disclosure imposed by applicable Environmental Legislation.

14. The Receiver shall not, as a result of this Order or anything done in pursuance of the Receiver's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless the Receiver is actually in possession.

15. Notwithstanding anything in federal or provincial law, the Receiver is not personally liable in that position for any environmental condition that arises or environmental damage that occurred:

    (a) before the Receiver's appointment; or,

    (b) after the Receiver's appointment, unless it is established that the condition arose or the damage occurred as a result of the Receiver's gross negligence or wilful misconduct.

16. Notwithstanding anything in federal or provincial law, but subject to paragraph 13 of this Order, where an order is made which has the effect of requiring the Receiver to remedy any environmental condition or environmental damage affecting the Property, if the Receiver complies with the BIA section 14.06(4), the Receiver is not personally liable for the failure to comply with the order and is not personally liable for any costs that are or would be incurred by any Person in carrying out the terms of the order.

LIMITATION ON THE RECEIVER'S LIABILITY

17. The Receiver shall incur no liability or obligation as a result of its appointment or the carrying out the provisions of this Order, save and except:

    (a) any gross negligence or wilful misconduct on its part; or

    (b) amounts in respect of obligations imposed specifically on receivers by applicable legislation.

    Nothing in this Order shall derogate from the protections afforded the Receiver by Section 14.06 of the BIA or by any other applicable legislation.

RECEIVER'S ACCOUNTS

18. The Receiver will be paid by the Trustee in respect of these proceedings based upon its standard rates for fees and disbursements, whether incurred before or after the making of this Order. The Receiver will be at liberty to apply for a charge as security for payment of its fees and disbursements as against the Property if it sees fit to do so in the future.

19. The Receiver may pass its accounts from time to time, and for this purpose the accounts of the Receiver are referred to a judge of the Supreme Court of British Columbia and may be heard on a summary basis, however the Receiver will not be obligated to pass their accounts if they have been approved by the Trustee.

20. Prior to the passing of its accounts, the Receiver shall be at liberty from time to time to apply reasonable amounts, out of any monies in its hands, against its fees and disbursements if these accounts are not already paid directly by the Trustee.

SERVICE AND NOTICE OF MATERIALS

21. An order that the time for service of this Notice of Application and the materials referred to herein pertaining to this Order and the service thereof is deemed to be good and sufficient.

22. Any Person who is served with a copy of this Order and that wishes to be served with any future application or other materials in these proceedings must provide to counsel for each of the Receiver and the Applicant a demand for notice in the form attached as Schedule B (the "**Demand for Notice**"). The Receiver and the Applicant need only provide further notice in respect of these proceedings to Persons that have delivered a properly completed Demand for Notice. The failure of any Person to provide a properly completed Demand for Notice releases the Receiver and the Applicant from any requirement to provide further notice in respect of these proceedings until such Person delivers a properly completed Demand for Notice.

23. The Receiver shall maintain a service list identifying all parties that have delivered a properly completed Demand for Notice (the "**Service List**").

24. Any interested party, including the Receiver, may serve any court materials in these proceedings by facsimile or by emailing a PDF or other electronic copy of such materials to the numbers or addresses, as applicable, set out on the Service List. Any interested party, including the Receiver, may serve any court materials in these proceedings by mail to any party on the Service List that has not provided a facsimile number or email address, and materials delivered by mail shall be deemed received five (5) days after mailing.

GENERAL

25. Any interested party may apply to this Court to vary or amend this Order on not less than seven (7) clear business days' notice to the Service List and to any other party who may be affected by the variation or amendment, or upon such other notice, if any, as this Court may order.

26. The Receiver may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

27. This Court requests the aid, recognition and assistance of any court, tribunal, regulatory or administrative body having jurisdiction, wherever located, to give effect to this Order and to assist the Receiver and its agents in carrying out the terms of this Order. All such courts, tribunals and regulatory and administrative bodies are respectfully requested to make such orders and to provide such assistance to the Receiver, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Receiver and its agents in carrying out the terms of this Order.

28. The requirements for the Receiver to file accounts pursuant to Supreme Court Rule 10-2(4) is hereby waived.

29. Nothing in this Order affects the ability of The Owners, Strata Plan BCS4016 to continue its proceedings in this Court, Vancouver Registry Action No.S1810083.

30. Nothing in this Order affects the ability of RCC to continue its proceedings in the RCC Action.

THE FOLLOWING PARTIES APPROVE THE FORM OF THIS ORDER AND CONSENT TO EACH OF THE ORDERS, IF ANY, THAT ARE INDICATED ABOVE AS BEING BY CONSENT:

Counsel for Hiroshi Morimoto, Trustee
Colin D. Brousson

BY THE COURT

REGISTRAR

Schedule "A"

COUNSEL LIST

Name of Counsel	Representing:
Robert W. Richardson	Resolution and Collection Corporation Tokyo

Schedule "B"

Demand for Notice

TO: **Hiroshi Morimoto, Trustee and Foreign Representative**
c/o Gowling WLG (Canada) LLP
Attention: Colin D. Brousson
Email: colin.brousson@gowlingwlg.com

AND TO: **Alvarez & Marsal Canada Inc.**
c/o Alvarez & Marsal Canada Inc.
Attention: Anthony Tillman
Email: atillman@alvarezandmarsal.com

Re: **In the matter of the Receivership of Masahiko Nishiyama in Supreme Court of British Columbia Action No. S1813807, Vancouver Registry**

I hereby request that notice of all further proceedings in the above Receivership be sent to me in the following manner:

1. By email, at the following address (or addresses):

   _____

   OR

2. By facsimile, at the following facsimile number (or numbers):

   _____

   OR

3. By mail, at the following address:

   _____

Name of Creditor:_____

Name of Counsel (if any): _____

Creditor's Contact Address: _____

_____

Creditor's Contact Phone Number: _____

No. S-1813807
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA
IN BANKRUPTCY AND INSOLVENCY

IN THE MATTER OF THE PART XIII OF THE
BANKRUPTCY AND INSOLVENCY ACT, R.S.C. 1985, C. B-6,
AS AMENDED

AND

IN THE MATTER OF MASAHIKO NISHIYAMA,
BANKRUPT UNDER THE LAWS OF JAPAN

ORDER MADE AFTER APPLICATION

BEFORE THE HONOURABLE	)	FRIDAY, THE 19TH DAY
	)	
MR. JUSTICE VOITH	)	OF JULY, 2019

ON THE APPLICATION of Hiroshi Morimoto (the "Trustee"), coming on for hearing before me this day, at 800 Smithe Street, Vancouver, BC; AND ON HEARING Colin D. Brousson, counsel for the Trustee; and those other counsel listed on Schedule "A" hereto; and no one else appearing although duly served; AND UPON READING the Pleadings filed to date;

THIS COURT DECLARES THAT:

1. All assets and property of Sun Moon Management Ltd. represent Property, as defined in the Order of this Court, made on December 21, 2018, in these proceedings (the "**Receivership Order**"), of Masahiko Nishiyama;

2. A Mercedes S550 vehicle, VIN WDDNG8GB0AA343089, registered to Hatsumi Nakajima (the "**Mercedes**") is the Property of Masahiko Nishiyama;

3. Under the terms of the Receivership Order, Alvarez & Marsal Canada Inc., in its capacity as the Court appointed receiver over all of the assets, undertakings and property owned or beneficially owned by Masahiko Nishiyama in Canada (the "**Receiver**") in empowered to:

(a) take possession of the Condo and the Mercedes and will become the custodian of the keys to the Condo and the Mercedes; and

(b) market and sell the Condo and the Mercedes under the terms of the Receivership Order;

4. The Receiver is a proper applicant for the purposes of s. 284 of the *Land Title Act*, R.S.B.C. 1996, c. 250.

AND THIS COURT ORDERS THAT:

5. The Land Title Office be directed to register this Order pursuant to s. 284 of the *Land Title Act*, R.S.B.C. 1996, c. 250, against title to the lands legally described as:

> Parcel Identifier: 028-447-263
> Strata Lot 254 District Lot 185 Group 1 New Westminster District
> Strata Plan BCS4016
> Together with an interest in the Common Property in Proportion to the Unit Entitlement of the Strata Lot as Shown on Form V.
>
> located at civic address #4102 - 1028 Barclay Street, Vancouver, British Columbia (the "**Condo**");

6. Upon payment to the Strata of its pay-out amount, the Strata's lien registered against title to the Condo, bearing #CA6608683 will be discharged;

7. The Receiver, on notice to the Application Respondents, and by posting on the Receiver's website https://www.alvarezandmarsal.com/nishiyama within three (3) days of this Order being made, shall conduct a claim process for personal property located in the Condo or the Mercedes (the "**Personal Belongings**"), whereby:

(a) any person may file a proof of claim (property) with the Receiver concerning ownership of their Personal Belongings within 30 days of the making of this Order.

(b) subject to approval of the Receiver of such claims, these parties will have 30 days to recover these Personal Belongings;

(c) in the event of a dispute over ownership as between the claimants or the Receiver of any claimed Personal Belongings then that matter should be referred to Court; and

(d) in the event there are no claims made, or no collection of the Personal Belongings within the 30 days following a claim being accepted, then the

Receiver can sell, dispose, or donate, all remaining personal property located in the Condo without recourse.

Conflict Between Orders

8. To the extent there is conflict between the terms of this Order and any orders made previously in either the proceeding initiated by The Owners, Strata Plan BCS4016 (the "**Strata**") in Supreme Court of British Columbia, bearing Action No. S1810083, Vancouver Registry (the "**Strata Foreclosure Action**") or proceedings initiated by the Resolution and Collection Corporation ("**RCC**") in Supreme Court of British Columbia bearing Action No. S162298, Vancouver Registry; (the "**RCC Action**"), the terms of this Order shall govern, however, for clarity:

   (a) where there is no such conflict, all orders made in the Strata Foreclosure Action or the RCC Action will remain in full force and effect;

   (b) the order made in the RCC Action and dated September 18, 2018, and registered on title to the Condo on September 19, 2018, bearing #CA7073370 (the "**Injunction Order**"), will continue to be registered on title to the Condo until further order of this Court or RCC's consent to discharge the Injunction Order; and

   (c) the Certificate of Pending Litigation, bearing #CA7071734 (the "**CPL**") will continue to be registered on title to the Condo until further order of this Court or such time as the Strata Foreclosure Action is discontinued by agreement of the Strata, RCC and the Receiver.

Service

9. Service of this Order on Masahiko Nishiyama shall be deemed effective by mailing a copy of this Order to the attention of Masahiko Nishiyama at the address, of 13-36 Showa-cho, Otsu city, Shiga; and 1038-1 Oaza Zengi, Shimoichi-cho, Yoshino-gun, Nara.

10. Endorsement of this Order by counsel appearing on this application is hereby dispensed with.

THE FOLLOWING PARTIES APPROVE THE FORM OF THIS ORDER AND CONSENT TO EACH OF THE ORDERS, IF ANY, THAT ARE INDICATED ABOVE AS BEING BY CONSENT:

Counsel for ~~Hiroshi Morimoto~~, Trustee
Colin D. Brousson

BY THE COURT

REGISTRAR

FORM CHECKED NR.

SCHEDULE "A"

NAME OF COUNSEL	REPRESENTING
Gordon Plotkin	RCC
Robert Richardson	RCC

No. S-1813807
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA
IN BANKRUPTCY AND INSOLVENCY

IN THE MATTER OF THE PART XIII OF THE
BANKRUPTCY AND INSOLVENCY ACT, R.S.C. 1985, C. B-6,
AS AMENDED

AND

IN THE MATTER OF MASAHIKO NISHIYAMA,
BANKRUPT UNDER THE LAWS OF JAPAN

NOTICE OF APPLICATION

Name of applicant: Alvarez & Marsal Canada Inc., in its capacity as the Court appointed receiver over all of the assets, undertakings and property owned or beneficially owned by Masahiko Nishiyama in Canada (the "**Receiver**"), and Hiroshi Morimoto, trustee over the bankruptcy estate of Masahiko Nishiyama (the "**Trustee**")

To: Masahiko Nishiyama ("**Nishiyama**")
To: Sun Moon Management Ltd., a British Virgin Island corporation ("**Sun Moon**")
To: The Resolution and Collection Corporation ("**RCC**")
To: The Owners Strata Plan BCS4016 (the "**Strata**")
To: Hatsumi Nakajima ("**Nakajima**")
To: Atsuma Nishiyama ("**Atsuma**")
To: Masako Nishiyama ("**Masako**")

(Collectively the "**Application Respondents**")

TAKE NOTICE that an application will be made by the applicant before Mr. Justice Voith at the courthouse at 800 Smithe Street, Vancouver, British Columbia on Friday, July 19, 2019 at 9:00 a.m. for the orders set out in Part 1 below.

Part 1: ORDERS SOUGHT

1. A declaration that:

   (a) all assets and property of Sun Moon Management Ltd. represent Property (as defined in the Receivership Order, defined below) of Masahiko Nishiyama; or

   (b) in the alternative, Masahiko Nishiyama is the beneficial owner of all of the assets of Sun Moon Management Ltd.

2. An Order directing the Vancouver Land Title Office ("**LTO**") to register this Order against title of the residential strata property, PID 028-447-263, located at civic address #4102 - 1028 Barclay Street, Vancouver, British Columbia (the "**Condo**").

3. A declaration that:

(a) a Mercedes S550 vehicle, VIN WDDNG8GB0AA343089, registered to Hatsumi Nakajima (the "**Mercedes**") is the Property of Nishiyama; or

(b) in the alternative, Nishiyama is the beneficial owner of the Mercedes.

4. An Order directing the Insurance Corporation of British Columbia to register a transfer of the ownership of the Mercedes upon the direction of the Receiver.

5. An Order of this Honourable Court that:

(a) the Receiver will be empowered under the terms of the Receivership Order (but not obligated) to take possession of the Condo and the Mercedes and will become the custodian of the keys to the Condo and the Mercedes;

(b) the Receiver is empowered to market and sell the Condo and the Mercedes under the terms of the Receivership Order; and

(c) upon payment to the Strata of its pay-out amount, the Strata's lien registered against title to the Condo, bearing #CA6608683 will be discharged.

6. An Order that the receiver, on notice to the Application Respondents, and by posting on the Receiver's website https://www.alvarezandmarsal.com/nishiyama within three (3) days of this Order being made, conduct a claim process for personal property located in the Condo or the Mercedes (the "**Personal Belongings**"), whereby:

(a) any person may file a proof of claim (property) with the Receiver concerning ownership of their Personal Belongings within 30 days of the making of this Order.

(b) subject to approval of the Receiver of such claims, these parties will have 30 days to recover these Personal Belongings;

(c) in the event of a dispute over ownership as between the claimants or the Receiver of any claimed Personal Belongings then that matter should be referred to Court; and

(d) in the event there are no claims made, or no collection of the Personal Belongings within the 30 days following a claim being accepted, then the Receiver can sell, dispose, or donate, all remaining personal property located in the Condo without recourse.

7. To the extent there is conflict between the terms of this Order and any orders made previously in either the Strata Foreclosure Action or the RCC Action (defined below), the terms of this Order shall govern, however, for clarity:

(a) where there is no such conflict, all orders made in the Strata Foreclosure Action or the RCC Action will remain in full force and effect;

(b) the Injunction Order dated September 18, 2018, and registered on title to the Condo on September 19, 2018, bearing #CA7073370, will continue to be registered on title to the Condo until further order of this Court or RCC's consent to discharge it; and

(c) the Certificate of Pending Litigation, bearing #CA7071734 (the "**CPL**") will continue to be registered on title to the Condo until further order of this Court or such time as the CPL is discharged and the Strata Foreclosure Action is discontinued by agreement of the Strata, RCC and the Receiver.

8. Such further and other relief as this Honourable Court deems just.

Part 2: FACTUAL BASIS

The Parties

9. By order of the Kyoto District Court in Japan on March 15, 2016, the Trustee was appointed the trustee over the bankruptcy estate of Masahiko Nishiyama.

10. By order of Madam Justice Maisonville of the Supreme Court of British Columbia, made on December 21, 2018 (the "**Recognition Order**"), the Trustee was recognized by this Honourable Court as the foreign representative in these proceedings.

11. By Order of Mr. Justice Voith of the Supreme Court of British Columbia, made on February 14, 2019 (the "**Receivership Order**"), Alvarez & Marsal Canada Inc. was appointed the receiver over all of the assets, undertakings and property of Nishiyama under s.272(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "***BIA***").

12. The Trustee has also obtained foreign recognition from the courts of Singapore and Hong Kong.

13. Nishiyama, is a bankrupt and a citizen of Japan who has for many years carried on a business both in his own name and through a number of corporations.

14. Nakajima was in a relationship with Nishiyama for a number of years. It is unknown at this time, if they continue to have a relationship.

Background of the Bankruptcy of Nishiyama

15. Over a number of years, RCC made loans to Nishiyama and a number of related parties and companies. Nishiyama and the related parties and companies failed to repay those loans to RCC.

16. RCC commenced legal action against Nishiyama and was granted judgment by the Kyoto District Court on February 9, 2012, in the amount of Yen 40,740,539,251 plus interest and costs (the "**2012 Judgment**").

17. RCC then commenced legal action again against Nishiyama and a number of related parties for concealing and hiding assets in corporations and with family members and other parties. RCC was granted judgment by the Kyoto District Court on October 29, 2013, in the amount of Yen 3,960,000,000 plus interest (the "**2013 Judgment**").

18. Following the 2013 Judgment, criminal charges were brought against Nishiyama for dissipating and concealing assets using foreign sham or alter-ego corporations in order to evade the anticipated enforcement of the Japanese judgments.

19. On February 10, 2016, RCC filed a petition for bankruptcy against Nishiyama based on his inability or failure to repay debts. Nishiyama did not file a response in those proceedings and the Kyoto District Court issued a Bankruptcy Commencement Order on March 15, 2016.

20. On June 17, 2016, the Courts in Japan found Nishiyama guilty of certain acts which fall under Article 60 and Article 96-2 (i) of the *Penal Code* in Japan, related to purposely concealed assets, conspiring with others to move assets out of Japan and into other jurisdictions such as Canada and in so doing he obstructed compulsory execution against these assets in Japan.

21. As a result of being found guilty in Japan, the Japanese Court sentenced Nishiyama to three (3) years in prison in Japan and under Article 21 of the *Penal Code* applied 140 days spent in pre-sentencing detention into the sentence imposed.

22. On July 26, 2018, Nishiyama was granted parole from Japanese prison.

23. In addition to his criminal conviction, Nishiyama has refused to cooperate with the Trustee in his bankruptcy, in contravention of the *Bankruptcy Act* in Japan.

24. On March 13, 2019, for the first time after several previous absences, Nishiyama attended a creditors meeting held in his bankruptcy proceedings in Japan. At this meeting Nishiyama made various claims about rights he hoped to assert in the future and indicated to the Trustee that he would retain legal counsel in Japan to assist him to do so.

25. On March 26, 2019, Nishiyama submitted to the bankruptcy court in Japan a Power of Attorney which appointed Mr. Murao as Nishiyama's attorney in his bankruptcy proceedings.

British Columbia Proceedings

26. Nishiyama spent a significant amount of time in British Columbia prior to 2012. The Trustee has located certain assets that are located in British Columbia.

27. In addition to these bankruptcy proceedings, there are two actions currently before the Supreme Court of British Columbia that relate to property, both real and personal, of Nishiyama in British Columbia, namely:

(a) proceedings commenced by way of Notice of Civil Claim by RCC against Nishiyama under SCBC Action No. S162298, Vancouver Registry (the "**RCC Action**").

(b) proceedings commenced by way of Petition by the Strata Plan BCS4016 against Sun Moon Management Ltd., a company related to and controlled by Nishiyama,

under SCBC Action No. S1810083, Vancouver Registry (the "**Strata Foreclosure Action**").

28. The Strata Foreclosure Action is a foreclosure of the Condo enforcing the Strata's lien for unpaid Strata fees, taxes and other charges owing to the Strata related to the Condo.

29. RCC was granted a Mareva-type freezing order over Nishiyama's Canadian assets by Mr. Justice Voith of this Court on March 11, 2016 (the "**Freezing Order**").

30. On August 30, 2016, Mr. Justice Voith of this Court granted an order amending the Freezing Order to include the Condo.

31. Discovery in the RCC Action disclosed the presence of a safety deposit box bearing number 8876 located at the Royal Bank of Canada ("**RBC**") branch 00010 in Vancouver, British Columbia (the "**Safety Deposit Box**").

32. On November 30, 2018, Mr. Justice Voith of this Court, made an order in the RCC Action requiring RBC to disclose a list of the contents of the Safety Deposit Box to RCC (the "**Safety Deposit Contents Disclosure Order**").

Safety Deposit Box

33. Following the disclosure of the contents of the Safety Deposit Box, the Receivership Order was sought and granted. Under the Receivership Order, the Receiver was empowered, among other things, to take possession and exercise control over the contents of the Safety Deposit Box.

34. On February 19, 2019, the Receiver met with representatives of RBC, including RBC's legal counsel, to obtain the contents of the Safety Deposit Box.

35. The Receiver reviewed the contents of the Safety Deposit Box and found a number of documents related to financial transactions and asset holdings.

36. A total of 141 documents and records were found in the Safety Deposit Box (the "**SDB Documents**") and these were removed and taken to the Receiver's office for analysis.

37. The SDB Documents have been categorized into those which the Receiver could release to RCC (the "**RCC Released Documents**") and those which the Receiver is holding for further analysis (the "**Hold Documents**").

38. The SDB Documents reveal a number of interconnected and related companies registered in a number of jurisdictions. One such company is Sun Moon.

Sun Moon

39. A number of the SDB Documents pertain to Nishiyama's relationship to Sun Moon. Specifically, the SDB Documents include:

(a) the application for the incorporation of Sun Moon:

(i) that is signed by Nishiyama;

(ii) encloses a copy of Nishiyama's Japanese passport to establish his identity as the applicant;

(iii) attaches a letter of reference from Nishiyama's Canadian counsel; and

(iv) names Nishiyama as the beneficial owner of Sun Moon.

(b) a certificate of incorporation that was issued to Sun Moon by the BVI Registrar of Corporate Affairs on April 14, 2010;

(c) the share registry for Sun Moon showing that on April 14, 2010, a single share of Sun Moon was issued to Nishiyama;

(d) the share certificate for the only share of Sun Moon;

(e) a will respecting the disposition of Nishiyama's British Virgin Island assets, dated July 22, 2010, bequeathing to Atsuma Nishiyama, Nishiyama's son, "all and any interest I may have in shares of Sun Moon management Ltd, Wine Valley Corp., and North Rock Capital Limited, companies incorporated under the laws of the British Virgin Islands";

(f) a "Certificate of Incumbency" dated October 13, 2011, which suggests that by that date, Nakajima had been appointed the sole director of Sun Moon;

(g) evidence of Nishiyama's effective control over companies that sent monies into or out of Sun Moon accounts.

40. There are no SDB Documents that suggest the Nishiyama ever transferred the ownership in Sun Moon's single share issued in April 2010. Nor does the share register of Sun Moon suggest that any shares aside from the one issued to Nishiyama were ever authorized or issued.

41. Sun Moon is the holder of a number of bank accounts with Royal Bank of Canada Dominion Securities ("**RBCDS**"). On March 5, 2019, RCC obtained an Order in the RCC Action that all assets of Sun Moon held by RBCDS are property that was fraudulently conveyed to Sun Moon and was void as against RCC.

The Condo

42. The Condo was purchased by Sun Moon on March 29, 2012 for $3,400,000 cash. Its assessed value in the 2018 Assessment Roll Report is $5,136,000. Sun Moon remains the registered owner of the Condo in the LTO.

43. The Condo was purchased by Sun Moon just seven weeks after the 2012 Judgment was rendered by the Kyoto District Court, which judgment underlies the RCC Action and the original bankruptcy order made in Japan that was recognized in these proceedings.

44. On March 27, 2019, Nishiyama sent an email to the property manager for the Condo, requesting access to the Condo. In this correspondence, Nishiyama writes: "This is Masahiko Nishiyama, I am the owner of the room PATINA 4102".

45. On May 23 2019, the Trustee received a letter from Nakajima dated May 20, 2019, confirming that Nishiyama always dealt with and treated the Condo as an asset he owned personally. Nakajima has also disclaimed any interest that she may have in the Condo, legal or otherwise.

46. There are a number of orders dealing with the Condo, in these proceedings, the RCC Action and the Strata Foreclosure Action:

(a) by Order dated August 30, 2016, the Freezing Order made in the RCC Action was further amended to apply to, inter alia, the Condo (the "**Condo Freezing Order**");

(b) on September 18, 2018, on the basis of the Condo Freezing Order and further evidence presented to the Court, RCC obtained an injunction order pursuant to s. 284 of the *Land Title Act* that was subsequently registered against title to the Condo;

(c) on November 30, 2018, RCC obtained an order to protect certain assets from risk of dissipation (the "**Secure Property Order**"). Pursuant to the Secure Property Order, RCC had the locks to the Condo changed and delivered the key to counsel for the Strata as custodian;

(d) a conduct of sale order was made in the Strata Action on February 5, 2019. The order includes a provision that the proceeds of any sale be paid into court in the RCC Action;

(e) the Receivership Order grants the Receiver the power to take possession of, or exercise control over, or exercise any right related to, any Property legally owned or beneficially owned by Nishiyama.

47. If the Order sought in this application with respect to the Condo is granted, the Receiver will pay out the Strata for the Condo to discontinue the Strata Foreclosure Action, and then be at liberty to market and sell the Condo under the terms of the Receivership Order.

Personal Belongings in the Condo Claims Process

48. On February 14, 2019 and March 11, 2019, representatives of the Receiver (and the Trustee on March 11, 2019) attended the Condo to inspect and photograph some of the contents of the Condo (the "**Inspection Visit**"). Certain personal property found in the Condo was clearly the Property of Nishiyama (such as personally monogrammed golf clubs). However, it is not readily discernible at this time to Receiver and the Trustee if Nishiyama owns all of the personal property found in the Condo. Indeed, while there does not appear to be any personal belongings of significant monetary value located in the Condo, it does appear that some of the items in the Condo may belong to Nakajima.

49. Nakajima is known to have resided at the Condo for a period of time, and is the only other known periodic resident.

50. The Trustee has received a letter from Nakajima confirming that to her knowledge Nishiyama was always the owner of the Condo. Nakajima has also disclaimed any interest in the Condo.

51. Any sale of the Condo will require the removal or disposition of all of the personal property found in the Condo. Given that there may be unknown competing claims to the personal property found in the Condo, the Receiver seeks to conduct a personal property claims process, whereby:

(a) Nakajima, and any other person may file proof of claim with the Receiver concerning ownership of their Personal Belongings within 30 days of the making of this Order;

(b) subject to approval of the Receiver on such claims, these parties will have 30 days to recover these Personal Belongings;

(c) in the event of a dispute over ownership as between the claimants or the Receiver of any claimed Personal Belongings then that matter should be referred to Court; and

(d) in the event there are no claims made, or no collection of the Personal Belongings within the 30 days following a claim being accepted, then the Receiver can sell, dispose, donate, all remaining personal property located in the Condo without recourse.

The Mercedes

52. On the Inspection Visit, representatives of the Receiver and the Trustee viewed the Mercedes in the underground parking spot that is owned by the Condo.

53. The Owner's Certificate of Insurance and Vehicle License for the Mercedes state that Nakajima is the owner, and Nishiyama is the "Principal Operator."

54. The Trustee has received a letter from Nakajima confirming that Nishiyama is the owner of the Mercedes. Nakajima has also disclaimed any interest that she may have in the Mercedes, and has authorized the Receiver to sell the Mercedes.

Part 3: LEGAL BASIS

1. Disregarding the corporate identity is a factual inquiry that requires courts to determine if the corporation is completely dominated and controlled and used as shield for a fraudulent or improper purpose and there is conduct that is fraudulent or akin to fraud.

Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co. (1996) 28 OR (3d) 423 (Gen. Div.); aff'd (1997) 74 ACWS (3d) 207 (Ont. CA), cited in *XY Inc. v. International Newtech Development Inc.*, 2013 BCCA 352

2. Nishiyama was arrested, charged and convicted in Japan of a scheme to transfer assets out of the reach of creditors to avoid recovery of those assets. Nishiyama used transfers between nominee companies to shield assets.

3. Sun Moon is a sham and has been used as a shield for fraudulent or illegitimate purposes and should be disregarded or set aside. This Honourable Court should instead deal with the economic interests lying behind the legal façade, namely, those of Nishiyama.

4. In the alternative, at all material times, Nishiyama retained the beneficial interest in the assets held by Sun Moon and are subject to recovery under the terms of the Receivership Order.

5. Paragraph 3 of the Receivership Order *inter alia* empowers the Receiver to:

(a) take possession of and exercise control over; and

(b) market, sell, convey or transfer;

all or any of the assets, undertakings and property legally or beneficially owned by Nishiyama.

6. In the further alternative, under paragraph 3(i) of the Receivership Order the Receiver is empowered to exercise any shareholder or other rights Nishiyama may have, including any such rights Nishiyama may have in the Condo as sole shareholder of Sun Moon.

7. This Honourable Court should either set aside the separate corporate personality of Sun Moon and declare the Condo to be an asset of Nishiyama, or alternatively declare the Condo as an asset exigible in the hands of the Receiver under the terms of the Receivership Order because the Condo is an asset:

(a) beneficially owned by Nishiyama; or

(b) legally owned by Sun Moon, and the Receiver already has all rights Nishiyama may have in the Condo as sole shareholder of Sun Moon.

8. The relief that the Receiver and Trustee are seeking is in accordance with the terms of the Receivership Order, the purposes of the *BIA*, and the insolvency regime generally.

Part 4: MATERIAL TO BE RELIED ON

1. Affidavit of Hiroshi Morimoto #1, sworn December 20, 2018.

2. Affidavit of Hiroshi Morimoto #2, sworn February 6, 2019.

3. Affidavit of Anthony Tillman #1, sworn May 23, 2019.

4. The pleadings filed herein.

5. Such further and other material as counsel may advise and this Honourable Court may consider.

The applicant estimates that the application will take 90 minutes.

☐ This matter is within the jurisdiction of a master.

☒ This matter is not within the jurisdiction of a master. This matter will be before Mr. Justice Voith, as arranged through Trial Division.

TO THE PERSONS RECEIVING THIS NOTICE OF APPLICATION: If you wish to respond to this notice of application, you must, within 5 business days after service of this notice of application or, if this application is brought under Rule 9-7, within 8 business days after service of this notice of application,

(a) file an application response in Form 33,

(b) file the original of every affidavit, and of every other document, that

(i) you intend to refer to at the hearing of this application, and

(ii) has not already been filed in the proceeding, and

(c) serve on the applicant 2 copies of the following, and on every other party one copy of the following:

(i) a copy of the filed application response;

(ii) a copy of each of the filed affidavits and other documents that you intend to refer to at the hearing of this application and that has not already been served on that person;

(iii) if this application is brought under Rule 9-7, any notice that you are required to give under Rule 9-7(9).

Date: June 3/2019

Signature of lawyer for applicant
Colin D. Brousson

THIS NOTICE OF APPLICATION was prepared by Colin D. Brousson, of the firm of Gowling WLG (Canada) LLP, Barristers & Solicitors, whose place of business and address for delivery is 2300 - 550 Burrard Street, Vancouver, B.C. V6C 2B5, Telephone: 604-683-6498; Fax: 604-683-3558.

To be completed by the court only:

Order made

[ ] in the terms requested in paragraphs _____ of Part 1 of this notice of application

[ ] with the following variations and additional terms:

_____

_____

_____

Date: _____ _____

Signature of ☐ Judge ☐ Master

APPENDIX

THIS APPLICATION INVOLVES THE FOLLOWING:

- ☐ discovery: comply with demand for documents
- ☐ discovery: production of additional documents
- ☐ other matters concerning document discovery
- ☐ extend oral discovery
- ☐ other matter concerning oral discovery
- ☐ amend pleadings
- ☐ add/change parties
- ☐ summary judgment
- ☐ summary trial
- ☐ service
- ☐ mediation
- ☐ adjournments
- ☐ proceedings at trial
- ☐ case plan orders: amend
- ☐ case plan orders: other
- ☐ experts

No. S-1813807
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA
IN BANKRUPTCY AND INSOLVENCY

IN THE MATTER OF THE PART XIII OF THE
BANKRUPTCY AND INSOLVENCY ACT, R.S.C. 1985, C. B-6,
AS AMENDED

AND

IN THE MATTER OF MASAHIKO NISHIYAMA,
BANKRUPT UNDER THE LAWS OF JAPAN

NOTICE OF APPLICATION

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File No. V49403 JDB/msh

2024 BCCA 249
British Columbia Court of Appeal

Skeena Resources Ltd. v. Mill

2024 CarswellBC 1905, 2024 BCCA 249, 2024 A.C.W.S. 3505

Skeena Resources Ltd. (Appellant / Appellant) And Richard Mill and The Chief Gold Commissioner of British Columbia (Respondents / Respondents) And Orogenic Gold Corp. (Respondent / Respondent) And Tahltan Central Government and the Mining Association of British Columbia (Interveners)

Newbury J.A., Harris J.A., and Skolrood J.A.

Heard: May 15, 2024; May 16, 2024; May 17, 2024
Judgment: July 4, 2024
Docket: Vancouver CA48751

Proceedings: reversing *Skeena Resources Ltd. v. Mill* (2022), 2022 CarswellBC 3276, 2022 BCSC 2032, Iyer J. (B.C. S.C.)

Counsel: A.I. Nathanson, K.C., T.A. Posyniak, E. Madden-Krasnick (Articled Student), for Appellant
K.L.M. Carteri, J.K. Lockhart, for Respondent, Richard Mill
L.D. Lachance, M.G. Goodwin, for Respondent, Chief Gold Commissioner of British Columbia
M.E. Fancourt-Smith, J.J. Mayfield, for Respondent, Orogenic Gold Corp.
E. Reimer, Ö. Yazar, for Intervener, Tahltan Central Government
M.L. Teetaert, E.W. Hulshof, for Intervener, Mining Association of British Columbia

Subject: Civil Practice and Procedure; Natural Resources; Property

APPEAL from judgment reported at *Skeena Resources Ltd. v. Mill* (2022), 2022 BCSC 2032, 2022 CarswellBC 3276 (B.C. S.C.), finding mineral claim included materials deposited at bottom of lake.

***Newbury J.A.*:**

Reasons for Judgment

1 For 14 years ending in April 2008, the Eskay Creek Mine, located underground in the rugged interior of northwest British Columbia, produced gold and silver ore and concentrates of remarkable purity, reaching a production rate of 750 tonnes per day from 2002. The Mine was operated first by Prime Resources Group Inc. (which obtained the initial mineral leases and related mining permits from the Province), then by Homestake Canada Inc., then by Barrick Gold Inc., and last by the appellant Skeena Resources Ltd. Like counsel, I will use the term "Skeena" in these reasons to refer to Skeena Resources Ltd. or its predecessors as appropriate in time to denote the operator of the Mine.

2 In addition to gold and silver minerals, the Mine also produced some 1,750,000 tonnes of mine waste rock and tailings — considerably more than had been expected at the outset of mining operations. Over the life of the Mine, the operator was required to comply with various conditions designed to minimize risks to the environment and public safety posed by such waste materials. Detailed plans for the post-closure phase of the Mine were developed and regularly reviewed and refined by the operator in consultation with government authorities and in accordance with the *Mines Act*, R.S.B.C. 1996, c. 293, the *Mineral Tenure Act*, R.S.B.C. 1996, c. 292 ("*MTA*"), the *Environmental Management Act* (now S.B.C. 2003, c. 53) and regulations thereunder.

3 From the beginning, it was recognized that the waste rock and tailings were likely to generate acid if exposed to the air. The solution eventually arrived at by the operator's consulting engineers and government officials was to deposit (to use a neutral term) the materials in a lake. Two lakes, Albino and Tom MacKay Lake, were nearby. Both were used, but after some time, Albino Lake, located about eight km west of the Mine, was found to be the more appropriate site. In late 1994, Skeena entered into a lease (the "Surface Lease") with the Crown in right of the Province, for the exclusive use of the Lake and surrounding area. The Lease had a term of 30 years ending in December 2024. Its stated purpose was "for waste rock disposal site purposes." Ultimately, almost 1,500,000 tonnes of waste rock and 258,000 tonnes of (dry) tailings were deposited in Albino Lake.

4 As the closure of the Mine approached, the Province required that "[a]ll waste rock, tailings, and sludge deposited into Albino Lake shall be permanently covered by a minimum of one metre of water." Regular site inspections, monitoring, sampling and testing programs were put in place, and are still in place, with respect to pH levels, the presence of dissolved lead, zinc, antimony, and copper, and water quality generally in and about the Lake. The evidence before us suggests that both Skeena Resources Ltd. and its predecessors complied with all environmental laws applicable to them, and continue to do so. These obligations are secured by a security deposit of some $13 million.

5 It is the "deposition" of waste rock and materials into Albino Lake that, 20 years later, forms the subject-matter of the dispute between the appellant Skeena on the one hand and the respondents Mr. Mill and Orogenic Gold Corporation ("Orogenic") on the other. In 2021 Skeena decided to carry out some drilling (through ice) at the "Albino Lake Waste Facility" in order to determine the degree of mineralization of the waste rock. Speaking informally, Skeena explained this proposal to the Ministry of Energy, Mines and Low Carbon Innovation on the basis that when the Mine had been in operation, its "cut-off grades" had been very high, such that "higher grades of minerals than the present resource" might be present. It noted that the Facility was within the permitted mine area for the Eskay Creek Mine and within the area covered by the Surface Lease. Responding informally, the Ministry saw no objection: an official advised that as long as no other regulations applied to the facility, authorization for the drilling work was not required since it would take place on "already disturbed ground (i.e., a dump) and within the [Permitted Mine Area]."

6 However, the matter proved much more complex than this correspondence suggested. On May 2, 2017, a mineral lease held by a company called Eskay Mining Corp. in respect of District Lot DL 7180, referred to as the "Albino Lake area" had expired, as shown on the Mineral Title Register maintained under the *MTA*. This area includes the land that is the subject of Skeena's Surface Lease. The following day, Mr. Mill became the recorded holder of a claim to that area, also as shown on the Register. There is no evidence as to whether Skeena became aware of this mineral claim prior to its preliminary drilling in Albino Lake. In May 2021, it issued two news releases, as required by securities legislation, publicly reporting the positive results of its drilling.

7 Having learned of these results, Mr. Mill applied in August 2021 to the Chief Gold Commissioner (the "Commissioner" or "CGC") under s. 13(1) of the *MTA*. He sought an order that *his* mineral claim included the materials deposited by the operator of the Mine at the bottom of the Lake. The Commissioner contacted Skeena and in due course, both parties filed written submissions. These related both to the Commissioner's jurisdiction to determine the issue, and to the merits of their dispute. The Commissioner ruled separately on October 20, 2021 that the dispute fell within the scope of his authority under s. 13(1)(a) of the *MTA*.

8 On February 7, 2022, the CGC issued his decision on the merits, ruling that the right to (all) minerals within the boundaries of Skeena's Surface Lease was held by Mr. Mill as the recorded holder of his mineral claim and that Skeena had "no right or entitlement to the waste rock and tailings within the boundary of Land Act Lease 634409" (i.e., the Surface Lease.)

9 Skeena filed a notice of appeal in the Supreme Court from the CGC's order, pursuant to s. 13(7) of the *MTA*. The appeal was heard by a judge in chambers in August 2022. For reasons dated November 22, 2022, she dismissed the appeal as containing no palpable or overriding error: see 2022 BCSC 2032. Skeena now appeals to this court, with leave of a justice, in accordance with s. 13(8) of the *MTA*.

The Statutory Context

10 Before reviewing the facts in detail, it may be useful to describe in general terms the statutory context in which those facts arose. Both sides emphasized this context in support of their arguments. The relevant provisions of the *MTA*, the *Mines Act*, the *Land Act*, R.S.B.C. 1996, c. 245, the *Environmental Management Act* and the *Health, Safety and Reclamation Code for Mines in British Columbia* (adopted by order under s. 34(6) of the *Mines Act*) comprise what Skeena refers to in its factum as the "complex regulatory regime of overlapping statutes dealing with the different stages of the mining cycle." I have attached the relevant provisions as Schedule A to these reasons.

11 Starting at the most general level, s. 50(1)(a)(ii) of the *Land Act* provides that a disposition of Crown land reserves to the Crown the right to "raise and get out of [the land] any . . . minerals, whether precious or base, as defined in section 1 of the *Mineral Tenure Act*" and to "use and enjoy any and every part of the land . . . for the purpose of the raising and getting, and every other purpose connected with them, paying reasonable compensation for the raising, getting in use". Thus as stated at s. 50(1)(b) of the *Land Act*, a grant of Crown land generally conveys no right, title or interest to minerals or placer minerals as defined in the *MTA* that may be found in, on or under the land. This reservation is, of course, subject to any disposition of Crown land that expressly authorizes the disposition on terms different from those referred to in s. 50(1).

12 The *MTA* governs the granting of rights in respect of minerals by the Crown and associated matters. It defines "mineral" as follows:

> "mineral" means an ore of metal, or a natural substance that can be mined, that is in the place or position in which it was originally formed or deposited or is in talus rock, and includes
>
> (a) rock and other materials from mine tailings, dumps and previously mined deposits of minerals,
>
> (b) dimension stone, and
>
> (c) rock or a natural substance prescribed under section 2 (1),
>
> Subparagraph (a) was added in 1988, together with various other changes that established a modern electronic-based registry system for mineral claims and leases in British Columbia. The expansion of the definition of "mineral" itself attracted no particular attention or debate in the Legislative Assembly (see British Columbia, Legislative Assembly, *Official Report of Debates of the Legislative Assembly*, 34-1 (1 March 1988) at 3192). The Minister of Energy, Mines and Petroleum Resources is reported as explaining that rights to minerals in waste dumps and tailings would be "made available under Bill 66."

but does not include

> (d) coal, petroleum, natural gas, marl, earth, soil, peat, sand or gravel,
>
> (e) rock or a natural substance that is used for a construction purpose on land that is not within a mineral title or group of mineral titles from which the rock or natural substance is mined,
>
> (f) rock or a natural substance on private land that is used for a construction purpose, or
>
> (g) rock or a natural substance prescribed under section 2 (2);

13 Mineral leases, which are issued by the CGC under s 42(4) of the *MTA*, may be issued for an initial term of up to 30 years and are renewable provided the lessee complies with the Act, the Regulations and any conditions of the lease. Under s. 48(2):

> A lease is an interest in land and conveys to the lessee the minerals or placer minerals, as the case may be, within and under the leasehold, together with the same rights that the lessee held as the recorded holder of the claim or group of claims, but is subject to a valid charge registered against the record of the claim. [Emphasis added.]

Under s. 14, the duly recorded holder of a mineral lease may "use, enter and occupy the surface" of a claim or lease for the exploration and development or production of minerals, subject to requirements imposed by the *Mines Act*. Importantly for our purposes, s. 28(1) of the *MTA* provides:

> Subject to this Act, the recorded holder of a claim is entitled to those minerals or placer minerals, as the case may be, that are held by the government and that are situated vertically downward from and inside the boundaries of the claim. [Emphasis added.]

In addition, s. 16(3) of the *MTA* clarifies that:

> (3) If a disposition is made of surface rights to Crown land, whether surveyed or unsurveyed, and at the time of disposition there is a valid mineral title over the Crown land, the disposition of surface rights does not diminish the rights of the recorded holder except to the extent otherwise determined
>
> (a) by order of the chief gold commissioner under section 13,
>
> (b) by order of the minister under section 17 . . . [Emphasis added.]

14 I also note s. 13(1), which deals with disputes between recorded holders of mineral rights and others:

> 13 (1) If a dispute arises between
>
> (a) recorded holders on the same mineral lands, or
>
> (b) a recorded holder of a mineral title and a person having a right under another enactment to a mineral substance in the lands to which the mineral title relates,
>
> the issue must, on application to the chief gold commissioner by a party to the dispute and subject to subsection (2), be decided by the chief gold commissioner, and the chief gold commissioner may make any order the chief gold commissioner considers appropriate.

As mentioned earlier, rights of appeal are provided by ss. 13(7) and (8).

respecting

> (c) whether a substance is a mineral, a mineral substance or a placer mineral, or
>
> (d) the exercise of rights conferred under this Act or any of the former Acts,

15 The *Mines Act* deals with the actual operation of mines. It defines "mine" as including:

> (a) a place where mechanical disturbance of the ground or any excavation is made to explore for or to produce coal, mineral bearing substances, placer minerals, rock, limestone, earth, clay, sand or gravel,
>
> (b) all cleared areas, machinery and equipment for use in servicing a mine or for use in connection with a mine and buildings other than bunkhouses, cook houses and related residential facilities,
>
> (c) all activities including exploratory drilling, excavation, processing, concentrating, waste disposal and site reclamation,
>
> (d) closed and abandoned mines, and
>
> (e) a place designated by the chief inspector as a mine; [Emphasis added.]

The phrase "mining activity" is also defined to include the reclamation of a mine.

16 Under s. 10 of the *Mines Act*, the "owner" of a mine (which term includes a lessee or occupier of a mine) must obtain a permit before starting any work in, on or about the mine. The permitting officer may impose various terms and conditions, including terms for environmental protection and reclamation and public health and safety: see now s. 10(2.01)(d) and (e), which replaced the earlier s. 10(4)(a) and (b) of S.B.C. 1989, c. 56. Inspectors appointed under the statute inspect the mine or a site where the inspector considers mining activity is taking place, and may issue various orders including orders for remedial action, suspension of work, or closure of the mine.

17 Section 34 of the *Mines Act* contemplates the establishment by the Minister of Energy and Mines of a health, safety and reclamation code committee, to be tasked with the preparation of a code dealing with "all aspects of health, safety and reclamation in the operation of a mine". I understand that the first Code was produced in 1990. In February 2017, two years of work on the part of the committee resulted in a revised Code in which the Minister acknowledged that the failure of the tailings storage facility at Mount Polley in 2014 had been a "wake-up call," not just for British Columbia but for governments throughout Canada and elsewhere. The most recent Code in evidence was revised in April 2021. Like its predecessors, it contains complex and detailed rules for the reclamation and closure of mines and for mines that include tailings storage facilities. Schedule A to these reasons contains excerpts from s. 10.4.1 to 10.7 of the Code.

Chronology

18 Against this background, I turn to a more detailed review of the facts that led to the parties' dispute in 2021. Neither the Commissioner nor the Supreme Court judge who heard the appeal from his decision was provided with every document referred to in this chronology; but most of the items appear not to be controversial.

November 1993	Prime Resources Group Inc. ("Prime") applied to the Minister of Energy, Mines and Petroleum Resources to develop the Eskay Creek Mine. The initial application (which was not in evidence) contemplated that waste rock and tailings (referred to as the "Mined Materials") extracted from the Mine would be placed into Albino Lake into what counsel referred to as the "Albino Waste Facility", or "AWF". In January 1994, a supplemental information report prepared by Knight Piésold Klohn Crippen, referred to as the "Knight Klohn Report", proposed an alternative site for "waste rock deposition" if Prime were unable to use Albino Lake. The report estimated that approximately 380,000 metric tonnes of mine waste rock would be produced in total — a figure that, as we have seen, proved to be much lower than the actual amount. The report quoted the following from the initial application report regarding Albino Lake: — Waste would be end dumped and dozed [i.e., bulldozed] out into the lake from the north end of the lake toward the central basin, forming a gradually expanding crescent shaped platform from which to place the waste rock under water. Waste, which will be retrieved from a temporary storage site at the mine portal, will be continuously or campaign hauled to Albino Lake and end dumped at the advancing front of the waste storage platform and then dozed under water. At closure, the exposed portion of the waste platform will be dozed 1.0 m below water level.
1991-1994	The Commissioner granted three mineral leases to Prime under the *MTA*, covering the Mine and surrounding areas, but not including Albino Lake. We were not provided with copies of these but under s. 42(4) of the *MTA*, mineral leases may have terms of up to 30 years.
March 29, 1994	The Minister, with the concurrence of the Minister of Environment, issued Mine Development Certificate 94-01 to Prime, authorizing development of the Mine. The third recital of the Certificate stated: — WHEREAS, the Development, inter alia, will consist of an underground mine, ore loadout facility, temporary waste rock and ore stockpiles and ancillary facilities including food preparation, . . . waste rock storage, treatment plant, and run off storage and collection facilities, an access road from the mine to Highway #37, and a process plant at Houston, British Columbia, which includes a tailings storage facility, reclaim pond, polishing pond, run off collection facilities, effluent treatment plant, and ancillary facilities, including maintenance and administration . . . — One of the many conditions of the Certificate was that the Mine would be operated in accordance with the original application and the Knight-Klohn Report.
August 1994	The Inspector of Mines granted a permit for Prime to commence construction of the Albino Lake Haul Road.
December 24, 1994	Reference date of the Surface Lease granted by the Ministry of Environment in favour of Prime Resources over an area (D.L. 7180) that included Albino Lake "for waste rock disposal site purposes".

	As lessee, Prime covenanted to pay an annual "fee", "keep the Land in a safe, clean and sanitary condition", "use and occupy the Land in accordance with the provisions of this lease", and on expiration of the term, to "restore the surface of the Land to the satisfaction of the Lessor AND . . . to remove any improvements that the Lessor may ... direct or permit to be removed." The Lease was also expressly stated to be subject to all subsisting grants to or rights of any person made under the *MTA* or in the *Land Act*. For its part, the Ministry covenanted for quiet enjoyment. Mineral rights were reserved to the Crown by the usual terminology. As I understand it, the rights and obligations of Prime Resources under the Lease were assigned over ensuing years to its successors as operators of the Mine.
September 6, 1996	We are told that on this date, a company called Eskay Mining Corp. became the recorded holder of a mineral lease covering, amongst other areas, Albino Lake. We are also told that Eskay Mining Corp. was not related to any of the operators of the Mine.
January 17,1997	The Ministry of Environment issued a permit to Prime authorizing the discharge of mine water treatment system sludge and fines into Albino Lake, and the discharge of lake water from Albino Lake that came into contact with the waste rock.
December 1998	Homestake Canada Inc. ("Homestake") purchased all the outstanding shares of Prime Resources, thus increasing its ownership of the Mine to 100%. The assignment of the Surface Lease was duly recorded in the office of the CGC.
February 2000	Homestake applied to use Tom MacKay Lake as an additional location for waste rock and tailings disposal. This application was granted in June 2000 and construction of a pipeline to Tom MacKay Lake was completed in the fall of 2001. Concurrent with this, the "routine" disposal of tailings at Albino Lake was temporarily discontinued.
2003	Homestake merged with Barrick Gold Corporation and the name of the merged company was changed to Barrick Gold Inc. ("Barrick".)
March 22, 2004	The Chief Inspector of Mines approved amendments to Barrick's reclamation project. One amendment rescinded, during operation of the Mine, the previous requirement for the "immediate submersion of all waste rock deposited into Albino Lake under one metre of water." The Inspector advised, however, that this condition would resume upon completion of mining such that "all waste rock, tailings, and sludge deposited into Albino Lake shall be permanently covered by a minimum of one metre of water."
2007	According to a presentation made by Barrick to provincial officials, concerns arose out of regular tests regarding high pH levels in discharge from the flushing of exposed waste rock, the generation of acid from "subaerially exposed waste rock", and the potential for alkalinity and Sb (antimony) to be released from submerged wastes at Albino Lake. Since the Mine was approaching closure, various solutions were considered. Finally, a "control structure" (essentially a dam) was constructed on the Lake to permit water levels to be raised and lowered. A drawdown of water in the Lake began in August 2007, permitting Barrick to regrade the waste rock and tailings in the Lake so that the waste materials were submerged beneath 1-2 metres of water after the drawdown was reversed. The control structure was then removed. Similar drawdowns, regrading and flooding of the Lake took place in 2008 and 2009.
April 2008	The Mine ceased commercial operations.
September 30, 2011	The Mine became a "Recognized Closed Mine" for purposes of the *Metal and Diamond Mining Effluent Regulations*, SOR/2002-222.
March 2017	In its 2016 annual reclamation report to the Ministry, Barrick noted, *inter alia*, that:— The Eskay Creek ore bodies were contained in the west flank of an anticline structure at the contact. Between 1995 and 2001 waste rock and tailings were discharged to Albino Lake. From 2001 through to mine closure in 2008, tailings were deposited below the water surface of Tom Mackay Lake, and waste rock continued to be deposited into Albino Lake. A total of 1,493,235 tonnes of waste rock and of 257,420 tonnes of tailings were deposited within Albino Lake, all of which has been accounted for as potentially acid generating waste (See Figure 2.5.1). Included in the waste rock total is low grade ore, [coarse] rejects and other mine wastes that include sludge from the settling pond system located within the foot print of the Eskay Creek Mine Site.— . . . — 3.5. Water Quality Prediction/Mitigation and Treatment — Since production ceased in 2008, water quality issues have been treated using the use of a lime addition for elevated dissolved Zinc, and low pH and in the event of elevated pH results a sulfuric drip is utilized. — Eskay Creek is currently not utilizing any water treatment as the water quality results from all permitted discharge locations continue to show limited variability and metal concentrations are consistently below compliance criteria. Trending of the historic water quality were similar to or lower than concentrations observed in previous post closure years and are reflective of the mine closure and cessation of production as shown in the *Eskay Creek 2016 Water Quality Summary* submitted with this report . . . . — In the event that the water quality appears to be diminished, or annual trending indicates the potential for ARD conditions, Barrick has retained the ability to treat the effluent to ensure an acceptable discharge and

	can augment the sample collection frequency. — 3.6. Water Management — Figure 3.6.1 - 1993 Pre-mining drainage and Figure 3.6.2 - 1993 Pre-mining drainage/Preliminary Sample Locations show pre-mining drainages and the water sheds surrounding the Eskay Creek Mine. There have been no changes to these drainages and water sheds through production, closure and reclamation. (See Figure 3.6.3 - Post Production Drainages)
May 3, 2017	The respondent Mr. Mill was granted a mineral claim to an area that included *inter alia* Albino Lake, the previous lease granted to Eskay Mining Corp. having expired without renewal on May 2.
October 2020	Skeena Resources Ltd. purchased the Mine from Barrick.
2020-March 2021	Skeena carried out drilling in Albino Lake (from the ice surface) and on May 25, 2021, issued a news release that contained *inter alia* the following:— Via the initial drill-based investigation in Q1 2021, the Company has now empirically demonstrated that significant Au-Ag mineralization was in fact deposited at Albino. The area of the AWF [Albino Lake Waste facility] measures 128,900 m{2}, of which the Company has only tested a small portion measuring 5,200 m{2}. As such, only 4% of the entire AWF has been investigated to date. This first phase of drilling was performed on staggered 50 m centers from the frozen ice surface. Although more drill holes were planned, ice conditions deteriorated, and the program was terminated early for safety reasons.— ...— About Skeena — Skeena Resources Limited is a Canadian mining exploration company focused on revitalizing the past-producing Eskay Creek gold-silver mine located in Tahltan Territory in the Golden Triangle of northwest British Columbia, Canada. The Company released a robust Preliminary Economic Assessment in late 2019 and is currently focused on infill and exploration drilling to advance Eskay Creek to full Feasibility by Q1 2022. — The promising news was confirmed in a second release dated May 31, 2021 which indicated that "analytical results for the eight drill holes indicate excellent downhole as well as hole to hole Au-Ag grade continuity."
May 21, 2021	SRK Consulting (Canada) Inc., retained by Skeena, issued a technical report to provide an estimate of capital and mineral resources in the Eskay Creek area, including both pit and underground domains. The data indicated mineralization in the overall area as having "reasonable prospects for economic extraction." The executive summary to the report stated: — Despite the substantial precious metal grades and potential base metal credits of the 21A Zone it was historically uneconomic to mine. High smelter penalties and prevailing low commodity prices were factors that halted mining ambitions. In addition, antimony was treated as a penalty element which contributed to the unfavourable economics of the 21A Zone at the time.— In the Pit constrained resource, on a tonnage weighted basis, approximately 12% percent of the contained metal at a 0. 7 g/t AuEQ cut-off grade is classified as Inferred. It is reasonable to expect that the Inferred Mineral Resource could be upgraded to an Indicated Mineral Resource with continued drilling.
August 27, 2021	Mr. Mill applied to the Commissioner under s. 13(1)(b) of the *MTA* for a determination of entitlement to the minerals in the waste rock and tailings deposited in Albino Lake.

The Gold Commissioner's Decision

19 The Commissioner issued his reasons on February 7, 2022, having decided in separate reasons that he had jurisdiction under s. 13(1)(a) of the *MTA* to determine the matter. He interpreted the reference in s. 13(1)(a) to disputes between "recorded holders on the same lands" to include disputes concerning "mineral rights on the same mineral land" even where the mineral titles do not relate to that land. The ruling has not been challenged.

20 After reviewing and quoting from the relevant legislation, and briefly summarizing the submissions of Skeena and Mr. Mill, he stated his conclusion that "the waste rock and tailings located in Albino Lake are minerals to which Mr. Mill has exclusive rights as the recorded holder of mineral claim 1051761 pursuant to the *Mineral Tenure Act*."

21 The Commissioner began his main analysis, which was six pages long, with the observation that waste rock from the Mine had been "dumped" in Albino Lake because it was "deemed to have no economic value to be processed to recover any valuable minerals contained in it. It was deemed to be a waste by-product from the Eskay Creek Mine and had to be disposed of as a requirement to operate the mine." He noted there was no evidence that demonstrated Skeena's predecessors had ever intended to *store* the waste rock in order to await a future opportunity to process it when it might be more valuable. Both Albino Lake and

Tom MacKay Lake had been chosen as "ideal sites" to guard against acid rock drainage or the leaching of toxic compounds that could adversely affect the environment in the long term. The crucial paragraphs of the Commissioner's reasoning then followed:

> The *Land Act* lease 634409 [the Surface Lease] over Albino Lake grants only one right, which is to dispose of waste. It does not grant a right to store private property indefinitely or otherwise. Lease 634409 demises to the Lessee the land, save and except those portions of the land that consist of trails, roads, highways, for the term of the lease, for waste rock disposal site purposes. Lease number 740715 over Tom Mackay Lake, first issued in 2004, grants a lease of land for waste rock and tailings disposal site purposes. In any event both leases use the term "disposal".
>
> The Oxford English Dictionary definition of "disposal" includes: "the action of disposing of or getting rid of, the action of bestowing, giving or making over, bestowal, assignment, sale, arrangement, disposition, or (noun) a waste disposal unit." The plain meaning of "disposal" is not consistent with the indefinite right to store proposition that Skeena asserts.
>
> The Province, by granting the right to dispose of waste rock and tailings in the *Land Act* lease area, Skeena, and its predecessors relinquished ownership to the waste rock and tailings that have been disposed in Albino Lake. If Skeena or is predecessors had wished to store minerals over which they assert ownership, they could have applied to use Crown land for such a purpose. They did not do this. [Emphasis added.]

I note that the underlined sentence in the last paragraph quoted above seems to lack a predicate for the subject "The Province". All counsel seemed to agree that the sentence was intended to mean that 'The grant by the Province of the right to dispose of waste rock and tailings in the area covered by the Surface Lease effected or resulted in Skeena's relinquishment of its ownership of the waste rock and tailings that have been disposed of in Albino Lake.' Or, as Orogenic put it more succinctly in its factum, "The effect of the Surface Lease was that Skeena's Predecessors relinquished ownership in the Waste Rock to the government upon disposal in Albino Lake".

22 The Commissioner went on to note that Skeena's permit M-197, issued under the *Mines Act*, had authorized it to haul and dispose of waste rock and tailings into the Lake, subject to terms and conditions aimed at ensuring that the material is covered with sufficient water to prevent the release of acid into the atmosphere. Although the permit allowed Skeena to undertake the drilling on the Lake in 2021, the *Mines Act* permit did not, in the CGC's analysis, "*grant*" Skeena any *right of ownership* to the waste rock and tailings. And, although Skeena was the holder of the Surface Lease, that instrument did not grant it the right to occupy the surface in order to explore for and develop minerals. In the CGC's opinion, the latter right was held by Mr. Mill as the recorded holder of the mineral claim in respect of the Albino Lake area. Thus the rights to minerals within the boundaries of Skeena's Surface Lease were held by Mr. Mill under claim number 1051761, and Skeena had "no right or entitlement to the waste rock and tailings within the boundary of *Land Act* lease 634409."

Appeal to Supreme Court

23 By notice of appeal filed March 7, 2022 in the Supreme Court of British Columbia, Skeena appealed the CGC's decision, asserting the following grounds:

> 1. The Commissioner failed to properly interpret provisions of the *MTA*, including, but not limited to, sections 1, 28, and 48;
>
> 2. The Commissioner failed to properly interpret provisions of the *Land Act*, including, but not limited to, sections 38 and 50;
>
> 3. The Commissioner failed to consider and properly interpret the other relevant and applicable statutes and provisions, including, but not limited to, *Escheat Act*, R.S.B.C. 1996, c. 120;
>
> 4. The Commissioner made factual findings of fact in the absence of any evidence;
>
> 5. The Commissioner failed to consider the evidence before him;
>
> 6. The Commissioner failed to properly consider and apply the common law principle of abandonment;

7. The Commissioner's reasons for decision are insufficient and procedurally unfair;

8. The Commissioner made a finding on an issue not advanced by Mr. Mill, and without reasonable notice to Skeena, thereby denying Skeena an opportunity to respond to the same; and

9. Such further and other grounds as the Appellant shall advise and may be proven at the hearing of the Appeal.

The notice was served not only on Mr. Mill and Mr. Messmer (the Commissioner), but also on Orogenic, which was described as an "interested party" in the style of cause by the chambers judge. She noted that Orogenic holds a beneficial interest in Mr. Mill's mineral title to the Albino Lake Land. The two respondents were (very ably) represented separately in this court and advanced slightly different arguments in favour of the dismissal of Skeena's appeal.

Chambers Judge's Reasons

24 The judge began her reasons by providing a brief overview of the facts, the leases and permits held by Skeena, the mineral claim held by Mr. Mill and the relevant sections of the *MTA* and *Land Act*. She then quoted the "substance" of the Commissioner's decision. In addition to Skeena's grounds of appeal, she noted that questions also arose concerning the applicable standard of review. As well, Skeena asserted that the Commissioner had "overstepped" his role in the appeal, while the respondents objected that the Tahltan Central Government ("TCG"), an intervenor, had overstepped its role as a public interest intervenor.

25 The chambers judge correctly stated the standards of review applicable to the statutory appeal before her, which had been confirmed in *Canada (Minister of Citizenship and Immigration) v. Vavilov*2019 SCC 65, and applied recently in *Cassiar Jade Contracting Inc. v. Messmer*2021 BCSC 1963 at para. 43. These indicate that the standards enunciated in *Housen v. Nikolaisen*2002 SCC 33, apply. These are correctness with respect to (extricable) questions of law, and "palpable and overriding error" for questions of fact or mixed law and fact. It need hardly be said that the latter is a highly deferential standard.

26 In the chambers judge's analysis, there was really only one substantive issue in the appeal — whether Skeena had "lost its rights" to what she called the "Material" by "putting it on land covered by the Mill Claim." She saw this issue, correctly in my view, as one of mixed fact and law because answering it involved the application of legal principles to a particular set of facts. Although statutory interpretation was also involved, the question of who owned or owns the Material turned on inferences to be drawn from the facts. Accordingly, the standard of review was one of 'palpable and overriding' error. (At para. 22.)

27 Skeena advanced three arguments based on procedural fairness in addition to its substantive arguments. These concerned the Commissioner's findings on Skeena's authority to conduct exploratory drilling in 2021 and on the "chain of title" to mineral rights over the Albino Lake area. Skeena contended that it had been denied notice of these issues and an opportunity to be heard on them. Skeena's third fairness argument challenged the adequacy of the CGC's reasons — an argument the chambers judge found was "misplaced", given that the adequacy of reasons is not seen as a matter of procedural fairness: see *R.N.L. Investments Ltd. v. British Columbia (Agricultural Land Commission)*2021 BCCA 67 at para. 68. The judge ruled that the standard of review applicable to the adequacy of reasons was one of palpable and overriding error. Skeena did not advance any argument based on inadequate reasons in this court.

28 As to whether the Commissioner had overstepped his "limited role" by defending his decision, the judge found he had done so by making written submissions on the meaning of "disposal" beyond what was contained in the decision itself. She therefore disregarded those submissions to that extent. (At para. 30.) The judge also found that TCG had gone beyond its role as a public interest intervenor. Accordingly, she also disregarded the offending portion of its submission. (At para. 35.)

29 The chambers judge then turned to the substantive question of whether the decision was "sustainable on its merits." (At paras. 36-58.) The starting point for her analysis was that Skeena had had a "chattel interest" in the waste materials when they were "located" on the land covered by Skeena's leases. The judge continued:

> . . . It was common ground before the Commissioner and in this appeal that in order for Mr. Mill to acquire mineral rights to the Material, Skeena would have had to have first lost its chattel interest in the Material to the government. In other words,

> the mineral rights would have had to have passed from Skeena to the government. If they were held by the government, Mr. Mill would have acquired them as part of the Mill Claim. [At para. 36; emphasis added.]

30 As I understand it, counsel in this court remain in agreement that this is correct — i.e., that Skeena owned the waste material as "chattels personal", or personal property, when minerals were being extracted from the Mine; and that Mr. Mill could have acquired the mineral rights to those materials *only from the government* as minerals "held by the government" in accordance with s. 28(1) of the *MTA*. The issue, then, was whether ownership of the chattels personal passed to the government at some point — the latest being, in the respondents' analyses, at the time the materials became submerged in water — such that the government was the 'holder' thereof and such that Mr. Mill became entitled to them as minerals "situated vertically downward from and inside the boundaries of [his] claim." (*MTA, s.* 28.)

31 The chambers judge summarized the Commissioner's reasons for reaching the conclusion he had, as follows:

> a) When the Material was put into Albino Lake, Skeena considered it to be waste material, not material that it intended to store for some potential future use;
>
> b) The Surface Lease did not grant Skeena any right over the Material other than the right to dispose of it as waste in Albino Lake;
>
> c) In its ordinary use, "disposing" of something means getting rid of it, not storing it indefinitely for future use;
>
> d) The effect of the Surface Lease was that Skeena relinquished ownership in the Material to the government when it disposed of it in Albino Lake; and
>
> e) The Mine Permit does not grant Skeena any ownership rights in the Material.
>
> f) Skeena does not take issue with the last proposition. [At para. 37.]

32 Skeena submitted that the CGC's decision interpreted the definition of "mineral" and s. 28 of the *MTA* to mean that the disposal of mine waste would result in the *escheatment* of title to waste rock to the government — a result that in its submission would conflict with s. 48(2) of the *MTA* and Skeena's Surface Lease. (At para. 38.) The judge did not comment on this argument, and escheat was not pursued by Skeena in this court. Instead, the judge went on to observe that the crux of Skeena's argument was that the reservation of minerals by the Crown in the Surface Lease could have reserved only those minerals that were *already* located in Albino Lake when the Surface Lease was granted — i.e., in December 1994. Since the deposits of waste materials did not begin until after Skeena obtained the Surface Lease, it contended that the mineral rights to the materials were not reserved to the Crown, and that Skeena continued to 'hold' them.

33 Mr. Mill disagreed: he submitted that that Surface Lease did not reserve to the Crown only those rights to minerals already in the Lake, but also reserved the right to minerals that "subsequently arrived there." This meant, the judge said, that "when Skeena put the Material into the Albino Lake land, the mineral rights to it reverted to government and then became part of the Mill Claim." (At para. 40; my emphasis.)

34 As I understand her reasons, the chambers judge read the Commissioner's decision as agreeing with Mr. Mill's position on the basis that the effect of Skeena's moving the waste material onto the Albino Lake land was to "relinquish its chattel interest in the Material." (My emphasis.) On this point, she cited the CGC's 'difficult' sentence quoted at para. 21 above, where it was said that that Skeena had "relinquished ownership" of the materials "disposed" in Albino Lake, although the CGC seemed to say in that sentence that this had occurred when the Surface Lease was granted. The judge continued:

> That conclusion is consistent with the statutory framework. The definition of "mineral" includes previously mined material; ss. 28 and 48(2) both refer to where material is *presently* situated (within the boundaries of and below a mineral claim or lease). The statutory language signifies that mineral ownership rights do not travel with "minerals" if they are moved from one location to another. Skeena lost its mineral rights to the Material because they reverted to government when Skeena

> removed the Material from the land subject to its Source Leases and deposited them on the Albino Lake Land. Mr. Mill acquired the mineral rights to the Material from government when he acquired the Mill Claim.
>
> The Decision does not explicitly engage in statutory interpretation as I have done in the preceding paragraph. However, an administrative decision-maker is not required to write reasons in the same way that a court would. The Decision contains the elements of a rational and logical analysis: it cites the relevant statutory provisions, comments on them (albeit very briefly), and gives reasons in support of its conclusion.
>
> The Commissioner reviews the Surface Lease, finding that it authorizes Skeena only to "dispose" of the Material in Albino Lake, not "to store private property". This is another way of saying that the Surface Lease (and s. 50 of the *Land Act*) did not preserve or convey mineral ownership rights. The Commissioner references the Permits as imposing positive and continuing obligations on Skeena to dispose of the Material in Albino Lake and monitor it for environmental hazards. The distinction between ownership rights to minerals and obligations tied to mining activity are implicit in his analysis. The fact that this aspect of the Decision could have been more explicit does not make it illogical or irrational. Still less does it demonstrate palpable and overriding error. [At paras. 47-9; emphasis added.]

35 The Court commented at para. 50 that that the CGC's "focus" on Skeena's intentions in "disposing" of the waste materials was understandable in light of the arguments made to him. Skeena had submitted that it obtained the Surface Lease in order to "maintain control" over the deposited materials and to comply with its environmental obligations in respect thereof. In her analysis, the Commissioner's decision did not "evince such an intention". The judge regarded this argument as inconsistent with the fact that, in her words, the "legislative regime ties ongoing environmental obligations to previous mining activity, regardless of present ownership rights." (At para. 51.) This may have missed the point that Skeena and any other predecessor bound by the environmental regulations would need access to the Lake and its environs to perform those obligations.

36 The judge found that the Commissioner's focus on Skeena's intentions and on the ordinary meaning of "disposal" was also understandable, given that Mr. Mill had referred in his initial argument to escheatment and abandonment. Both of these, she stated, "require an element of intent to end ownership." (With respect, this is not true of escheat, which is triggered on upon a failure of title, most commonly where a person dies leaving property without heirs or where a company is wound up without disposing of property: see *Escheat Act*, R.S.B.C. 1996, c. 120, ss. 3(1) and 4(1) and *Mercer v. Attorney General for Ontario*(1881) 5 S.C.R. 538.) In any event, Mr. Mill had later clarified that he was not relying on escheat or the common law of abandonment. I will return to the law relating to abandonment later in these reasons.

37 The chambers judge did not accede to an argument made by Skeena based on the "strong presumption" that the Legislature does not intend to deprive persons of their rights (here, property rights) unless expressly stated (citing *Li v. Rao*2019 BCCA 265). The judge found that the presumption did not apply in this case; in her words:

> . . . As Skeena's rights to the Material are statutory, interpreting the statute does not take away any right that had previously been accrued to Skeena. It clarifies that Skeena never had the right it now asserts. [At para. 53; emphasis added.]

She also rejected Skeena's challenge to the adequacy of the Commissioner's reasons and concluded:

> I have found that the Commissioner's reasons for finding that Skeena lost its ownership interest in the Material when it put it in Albino Lake do not constitute palpable and overriding error. His reasons are adequate on the applicable standard of review [At para. 55.]

38 Finally, the chambers judge considered Skeena's argument that it had been denied notice of, and an opportunity to be heard, on two matters, namely:

> a) the Commissioner's conclusion that the Surface Lease did not authorize Skeena to conduct the exploratory drilling of the Material in the Albino Lake Land [in 2021], and

> b) the Commissioner's characterization of Mr. Mill's position as stating that throughout the period of the Surface Lease, a mineral title has always been registered over the lands covered by the Surface Lease. [At para. 60.]

She found that the second argument was without foundation. Mr. Mill's submissions to the Commissioner had set out the history of prior recorded holders of mineral title to Albino Lake dating back to 1989 and the sentence complained of did not represent a *finding* on his part. As for the conclusion that the Surface Lease had not authorized Skeena's exploratory drilling in 2021, the judge reasoned:

> It was Skeena's exploratory drilling that led to Mr. Mill's request to the Commissioner to decide who owns the Material. The issue of its authority to do so was raised before the Commissioner when he was considering the issue of jurisdiction. It was not addressed by the parties at the hearing on the ownership dispute.

Despite that, the Commissioner found that Skeena's *Mines Act* permit M-197 gave it the authority to conduct exploratory drilling, but that neither it nor the Surface Lease gave it any ownership interest in the Material:

> A condition of the *Mines Act* permit M-197 allows Skeena to make a "Notice of Departure". Skeena's notice of departure has allowed them to undertake exploration drilling on Albino Lake to assess the mineralized quality and content of the waste rock and tailings. The *Mines Act* permit however does not grant Skeena any right of ownership to the waste rock and tailings. Neither Skeena nor Mr. Mill have made assertions to the contrary.
>
> *Land Act* Lease 634409 does not authorize occupation of Albino Lake for the purposes of exploratory drilling to assess the quality and content of the waste rock and tailings. The only right to occupy the surface of Lease 634409 for the purposes of exploring for and developing minerals is held by Mr. Mill, the recorded holder of the overlapping mineral claim 1051761.

Read in the context of the Decision as a whole, this finding is implicit in the Commissioner's earlier conclusion that the Surface Lease "grants only one right" to Skeena, which is to dispose of the Material in Albino Lake. In my view, the passage is more of a consequential observation than a finding. Importantly, a finding on the authority to conduct exploratory drilling was irrelevant to the ownership issue and could not affect the outcome of the case before the Commissioner. [At paras. 64-6; emphasis added.]

39 Accordingly, even if she were wrong and the CGC had breached the duty of procedural fairness by deciding an issue not before him, that error would not warrant setting the decision aside and remitting it back to him. No useful purpose would be served by doing so. (Citing *Chu v. British Columbia (Police Complaint Commissioner)*2021 BCCA 174 at paras. 114-8, in turn citing *Vavilov* at para. 142.) In the result, the chambers judge ruled that the Commissioner's decision contained no palpable and overriding error. The appeal was dismissed.

On Appeal

Standard of Review

40 As stated by Skeena in its factum, it is common ground that appellate (as opposed to administrative law) standards of review apply to this second statutory appeal from the Commissioner's decision. Thus as the majority reasoned in *Vavilov* :

> It should . . . be recognized that, where the legislature has provided for an appeal from an administrative decision to a court, a court hearing such an appeal is to apply appellate standards of review to the decision. This means that the applicable standard is to be determined with reference to the nature of the question and to this Court's jurisprudence on appellate standards of review. Where, for example, a court is hearing an appeal from an administrative decision, it would, in considering questions of law, including questions of statutory interpretation and those concerning the scope of a decision maker's authority, apply the standard of correctness in accordance with *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 8. Where the scope of the statutory appeal includes questions of fact, the appellate standard of review for those questions is palpable and overriding error (as it is for questions of mixed fact and law where the legal principle is not readily extricable): see *Housen*, at paras. 10, 19 and 26-37. Of course, should a legislature intend that a different

> standard of review apply in a statutory appeal, it is always free to make that intention known by prescribing the applicable standard through statute. [At para.37.]

41 As to how these standards are to be applied by a second appeal court, the most helpful reference I have found is that of the Manitoba Court of Appeal in *Jhanji v. The Law Society of Manitoba*2020 MBCA 48. There the Court stated:

> Except for grounds related to questions of procedural fairness, the appeal to this Court is a second-level appeal from a statutory appeal of a decision from an administrative tribunal. . . .
>
> In the administrative law context, a second-level appeal raises a two-part question of law:
>
> 1. whether the reviewing judge correctly identified the applicable standard of review, and, if so;
>
> 2. whether the reviewing judge applied that standard properly.
>
> (See *Dr. Q v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19at para. 43; and *Pollock et al. v. Human Rights Commission (Manitoba) et al*,. 2019 MBCA 110 at paras. 40-42).
>
> To answer whether a reviewing judge applied the appropriate standard of review correctly, the appellate court must step "into the shoes" of the reviewing judge and consider the decision of the administrative tribunal (*Prairie Acid Rain Coalition v. Canada (Minister of Fisheries and Oceans)*, 2006 FCA 31at para. 14, leave to appeal to SCC refused, 31370 (20 July 2006)). [At paras. 36-8; emphasis added.]
>
> I also note on this point para. 46 of *The College of Physicians and Surgeons of Saskatchewan v. Leontowicz*, 2023 SKCA 110:
>
> > In assessing this argument, I begin by reminding myself of the role this Court plays in sitting as a secondary appellate court. In that regard, an appellate court is to determine whether the judge chose the correct standard of review and applied it properly. This is a question of law, reviewable on the correctness standard: *Dr. Q v. College of Physicians and Surgeons of British Columbia* . . . In practice, once the appellate court has identified the correct standard of review, it "steps into the shoes" of the reviewing court and reviews the decision of the administrative tribunal in accordance with that standard (*Teamsters Canada Rail Conference v. Canadian National Railway Company*, 2021 SKCA 62at para. 41 ...). [At para. 46; emphasis added.]
> >
> > See also *Mason v. Canada (Citizenship and Immigration)*, 2023 SCC 21at para. 36.

Preliminary Points

42 Our "focus", then, should be on the Commissioner's decision rather than that of the chambers judge below. That said, I am compelled to say that some of the chambers judge's statements of law are problematic. First, I note her acceptance of the principle that when minerals are extracted from the ground pursuant to a mineral lease, the owner of mineral title (here, predecessors of Skeena) acquires a "chattel interest" in them. (At para. 10.) On this point, counsel referred us to Gary Barton, *Canadian Law of Mining* (2nd ed., 2019), where the author states the converse of the principle, namely that minerals that have *not* been extracted are *not* yet chattels:

> Because land includes minerals, it is not legally possible to give a bill of sale of ore that remains in the ground unextracted. Until severed from the land, the ore is not a chattel, but remains an indivisible part of the land. [At 42-3.]
>
> Similarly, in *Anyox Metals Ltd. v. Morod*, [1950] 1 W.W.R. 769 (B.C.C.A.), the majority stated that "Until severed from the land the ore is not a chattel, but remains as much an indivisible part of the land as standing timber . . . ." (At 774.)

43 The other side of the coin also follows — once it is severed from the land, ore or related material becomes a chattel personal. Author Rodney A. Stone, in ch.12 of *Canadian Mining Law*, states the proposition directly: "Ores and minerals, once

extracted from the land, become personal property" (at s. 212.04); as does Robert Chambers in *The Law of Property*, who writes that "Rocks, minerals and soil become goods when they are removed from the land." (At 6.) This principle is reflected in the definitions of "goods" in both the *Sale of Goods Act*, R.S.B.C. 1996, c. 410, and the *Personal Property Security Act*, R.S.B.C. 1996, c. 359.

44 While recognizing this principle, however, the judge stated at para. 53 of her reasons that:

> Skeena argues, citing *Li v. Rao*, 2019 BCCA 265, that interpreting the statutory regime as the Commissioner did violates the strong presumption that the legislature does not intend to deprive citizens of existing rights. The presumption does not apply here. As Skeena's rights to the Material are statutory, interpreting the statute does not take away any right that had previously been accrued to Skeena. It clarifies that Skeena never had the right it now asserts. [Emphasis added.]
>
> The suggestion that Skeena "never had" any right in respect of the waste material is simply incorrect. In addition, the judge's apparent endorsement of the Commissioner's finding (at p. 6) that Skeena's permit to operate the Mine did not "grant Skeena any right of ownership in the waste rock" ignores the fact that the operator of the Mine had acquired ownership of the waste rock as chattels personal upon removing the waste rock and tailings (which, as seen above, come within the definition of "mineral" in the *MTA*) from the Mine. Skeena did not, as indicated by the chambers judge at para. 65, need to look to its *Mines Act* permit, nor to a "grant" in the Surface Lease, for this purpose.

45 Respectfully, the judge also erred, or misspoke, in stating at para. 47 that "mineral ownership rights do not travel with 'minerals' if they are moved from one location to another." No one in this case has contended that placing minerals in a truck, for example, to transport it to a smelter or other facility results in a change in ownership. As Skeena observes in its factum, it is inherent in the mining process that mineral products must be moved to another location after they are extracted. In the case of the Eskay Creek Mine, minerals were regularly transported to smelters in Trail and Quebec, among other locations. They remained the property of the Mine operator until they were sold.

46 Again, however, our focus must be on the Commissioner's decision rather than that of the lower court. Since the chambers judge correctly stated the standard of review at para. 18 of her reasons (although Skeena asserts that certain references, at paras. 47 and 48, might suggest otherwise), I turn to the question of whether the standards of appellate review as described in *Housen* were properly applied.

Three Grounds of Appeal

47 In its factum, Skeena asserted that the chambers judge erred in law by applying an incorrect standard of review as follows:

> i. in concluding there was no error in the Commissioner's conclusion that the Surface Lease granted only one right to Skeena: the right to relinquish ownership of the Mined Minerals to the Crown;
>
> ii. in concluding there was no error in the Commissioner's implicit interpretation of the *MTA* and in the judge's conclusion that ownership rights under the *MTA* do not travel with extracted minerals if they are moved; and
>
> iii. in concluding the Commissioner made no error in finding that Skeena "relinquished" the Mined Minerals the moment they were placed into Albino Lake, which is inconsistent with the test for abandonment of property.

48 I have already indicated my opinion that the judge misspoke when she stated that ownership rights under the *MTA* do not "travel with" extracted minerals when they are moved. Mr. Mill agrees in his factum that "Clearly, chattel property rights to mined minerals travel with those minerals and there are means for parties to protect and preserve those rights." He contends, however, that "mineral rights as provided for by the *MTA* do not travel — i.e., that they are "tied to the specific claim area, and cover all of the minerals held by the government in that area." Further, he says that nothing in this interpretation causes the *MTA* nor the *Land Act* to 'reach up and grab' mined minerals extracted by miners." This reasoning might possibly avail if s. 28 of the *MTA* (quoted above at para. 13) did not contain the phrase "held by the government". But since it does, those words

must be given effect, and in my respectful view, they can only mean that the government could not grant mineral rights over "minerals" it did not own.

49 With respect to the first asserted error above, I also agree that the Commissioner erred in stating that that the Surface Lease granted "only one right", being the right to dispose of waste. The Lease conferred many "rights" on Skeena, including rights to quiet enjoyment and exclusive possession and the right to build improvements on the property, subject to removing them at the end of the term as directed by the Lessor. In short, it created a tenancy relationship on ordinary commercial terms. As I will explain below, it is also reasonable to infer that the lessee would be entitled to store waste rock and tailings on the Land during the term, contrary to the CGC's suggestion.

The Question on Appeal

50 The foregoing are clear errors, but in my view not "overriding" ones in the sense that they would necessarily change the result in this case. The real question for us is encapsulated in the third ground of appeal — whether the judge was correct in finding that the Commissioner did not err in a palpable and overriding way in ruling that:

> The Province, by granting the right to dispose of waste rock and tailings in the *Land Act* lease area, Skeena, and its predecessors relinquished ownership to the waste rock and tailings that have been disposed in Albino Lake. If Skeena or [its] predecessors had wished to store minerals over which they assert ownership, they could have applied to use Crown land for such a purpose. They did not do this. [At page 6; emphasis added.]

51 The Commissioner treated this issue primarily as one of interpreting the word "disposal" in the statement of purpose in the Surface Lease — "for waste rock disposal site purposes." As we have seen, he noted that the *Oxford English Dictionary* defines "disposal" to include "the action of disposing of or getting rid of, the action of bestowing, giving or making over, bestowal, assignment, sale, arrangement, disposition, or (noun) a waste disposal unit." From this he found that the plain meaning of "disposal" was not consistent with an indefinite right to store waste rock as asserted by Skeena. (It appears he considered over 30 years to be "indefinite".)

52 In Skeena's submission, the CGC here made two extricable errors of law. First, he failed to read the Surface Lease as a whole and in its context, instead fixing unduly on the dictionary definition of "disposal". This is said to have led him to reduce Skeena's leasehold rights to only a negative "right to lose its property". Second, Skeena submits that he failed to consider whether his interpretation of the Surface Lease was consistent with "commercial common sense". On both points, Skeena cites *Sattva Capital Corp. v. Creston Moly Corp.*2014 SCC 53, where Mr. Justice Rothstein stated for the Court:

> Regarding the first development, the interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction. The overriding concern is to determine "the intent of the parties and the scope of their understanding" (*Jesuit Fathers of Upper Canada v. Guardian Insurance Co. of Canada*, 2006 SCC 21, [2006] 1 S.C.R. 744, at para. 27, *per* LeBel J.; see also *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69, at paras. 64-65, *per* Cromwell J.). To do so, a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract. Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning:
>
> > No contracts are made in a vacuum: there is always a setting in which they have to be placed . . . In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.
> >
> > (*Reardon Smith Line*, at p. 574, *per* Lord Wilberforce)

> The meaning of words is often derived from a number of contextual factors, including the purpose of the agreement and the nature of the relationship created by the agreement (see *Moore Realty Inc. v. Manitoba Motor League*, 2003 MBCA 71, 173 Man. R. (2d) 300, at para. 15, *per* Hamilton J.A.; see also Hall, at p. 22; and McCamus, at pp. 749-50). As stated by Lord Hoffmann in *Investors Compensation Scheme Ltd. v. West Bromwich Building Society*, [1998] 1 All E.R. 98 (H.L.):
>
> > The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. [p. 115] [At paras. 47-8; emphasis added.]

53 Counsel also referred to *Sutter Hill Management Corporation v. Mpire Capital Corporation*2022 BCCA 13, where this court observed that while it is certainly legitimate when interpreting a contract to look to other cases for assistance (and, I would add, to look to dictionary meanings), "the question must always be asked, is that interpretation consistent with what the parties to this agreement intended in the particular circumstances of this case? Context is key." (See also *Ledcor Construction Ltd v. Northbridge Indemnity Insurance Co.*2016 SCC 37 at para. 38.)

54 As with many legal rules, this principle should not be taken too far, such that context is allowed to overwhelm the meaning of the words of a contract. As stated by this court in *Black Swan Gold Mines Ltd. v. Goldbelt Resources Ltd.*[1996] 25 B.C.L.R. (3rd) 285:

> In my respectful opinion, [the trial judge below] properly kept the contextual facts in the background and the text of the agreement in the foreground as he examined the picture. The words of the contract must not be overwhelmed by a contextual analysis, otherwise there is little point in writing things down. No certainty could be achieved in choosing words to express a bargain. Contract disputes would have to be resolved by lengthy inquiries into what was fair in light of what happened before, during and after the making of a contract. [At para. 19; emphasis added.]

This principle was also applied in *Water Street Pictures Ltd. v. Forefront Releasing Inc.*, 2006 BCCA 459at para. 24.

55 The Court in *Water Street* also reproduced at para. 23 the following passage from *Geoffrey L. Moor Realty Inc. v. Manitoba Motor League*2003 MBCA 71 concerning contractual interpretation generally:

> In brief summary then, to determine the intentions of the parties expressed in a written contract, one looks to the text of the contract as a whole. In doing so, meaning is given to all of the words in the text, if possible, and the absence of words may also be considered. If necessary, the text is considered in light of the surrounding circumstances as at the time of execution of the contract. The goal is to determine the objective intentions of the parties in the sense of a reasonable person in the context of those surrounding circumstances and not the subjective intentions of the parties. If, after that analysis, the text in question is ambiguous, extrinsic evidence may be considered. [*Manitoba Motor League* at para. 26.]

56 If the Commissioner had followed the rules of contractual interpretation, Skeena says, he would have appreciated that the Surface Lease was not a contract to dispose of waste to a third party, but was a lease to allow Skeena to use the Albino Lake lands as a "waste rock disposal site." Skeena says further that if the Commissioner had considered the Lease as a whole in order to determine, *objectively*, the "intent of the parties and the scope of their understanding" (*Sattva* at para. 48) in the context of all the surrounding circumstances, he would have realized that "waste rock disposal" referred to the process of transferring the waste rock from the place where it had been extracted, to the site of the Albino Lake Facility, where it was to be deposited and monitored as the Crown and Skeena's permits required.

57 Consistent with this, Skeena emphasizes that the Knight-Klohn Report, while using the word "disposal", also used the phrases "transported and deposited", and "waste rock deposition". At para. 1.1, it stated that "Disposal of the waste rock in an environmentally secure manner will be achieved by storing it permanently under water to prevent oxidation." (My emphasis.) Skeena also notes that the dictionary definitions of "dispose" and "disposal site purposes" are broader than the Commissioner suggested. The *Oxford Canadian Dictionary* (2nd ed., 2004), for example, defines "dispose" to include "the arrangement,

disposition, or placing of something; control or management (of a person, business, etc.)". Thus, Skeena submits, "disposal" does not necessarily refer to "getting rid of" something.

58 In Skeena's analysis, the relevant contextual factors also included the Crown's regulation of the Mine and the Albino Lake Facility. Skeena's enduring environmental obligations contemplated that it would have to enter the Facility to "manage" the waste materials once placed there. During the term of the Surface Lease, Skeena obviously had the ability to deal with the waste materials as required, but, Skeena asks, if the waste materials were no longer owned by it, how could the government continue to regulate them? Here, Skeena seems to suggest that the Province and Skeena expected that the waste materials had to remain owned by Skeena so that it could continue to perform its obligations of monitoring, testing and reporting on water quality. This context, it is said, is inconsistent with the "relinquishment" that the Commissioner found had occurred upon the Crown's grant of the Surface Lease.

59 The respondents point out, of course, that in accordance with the "polluter pay" principle, the *Environmental Management Act* imposes enduring obligations on both current and previous operators of mines: see especially Part 4: Division 3 - Liability for Remediation at paras. 45, 47. Further, Orogenic submits that although Skeena needed to "manage, maintain, move and manipulate" the waste rock when it transported it to Albino Lake, this has not been the case since at least 2010. From that time, the waste rock has sat "permanently" one meter under the surface of the Lake in accordance with strict environmental requirements. Nevertheless, the evidence is that Skeena Resources and/or its predecessors remain subject to regular monitoring and testing obligations. It is unclear whether Skeena will be able to perform these after the Surface Lease expires, without some licence or permit from the Province.

60 Orogenic contends that in entering into the Surface Lease, Skeena "contracted for the right to access a disposal site and to dispose of [its] waste, in exchange for a fee paid to the Crown." Indeed, Orogenic goes further and characterizes the Surface Lease simply as a "*waste disposal contract*" under which the Lessee paid a "fee" in the context of a "regulated activity that required [Skeena] to not only dispose of the Waste Rock but to access Albino Lake to ensure disposal occurred safely. [Skeena] contracted for the right to access the disposal site and to dispose of [its] waste, in exchange for a fee paid to the Crown." Orogenic says that it is not necessary for our purposes to determine precisely when "disposal" occurred "as contemplated by the Surface Lease", but that it occurred "years before Skeena Resources acquired the Mine" (2017.)

61 Aside from its stated purpose, however, the Surface Lease itself makes *no mention of the deposit of waste or other materials on land or under the Lake or ownership thereof.* As already mentioned, the Lease appears to be an unremarkable commercial lease. The annual fee payable under the Lease did not vary depending on the amount deposited; nor was Skeena entitled to terminate the Lease (except to negotiate a longer term) once all the material had been placed underwater. There was no suggestion that the lessee sought to terminate the Lease after the cessation of mining. Presumably it has continued to pay the annual fee under the Lease.

62 If Skeena had decided to pile rock of any kind — waste or otherwise — that remained identifiable as such on the Albino Land, I think it unlikely as a matter of law that Skeena would have been in breach of the Lease or that it would not have remained the owner of the material. (See, e.g., *Ross Cromarty Developments Inc. v. Arthur Bell Holdings Ltd.*[1994] 3 W.W.R. 142 (B.C.C.A.).) Certainly, this is not a case that engages a question of "illegal use" of the premises — a situation that arises when a tenant uses demised premises contrary to some other law, often a zoning by-law. (See, e.g., *McCulloch v. Nocair*2023 BCSC 154.) Nor is this a case where the tenant has derogated from the purpose of the lease in such a way that it could be viewed as a breach of contract — a situation that often arises in the retail context, where, for example, a mall leases a unit on terms that specify the kind of business that the tenant may operate and the tenant materially departs from operating that particular business. (See, e.g., *Cavalier Enterprises Ltd. v. Country Style Donuts Ltd. and Copeland et al.*42 Sask. R. 256 (Q.B.).) At the least, Skeena was entitled to do all things reasonably connected to the stated purpose of the lease. In my view, that entitlement would include placing its chattels on the Land during the term of the Lease.

63 In any event, I am unable to agree with Orogenic's submission that looked at objectively, the Lease was in reality a disguised waste disposal contract that somehow resulted in a transfer of ownership of the waste materials to the Crown. To ignore all the terms of this agreement except for its statement of purpose would indeed permit context to overwhelm the text. To

'read in' to the agreement a series of covenants it did not contain — most importantly, a transfer of ownership of chattels to the Province — would amount to pure fabrication. The Surface Lease did not purport to transfer anything to the Province, nor to deprive Skeena of its ownership in some other way, least of all by moving the waste material from one location to another. Nor can it be said a transfer of ownership can be implied as something that "goes without saying", or that such a term was necessary in order to give the Surface Lease business efficacy. (See generally *Athwal v. Black Top Cabs Ltd.*2012 BCCA 107 at para. 48.) No suggestion has been made as to why the parties' arrangement would have been disguised, or by whom.

64 In the circumstances, I find that the chambers judge erred in finding, or in endorsing the CGC's finding, that the Surface Lease granted "*only one right*", namely to "dispose of waste." Moreover, his observation that the Lease did not "grant" Skeena any right to store private property on the site during the term of the Lease missed the point: Skeena did not require a "grant" of this kind when it was already the owner of the waste materials.

65 The more difficult question, to which I now turn, is the crux of Orogenic's submission — whether by reason of its placement of the waste materials in the bed of Albino Lake, Skeena *relinquished, abandoned or otherwise effectively transferred title to its chattels personal, to the Province*. This is clearly a question of mixed fact and law.

"Relinquishing" and "Abandoning"

66 The words "relinquish" and "abandon" are very closely related. According to the *Oxford Dictionary of Word Origins* (3rd ed., 2021), the origin of "abandon" is the old English word "ban", which meant "to summon by popular proclamation." The word "ban" also passed into the French, where it connoted "proclamation, summons, banishment". In old French, the phrase "*à bandal*" meant "at one's disposal, under one's jurisdiction". As for "relinquish," the *Dictionary* refers the reader to "derelict," which originated in the Latin word *derelictus*, the past participle of *delinquere*, or "to abandon". *Black's Law Dictionary* (2004) confirms the closeness of the two terms: it defines "relinquish" as "the abandonment of a right or thing" and "abandonment" as "the relinquishing of a right or interest with the intention of never reclaiming it."

67 In *Ziff's Principles of Property Law* (8th ed., 2023), authors E. Kaplinsky, M. Lavoie and J. Thomson write that:

> Whether one acquires personal property through possession, purchase or otherwise, under Canadian law these entitlements can be relinquished through abandonment. Abandonment is, in essence the reverse of possession-taking: there must be an intention (*animus relinquendi*) to renounce title; that is, an indifference as to the fate of a chattel. Accordingly, if one misplaces some item, and all efforts to locate it proved fruitless, merely giving up the search in despair is not abandonment. Losing all hope of recovery is not equivalent to the *animus* of abandonment. Sufficient acts of divestment are also required. It is sometimes offered that unilateral (or 'divesting') abandonment is not possible, or alternatively is not effective until the chattel is taken by someone else. Canadian courts have not been so demanding, nor have they delved into the abstruse and convoluted learning on point. . . . . There is case law to support the proposition that garbage placed for pick up and disposal is abandoned property. However, a contrary view is that the goods are relinquished conditionally, not absolutely, because a householder leaving the trash out is not completely indifferent as to what will occur next. Rather, it is being disposed of on the understanding that the collection service will haul it away. [At 162-3; emphasis added.]

68 The distinction between being indifferent as to who acquires the property and leaving it, for example, for pickup by local authorities is discussed at length by Professor Saw Cheng Lim in "The Law of Abandonment and the Passing of Property in Trash," (2011) 23 SAcLJ 145. It need not concern us here. In more general terms, however, the author says this about "abandonment":

> The word "abandonment" may, in law, assume a number of different meanings, depending on the context in which it is used. It is important, at the outset, to distinguish between an abandonment of ownership of property (or title to property) and an abandonment of possession of (or control over) property. It has been said that the mere relinquishment of "possession" of a thing is not an abandonment in a legal sense, since such an act is not wholly inconsistent with the idea of continuing "ownership". The act of abandonment must be an overt act (or some failure to act) which carries the implication that the legal owner neither claims nor retains any interest in the subject matter of the abandonment. . . .

> From a brief survey of US and Canadian case law, it is apparent that two requirements must be satisfied in order to effect a proper abandonment of property. According to the Ontario Court of Appeal in *Simpson v Gowers*, [(1981) 121 D.L.R. (3d) 709 at 711] "[a]bandonment occurs when there is 'a giving up, a total desertion, and absolute relinquishment' of private goods by the former owner. It may arise when the owner with the specific intent of desertion and relinquishment casts away or leaves behind his property . . . ". There must therefore be, in addition to the *overt act* of abandonment itself, a specific *intention/motive* on the part of the original owner to completely relinquish all rights of ownership — voluntarily and, more importantly, without regard as to who may subsequently take possession of the property. It bears repeating that such relinquishment must be to the extent where the former owner is *completely indifferent* as to the fate of the discarded object (*ie*, as to what/who may await the abandoned property). In other words, if anyone else takes and uses the abandoned property in whatever manner, that is a matter of no consequence to him.
>
> Proof of "intention" is, of course, a question of fact. Clearly, an intention to abandon property will not ordinarily be presumed. There must, generally, be some direct or affirmative evidence of subjective intent. Alternatively, intention may be established objectively, through the process of inference, from the overt acts and conduct of the proprietor — *e.g*, from the circumstances surrounding the proprietor's treatment of the property, the manner and location of abandonment, as well as the nature and value of the property. There must, in other words, be some explicit conduct which can be taken to indicate, clearly and objectively, that the owner no longer wants his or her property. [At 147-8; emphasis added; footnotes omitted.]

69 One of the leading Canadian cases is *Stewart v. Gustafson*[1999] 4 W.W.R. 695 (Sask. Q.B.). There, Klebuc J. summarized the basic principles relating to abandonment:

> R.A. Brown in *The Law of Personal Property*, 2nd ed. (Chicago: Callaghan, 1955) defined "abandonment" as follows:
>
> > Abandonment occurs when there is "a giving up, a total desertion, and absolute relinquishment" of private goods by the former owner. It may arise when the owner with the specific intent of desertion and relinquishment casts away or leaves behind his property . . .
>
> *Black's Law Dictionary*, 5th ed. (St. Paul Minn.: West Publishing Co., 1979) provides the following definition:
>
> > The surrender, relinquishment, disclaimer, or cession of property or of rights. Voluntary relinquishment of all right, title, claim and possession, with the intention of not reclaiming it.
> >
> > . . .
> >
> > "Abandonment" includes both the intention to abandon and the external act by which the intention is carried into effect.
> >
> > . . .
>
> The act of abandonment is essentially a question of fact to be proven by the party relying on the principle of abandonment [citations omitted]. The burden of proof is an onerous one where the owner's actions do not clearly manifest an intention to surrender ownership of the chattel in issue. In the result, intention often must be inferred by using the approach commonly employed in criminal law where intention is of paramount importance.
>
> The authorities reviewed suggest that the following factors in the appropriate factual context support an inference of intention to abandon: (1) passage of time; (2) nature of the transaction; and (3) the owner's conduct. I am of the view the nature and value of the property also may be an indicator of intent. [At paras. 13, 14, 16 and 17; emphasis added.]
>
> See also *Chieftain Metals Inc. v. Tulsequah Wilderness Adventures Inc.*, 2014 BCSC 1251at para. 72, *Dean v. Kotsopoulos*, 2012 ONCA 143at para. 18; and Michael Bridge, Louise Gullifer, Gerard McMeel and Sarah Worthington, *The Law of Personal Property* (1st ed., 2013) at § 2-059.

70 Applying the foregoing principles of law, can it be said that the CGC was correct, or was not clearly and palpably wrong, in ruling that by virtue of being granted the right to deposit waste rock and tailings in Albino Lake, Skeena "relinquished ownership to the waste rock and tailings" that were so deposited? Skeena says not. In Mr. Nathanson's able submission, the requirement that a person be "indifferent" as to the fate of his or her property is inconsistent with the reality of regulatory obligations attaching to property created by an undertaking. In counsel's words, complying with regulatory obligations is not "indifference". Moreover, the decision to put a chattel in a mandated place for "disposal" is hardly an unequivocal expression of an intention to abandon ownership of it. The measure may simply be a necessary step for waste to be handled in a lawful and environmentally safe way. Rather than asking whether Skeena did anything to *preserve* its property in the waste materials, Skeena says the CGC should have asked whether it demonstrated an intention to *give up* its property unequivocally and voluntarily, and whether it engaged in an act of divestment in relation thereto. The burden lies on the person alleging abandonment: *Simpson v. Gowers*(1981) 121 D.L.R. (3d) 709 (Ont. C.A.) at 712; *R. v. Shearing*2002 SCC 58 at para. 160 (*per* L'Heureux Dubé J. in dissent, although not on this point).

Case Authorities

71 In response, Mr. Mill and Orogenic rely on a line of cases dealing variously with implied transfer, abandonment, affixation and accretion. The first of these is *Peterson Lake Silver Cobalt Mining Co. v. Dominion Reduction Co*(1917) 41 O.L.R. 182 (S.C.), *aff'd* (1918) 46 D.L.R. 724 (Ont. C.A.), *aff'd* (1919) 50 D.L.R. 52 (S.C.C.). (The latter judgment is more complete than that found at 59 S.C.R. 646.) The facts of *Peterson Lake* bear some similarity to those of the instant case. The plaintiff "Peterson" owned the bed of a lake and associated land in Coleman, Ontario. In 1910, a company referred to as the "Nova Scotia company" acquired the land adjacent to the east arm of the lake and erected a reduction mill on that land, and began depositing its tailings in the lake. The Nova Scotia company later made an assignment for the benefit of its creditors and sold its "real estate, goods and chattels" to a Mr. Steindler. He in turn sold this property to the defendant ("Dominion") in 1912.

72 In 1914, Dominion wrote to Peterson, acknowledging that in the past, Peterson had made no objection to the tailings being deposited in the bay of the lake. Dominion's directors, however, felt that Dominion should have some written confirmation of this arrangement, so that no question of "encroachment" could arise. Peterson replied that its directors were content for the residues to be "discharged" in the lake, on the understanding that the practice would be discontinued on one month's notice from Peterson. (At para. 9.) In May 1915, however, Dominion's solicitors went further. They requested an acknowledgment that if the tailings should ever prove to have value, Dominion would be free to remove them from the lake at any time. Peterson's directors passed a resolution reciting the letter and instructed its secretary to tell Dominion that "this would be satisfactory if [Peterson] had the right to direct the point of deposit of the tailings."

73 Further correspondence led eventually to litigation as to who owned the tailings that had been deposited before July 2, 1915, when an arrangement was agreed upon. Before that date, "There was no bargain or understanding save such as may be inferred from a request upon the one side for permission to dump the tailings in the lake". Middleton J. found that the tailings so deposited had become the land of Peterson, adopting the words of the Court in *Boileau v. Heath*[1898] 2 Ch. 301 that:

> They could not sell it and did not want to sell it, and when they piled it on the earth their intention was that it should once more form part of the earth out of which it had been produced, and should no longer be, if ever it was, of the nature of a chattel. [At 305; emphasis added.]
>
> (The deposited material in *Boileau* consisted of "refuse" from the manufacture of iron which had been deposited in heaps by a previous tenant and left at the expiry of the lease.) Middleton J. in *Peterson* observed that the holding in *Boileau* was that although the original tenant might have taken the refuse during his tenancy, the refuse became a part of the freehold when he had left it behind at the end of the lease "and did not pass to the defendants as stores and effects, nor were they "minerals which the defendants might take under the mining lease". (At para. 30.) (In the case at bar, of course, the Surface Lease has not yet expired, and the waste materials *are* "minerals" under the *MTA*.)

74 The crucial part of Middleton J.'s reasoning was that:

> I am not quoting these words because the decision governs this case, but because they express aptly the principle that governs. The ore here was not mined from the lands to which it was returned — the property in it was undoubtedly vested in the defendant, under the agreements with the mine-owners — it was the defendant's to deal with as it saw fit — the defendant might regard it as of value, and store it for treatment in the future, or might cast it away as refuse. The defendant's property in it could not be lost without its consent; the whole question is, whether, when the defendant returned this ore, won from the earth and earthy in its nature, to the bosom of the earth, the right to regard it as chattel property was lost, and it became part of the land owned by the plaintiff. I think this is the effect of what was done.
>
> When a building is erected on the land of another, or a fixture is made to realty, there is a presumed intention that that which once was a chattel should become part of the realty; and, similarly, when earth is placed upon the land of another by his permission, the presumption would be that it became part of the land. Though the deposits are now found to be of value, when they were placed in the lake they were regarded as mere waste. The case is analogous to that of an owner building a house who asks permission to dump the earth from the excavation for the cellar in a hollow upon his neighbour's ground. He cannot afterwards go upon the ground and remove it.
>
> I am not losing sight of the statement that there had been for many years in the minds of chemists the hope and expectation that tailings might be re-treated in such a way as to yield profit, but by many this was regarded as a thing remote and visionary; and in the meantime there was the ever-present difficulty of getting rid of the vast quantity of material discarded in the operation of the known mining processes. Actions speak louder than the words of interested witnesses who, many years afterwards, say, "I thought," or "It was understood;" and the facts that the assignee of the Nova Scotia company and its creditors did not regard this heap as an asset, that Steindler did not include it in his purchase, and that the only permission sought until 1915, when the deposit was thought to be of value, was the right to dump, all go to shew that until then this was regarded as waste material, to be got rid of as easily as was possible.
>
> I have refrained from using the word "abandonment," because it has a technical meaning. "Abandonment of goods takes place when possession of them is quitted without any intention of transferring them to another:" 12 Co. Rep. 113. Here, if I am right, there was an intention of transferring the title to these tailings to the plaintiff. [At paras. 23-6; emphasis added.]

75 On appeal, the Appellate Division formulated the question before the Court as one of fact:

> That there was no express agreement between the parties as to the reclaiming of the tailings is clear, and the question therefore is, what, in the circumstances of the case, is the proper inference to be drawn as to the intention of the parties?
>
> That the appellant is not entitled to any of the tailings which were discharged into the lake by the Nova Scotia company, is clear. No transfer of them was made by the company, and, if it was the owner of them, it still owns them.
>
> With regard to some things the inference to be drawn would be clear. If they had been lumber or coal or ore of commercial value, the proper inference would be that they remained the property of the person who deposited them on the land of another; while, on the other hand, if they had been earth or débris which was discharged into a hole or depression on the land of another, the contrary inference would be drawn.
>
> In my opinion, the tailings in question, when discharged into the lake, ceased to be the property of the appellant. I refer of course only to the tailings which were so discharged before the 3rd July, 1915, when the arrangement was made that the appellant should have the right to remove them.
>
> The tailings were of no commercial value, and it was problematical whether they would ever have any such value.
>
> It is quite consistent, I think, with the testimony of the appellant's witnesses that it was not in the contemplation of the parties, or either of them, that the tailings which were discharged into the lake should be reclaimed by the appellant, but that the true position was that the appellant was finally getting rid of them, though it was thought that in the future tailings

> might have some commercial value and was contemplated that when that time should arrive persons who had tailings produced in the course of their operations would dispose of them otherwise.
>
> No witness ventured to say that it would be commercially practicable, even if at all practicable, to take the tailings from the lake without pumping out the waters of the lake or otherwise draining it. The lake was of considerable depth, and if, after dumping into it sufficient to cover the bottom of it to the depth of 8 or 10 feet, the tailings would be many feet below the surface of the lake, the difficulty that there would be of removing them is obvious. The tailings went into the lake in the form of sludge, consisting of water and particles of rock and earth, and much of this would probably spread for a considerable distance beyond the point at which it was discharged into the lake.
>
> The arrangement that was proposed in 1917 affords reasonable ground for concluding that it was only by draining the lake that it would be practicable to remove the tailings except those on, above, or very little below the surface of the lake-when I say practicable, I mean commercially practicable. [At paras. 39-46; emphasis added.]
>
> The appeal was dismissed.

76 On further appeal to the Supreme Court of Canada, the trial judgment was again affirmed. Like the Court of Appeal, Mr. Justice Idington for himself placed considerable emphasis on the lack of evidence regarding any value that might be ascribed to what he called the "rubbish heap". He observed:

> I cannot see why, when it dawned on someone interested in the appellant that this *quandum* rubbish heap might be made productive of wealth, that he and others shrank from putting their claim in plain language if designed to make the title of their company clear, unless perhaps it had dawned on respondent at or about the same time and hence it would be useless to set up such retention.
>
> It would have been interesting to have had a little more enlightenment on the progress of scientific discovery which made it manifest that there are possibilities in the rubbish heap, and the date on which that became known to those concerned in this litigation. [At 53-4.]

Anglin J., speaking for the majority, could find nothing in the written evidence, including resolutions of Peterson's directors, that could be said to support the inference of a 're-transfer' of the tailings to Dominion. Anglin J. commented near the end of his reasons:

> If the inference of abandonment and accretion (using these words in a non-technical sense) unanimously drawn by the Judges below was not clearly right, as I incline to think it was, the evidence at all events fall short of what would be necessary to enable us to say that it was wrong. [At 55; emphasis added.]
>
> Middleton J. reached a similar result in *La Rose Mines Ltd. v. Mining Corporation of Canada Ltd.* for reasons summarized at 22 O.W.N. 61 (S.C.).

77 *Mastermet Cobalt Mines Ltd. v. Canadaka Mines Ltd.*(1978) 91 D.L.R. (3d) 283 (Ont. C.A.) is a more modern case to which we were referred. At para. 1 of its reasons, the Court there stated the issue for determination — "whether tailings, consisting of the powdered residue after the refining and processing of ore, which have come from other properties and have been deposited on the surface of the appellant's property, belong to the appellant as owner of the surface rights or to the respondent as owner of the mining rights." At the time, the *Conveyancing and Law of Property Act*, R.S.O. 1970, c. 85, stated that "mining rights" shall be "construed to convey or reserve the ores, mines and minerals on or under the land" and the necessary right of access. The phrase "surface rights" on the other hand was to be read as reserving "the ores, mines and minerals on or under the land" and rights of access. The registered owner of the subject land had "severed" the surface rights from the mining rights in 1936.

78 It was common ground that the respondent company had acquired the mining rights in 1973 and operated a silver refinery near Cobalt, Ontario. Lacourciere J.A. for the Court recounted:

> At the date of trial before Boland, J., without a jury, the tailings had flowed onto the appellant's property along an old stream bed, as a result of being sluiced down by mine operators and by forces of nature. They consisted of a very fine sandlike material and were mostly deposited on the lands between 1905 and 1922, many years before the severance of the surface from the mining rights. The tailings became, in effect, the new surface, with an average depth of five to nine feet. During this period, the tailings were viewed as waste material without economic value, and as a hindrance to the growth of vegetation and to building. At the date of trial, because of technological advances and a dramatic increase in the price of silver, it had become economically feasible to process the tailings for their content of that metal. [At para. 3; emphasis added.]

79 The trial judge had found that the tailings were composed of *particles* of silver and other minerals and reasoned that "*a mineral is always a mineral regardless of its size, economic value or change in character."* She continued:

> The wording in the conveyances is of paramount importance in this case. In the absence of strong evidence of intention to the contrary, I cannot see how a conveyance of the 'mines, minerals and mining rights, in, upon and under the lands' . . . can mean anything other than an exhaustive right to mine all minerals upon or under the lands, including the minerals contained in the tailings. Such a conveyance carries rights on the surface where minerals exist and owners of the surface are not entitled to compensation. [At para. 10; emphasis added.]

80 The Court of Appeal noted that the words "mine" and "minerals" had received different meanings in the various cases dealing with them, depending on the particular statutes or on the wording of conveyancing documents reserving mines or minerals. Most of the cases, it was said, "approached the problem whether a substance is a mineral as a question of fact to be determined by the use, character and value of the substance, in the light of the common understanding of mining engineers, commercial men and landowners at the time of the conveyance." (Citing, *inter alia*, *Seymour Management Ltd. v. Kendrick*[1978] 3 W.W.R. 202 (B.C.S.C.), *per* Munroe J.) Lacourciere J.A. for the Court in *Mastermet* continued:

> To understand the vernacular of mining engineers and other mining people, it is of great practical assistance to turn to the definitions of the noun and the verb "mine" and the word "mining" contained in s. 1, paras. 15 and 16 of the *Mining Act* and its predecessor, and quoted above.
>
> I would give substantial weight to this provincial statute governing the mining industry in determining the meaning of the language of mining engineers and other persons engaged in mining -- the definition of its words -- in the same way that the meaning of the language of other trades and professions is influenced by relevant legislation. This proposition, rooted in common sense, finds confirmation in the evidence of the witness Halstead, a professional engineer.
>
> The definitions in the Act make it abundantly clear that in the mining industry in Ontario a conveyance containing the words in the 1936 transfer of mining rights above quoted confers an exhaustive right to mine all minerals, including the silver contained in the tailings. In my view, the acquisition of mining rights was never intended to be limited to the acquisition of valuable minerals in place, and in sufficient concentration to be extracted at a profit, as contended by a mining engineer called at trial to give evidence on behalf of the appellant. The definition of mining in s. 1, para. 16, to include any method whereby a mineral-bearing substance may be dealt with " . . . for the purpose of obtaining any mineral therefrom, whether it has been previously disturbed or not" (emphasis added), necessarily includes the removal, by any process, of silver from tailings accumulated on the surface. [At paras. 13-15; emphasis added.]

81 Lacourciere J.A. also referred to *Peterson Lake* and *La Rose Mines* and again to *Seymour Management* , in which the issue was the true construction of a reservation clause of "minerals precious or base" in Crown grants. Munroe J. had treated the meaning of those words as a question of fact "to be decided on what they meant 'in the vernacular of the mining world, the commercial world and the landowners at the time they were used in the Crown grants'. He had concluded that it could not have been the intention of the parties to reserve title to minerals in the tailings which were not then regarded as having practical value." (At para. 22.)

82 Lacourciere J.A. found that the foregoing cases supported the proposition that "additional earth or substances containing minerals which *accrete to the land by the forces of nature* become part of the land." (My emphasis.) They were not helpful in the circumstances of *Mastermet* because of the severance of mining from surface rights in the subject lands and the statutory definitions noted earlier. In the result, the Court of Appeal ruled that the appellant's predecessor as owner of the surface rights had *not* acquired "the ownership of the right to mine the mineralized tailings which had accreted on the surface at the time of the severance of surface rights." (At para. 24; my emphasis.) This judgment was affirmed by the Supreme Court of Canada at [1980] 2 S.C.R. 119 for the reasons of the Court of Appeal.

83 The respondents in the case at bar contend that the case law, although not decided under the current statutory regime in British Columbia, is based on common law principles that apply equally to the waste rock and tailings in this case. They referred us to a passage from Mr. Barton's book, *supra*, to the effect that tailings may be regarded as "part of the soil" rather than as chattels, although it is open to a person depositing tailings and the owner of land to agree otherwise. (At 63.) After describing *Peterson Lake* , the author continues:

> The only inference that could be drawn [in *Peterson Lake*] as to the intention of the parties was that the tailings were waste material to be disposed of as easily as possible. In doing so, the Dominion company lost the right to regard the material as a chattel property, and the material became part of the land. It was a different matter when the parties had agreed to regard deposits as chattels in storage pending their reclamation.
>
> It is appropriate to rely on the intention of the parties in a case like *Peterson Lake* . . . and is certainly in accordance with the general law on fixtures, where the purpose of annexation is relevant. It would be less appropriate after a greater lapse of time and between parties other than the original participants. Greater reliance would then have to be placed on the degree of annexation of the tailings to the land.
>
> Where tailings are part of the land, and where mineral rights have been severed, do they belong to the mineral owner or the landowner? Just as with naturally deposited substances, the question must be answered by interpreting the instrument of severance. [At 63; emphasis added.]
>
> Barton then goes on to refer to the same passage from *Seymour Management* as that noted in *Mastermet*:
>
> > The intention of the parties to the Crown grants could not have been to reserve title in the Crown to minerals in tailings which were then regarded as of no practical value, placed on the land by man, and which later may have become practicable to treat at a profit by a new process resulting from technological advances. [At para. 8.]

84 It is not clear to me whether the author has taken the expanded definition of "minerals" in the *MTA* into consideration. Barton acknowledges that the Court in *Mastermet* went in the "opposite direction" from *Peterson Lake* after construing the statutory definitions of "mine" and "mining" using the "vernacular test". In the author's analysis, the two cases were not necessarily inconsistent even though the two severances were similar. (At 65.) Arguably, *Seymour Management* would have been decided the same way as *Mastermet* if a similar statutory definition had been applicable. On the other hand, he continued, it was plain that in *Seymour Management* "artificially deposited tailings were considered an exceptional case and called for express words to make them minerals." Express words were, of course, provided in this province by the amendment of the *MTA* in 1988 when the definition of "minerals" was expanded to include "rock and other materials from mine tailings, dumps, and previously mined deposits of minerals". If nothing else, this amendment suggests a recognition in the mining industry more than 30 years ago that waste materials from mining operations should not to be presumed to have "no practical value".

85 All the foregoing cases, of course, depended on their own facts, including the wording of particular instruments and of particular statutes at particular points in time. The trial court in *Peterson Lake* found there had been an intention to 'transfer title' to the tailings, mainly because they were seen as "mere waste". The tailings had been placed on "the land of another" without the express permission of that other — a feature not present in the case at bar. On appeal, reliance was placed both on the fact that the ore was "earthy in its nature" and had returned to the "bosom of the earth" (see para. 37), and on factual inferences concerning the parties' intentions, gleaned from their correspondence. No comparable evidence was adduced in this instance. (See para. 39.)

In the Supreme Court of Canada, the lower courts were said to have drawn inferences of "abandonment and accretion (used in the non-technical sense.)" The paucity of evidence on the "possibility" that the "rubbish" might become valuable was lamented. In *Mastermet*, the particular wording of the statute obviously governed, although the Court characterized the question before it as a question of fact to be determined "by the use, character and value of the substance, in the light of the common understanding of mining engineers, commercial men and landowners at the time of the conveyance" in question. Even though the statute did not expressly include mining waste rock in the definition of "minerals" or "mining rights", the Court endorsed the lower court's reasoning that "a mineral is always a mineral regardless of its size, economic value or change in character."

86 In the end, no one rule or principle that is clearly applicable to the case at bar emerges from these cases, whether one approaches the issue in terms of "abandonment", "relinquishment" or accretion, or seeks to draw a factual inference concerning an intention on the part of the parties to transfer ownership. The fact that in this province, the statutory term "mineral" now includes waste rock and tailings is surely part of the statutory context that would seem to point to the *Mastermet* reasoning as opposed to that in *Peterson Lake* and *La Rose*. As far as the law relating to fixtures is concerned, I do not consider that it would be appropriate to adopt that law in the case at bar, given the lack of evidence concerning the physical nature of the waste rock and tailings, including any tendency to become "part of the earth" or to accrete to the earth.

"Relinquishment"

87 In any event, the Commissioner used the word "relinquish" in the crucial part of his reasoning in the case at bar, and it is that finding that we must address. As we have seen, it may be considered for our purposes that "relinquish" in this context is synonymous with "abandon". As we have also seen, the common law requires a "giving up, a total desertion, and absolute relinquishment of private goods by the former owner" for abandonment to be shown. (See *Simpson v. Gowers*, *supra*, at 711.) This requires not only a "casting away" but a specific intention on the part of the owner to "completely relinquish all rights of ownership." (See Saw, *supra*, quoted above at para. 68.) As stated more succinctly by Bridge et al., *supra*, "an abandonment sufficient to divest the owner of both possession and ownership requires both an intention to abandon and 'some physical act of relinquishment'." (At §2-059, citing *Robot Arenas Ltd. v. Waterfield*[2010] EWHC 115Eng. Q.B. (Q.B.) at para. 14.) Further, the law distinguishes between the abandonment of *possession* and the abandonment of *ownership*. The two should not be confused.

88 In my respectful opinion, the CGC did not consider these principles. Instead he inferred from the fact that the Province and Prime entered into the Surface Lease that Prime had "relinquished" its ownership of the waste rock and tailings. It is clear that the Lease itself exhibited no such intention; and I cannot agree that the placing of the waste material in Albino Lake, over which Prime had exclusive possession, was proof of such an intention. As Professor Saw emphasizes, *supra*, proof of such an "intention" is a question of fact and will not normally be presumed. If it is not possible to prove it in the subjective sense, it may be established "objectively, through the process of inference, from the overt acts and conduct of the proprietor."

89 In support of his finding of relinquishment, the Commissioner relied on the fact the waste materials had been "deemed to have no economic value." Indeed the materials were referred to as "waste" in reports prepared by Skeena's consultants, in governmental certificates and permits and in Skeena's annual reclamation reports. It is reasonable to infer, however, that the operators of the Mine over the years were aware that waste rock and mine tailings might become more valuable as technology and ore values changed in future years. In this sense, references to "waste rock" should not necessarily be interpreted as meaning "garbage" but simply as referring to materials not worth processing as ore at a given point in time. Obviously, the expansion of the term "mineral" in the definition in the *MTA* confirms that market changes and new technologies may turn "waste" into worthwhile raw material.

90 The waste rock here was deposited at the bottom of Albino Lake because of the Province's environmental requirements — otherwise, it might have been placed in a pile on the Mine property itself or on the Albino Lake property over which Skeena had, and still has, the Surface Lease. (Again, this fact distinguishes this case from *Peterson Lake* , where waste rock was simply left by Dominion on the property of a neighbour without consultation.) If the materials had been piled on the Albino Lake land, there would be no argument that Skeena had abandoned it — whether as a result of entering the Lease or otherwise. To the contrary, the Lease allowed the operator to access the material from time to time. Nor is the fact the waste rock and tailings had

to be deposited underwater something from which an unequivocal intention to abandon ownership could be inferred. Skeena had no choice but to comply, and it was still possible to drain the Lake and access the materials when necessary.

91 Applying the "palpable and overriding" standard of review to the Commissioner's decision, can it be said he was clearly wrong in finding that Skeena had "relinquished ownership" to the waste rock and tailings *as a necessary consequence* of the Province's grant of "the right to dispose of waste rock and tailings in the *Land Act* Lease"? With respect, I am of the view that the Commissioner was clearly and palpably wrong in this reasoning and in his conclusion. Aside from the statement of purpose of the Lease — an important factor to be sure but one that in my view is not unequivocal — there is simply nothing in the text dealing with waste rock and tailings, much less amounting to evidence of an intention on Skeena's part to abandon ownership of those materials (as opposed to an intention to comply with the Minister's environmental requirements). Even if there had been such evidence, the CGC made a number of legal errors in his analysis which undermine his conclusion. Nor is there evidence of an intention on the part of the Province, which has not participated in this litigation, to acquire or accept ownership of the waste rock and tailings. I can think of no reason why it would do so and counsel suggested none.

92 Looking forward, Skeena Resources and/or its predecessors will continue to have various statutory obligations with respect to the waste materials, whether or not the Surface Lease is renewed. Presumably, the Province would ensure Skeena continues to have access to the Albino Lake area to carry out its testing and monitoring; there is certainly no suggestion the respondents regard themselves as bound to assume such obligations. In this regard, I note the point made by the Central Government of the Tahltan First Nation, whose traditional territory includes the Mine and Albino Lake, to the effect that granting to "third parties" (here, the respondents) rights in respect of "actively-managed, toxic mine wastes" is likely to introduce "additional uncertainty and volatility into the mine closure and remediation process, and endorses an interpretation of the *MTA* that would undercut prior consultations on a mine project and regard for Indigenous interests." The Mining Association of British Columbia made a similar point in its argument.

93 At the end of the day, there simply was no overt act of abandonment or evidence of an intention on Skeena's part to abandon the waste materials and tailings. In all the circumstances, I am driven to the conclusion that on the record before us, Skeena did not "relinquish" the materials and that the CGC was clearly and palpably wrong to hold otherwise. It follows that it cannot be said the Province was 'holding' the waste materials from the time of the granting of the Surface Lease or from the time the waste material was covered by water for the protection of the environment. It also follows that the Province cannot be said to have granted ownership rights to Mr. Mill in the waste material upon his receipt of the mineral claim over the Albino Lake area in 2017.

Disposition

94 I would allow the appeal and set aside the Commissioner's decision. Being mindful of the expertise of the Commissioner (as to which, see *Dupras v. Mason et al.*(1994) 120 D.L.R. (4th) 127 (B.C.C.A.) at paras. 16-18), I would refer the matter back to the CGC for rehearing and reconsideration in light of our reasons.

95 We are indebted to all counsel for their very able arguments.

***Harris J.A.*:**

I agree

***Skolrood J.A.*:**

I agree

Appeal allowed.

ScheduleA

Excerpts from the Land Act, R.S.B.C. 1996, c. 245

50 (1) A disposition of Crown land under this or another Act

(a) excepts and reserves the following interests, rights, privileges and titles:

. . .

(ii) a right in the government, or any person acting for it or under its authority, to enter any part of the land, and to raise and get out of it any geothermal resources, fossils, minerals, whether precious or base, as defined in section 1 of the *Mineral Tenure Act*, coal, petroleum and any gas or gases, that may be found in, on or under the land, and to use and enjoy any and every part of the land, and its easements and privileges, for the purpose of the raising and getting, and every other purpose connected with them, paying reasonable compensation for the raising, getting and use;

. . .

(b) conveys no right, title or interest to

. . .

(ii) minerals and placer minerals as defined in the *Mineral Tenure Act*,

. . .

that may be found in or under the land,

Excerpts from the Mineral Tenure Act, R.S.B.C. 1996, c. 292

Disputes

13 (1) If a dispute arises between

(a) recorded holders on the same mineral lands, or

(b) a recorded holder of a mineral title and a person having a right under another enactment to a mineral substance in the lands to which the mineral title relates,

respecting

(c) whether a substance is a mineral, a mineral substance or a placer mineral, or

(d) the exercise of rights conferred under this Act or any of the former Acts,

the issue must, on application to the chief gold commissioner by a party to the dispute and subject to subsection (2), be decided by the chief gold commissioner, and the chief gold commissioner may make any order the chief gold commissioner considers appropriate.

. . .

(7) A party to a dispute who is aggrieved by the decision of the chief gold commissioner under subsection (1) may, within 30 days after service of the notice under subsection (3), appeal the decision to a judge of the Supreme Court.

(8) An appeal lies from a decision of the court under subsection (7) to the Court of Appeal with leave of a Justice of the Court of Appeal.

. . .

Surface rights

14 (1) Subject to this Act, a recorded holder may use, enter and occupy the surface of a claim or lease for the exploration and development or production of minerals or placer minerals, including the treatment of ore and concentrates, and all operations related to the exploration and development or production of minerals or placer minerals and the business of mining.

(2) Despite subsection (1), no mining activity may be done by the recorded holder until the recorded holder receives the permit, if any, required under section 10 of the *Mines Act*.

(3) Subject to the terms and conditions set by the issuing authority under the *Forest Act*, a recorded holder of a mineral title that is not in production must on request be issued either a free use permit or an occupant licence to cut under that Act at the option of the government.

(4) The recorded holder of a mineral title that is in production or being prepared for production must on request be issued an occupant licence to cut under the *Forest Act*, subject to terms and conditions set by the issuing authority.

(5) Unless the location is one of the following, a land use designation or objective does not preclude application by a recorded holder for any form of permission, or approval of that permission, required in relation to mining activity by the recorded holder:

(a) an area in which mining is prohibited under the *Environment and Land Use Act*;

(b) a park under the *Park Act* or a regional park under the *Local Government Act*;

(c) a park or ecological reserve under the *Protected Areas of British Columbia Act*;

(d) an ecological reserve under the *Ecological Reserve Act*;

(e) a protected heritage property.

. . .

(d.1) an area of Crown land if

(i) the area is designated under section 93.1 of the *Land Act*, for a purpose under that section, and

(ii) the order under that section making the designation, or an amendment to the order, precludes the application by the recorded holder;

Priority of rights on Crown land

16 (3) If a disposition is made of surface rights to Crown land, whether surveyed or unsurveyed, and at the time of disposition there is a valid mineral title over the Crown land, the disposition of surface rights does not diminish the rights of the recorded holder except to the extent otherwise determined

(a) by order of the chief gold commissioner under section 13,

(b) by order of the minister under section 17,

(c) by order of the Surface Rights Board in a settlement under section 19 (4), or

(d) by a quit claim agreement between a recorded holder and a subsequent holder of the surface rights.

. . .

Entitlement of minerals and nature of interest

28 (1) Subject to this Act, the recorded holder of a claim is entitled to those minerals or placer minerals, as the case may be, that are held by the government and that are situated vertically downward from and inside the boundaries of the claim.

(2) The interest of a recorded holder of a claim is a chattel interest.

. . .

Issue of a mining lease

42 (1) A recorded holder of a mineral claim who wishes to replace the mineral claim with a lease must do all of the following:

(a) comply with section 6.32 and pay the prescribed fee;

(b) if required to do so by the chief gold commissioner, have the mineral claim over which the mining lease will be issued surveyed by a British Columbia land surveyor and have the survey approved by the Surveyor General;

(c) post a notice in the prescribed form in the office of the chief gold commissioner stating that the recorded holder intends to apply for a mining lease;

(d) publish promptly in one issue of the Gazette, and once each week for 4 consecutive weeks in a newspaper circulating in the area in which the mineral claim is situated, a copy of the notice referred to in paragraph (c).

. . .

(4) If the chief gold commissioner is satisfied that the recorded holder has met all of the requirements of subsection (1), the chief gold commissioner must issue a mining lease for an initial term not longer than 30 years on conditions the chief gold commissioner considers necessary.

. . .

Effect of leases

48 (2) A lease is an interest in land and conveys to the lessee the minerals or placer minerals, as the case may be, within and under the leasehold, together with the same rights that the lessee held as the recorded holder of the claim or group of claims, but is subject to a valid charge registered against the record of the claim.

Excerpts from the Mines Act, R.S.B.C. 1996, c. 293

Permits

10 (2.01) Without limiting subsection (1.1) or (2), terms and conditions imposed under those subsections may include terms and conditions respecting any or all of the following:

. . .

(d) environmental protection and reclamation;

(e) public health and safety.

. . .

Health, safety and reclamation code committee

34 (1) The minister must establish a health, safety and reclamation code committee consisting of the members the minister appoints.

. . .

(3) The committee must prepare a code dealing with all aspects of health, safety and reclamation in the operation of a mine and may amend the code from time to time as required.

. . .

(6) The code and any amendments to it come into force on approval of the Lieutenant Governor in Council.

(7) If there is a conflict between a provision of the code and a provision of the regulations, the regulations apply.

Excerpts from the Health, Safety and Reclamation Code for Mines in British Columbia

Permitted Sites

Updated Plans

10.4.1 (1) After commencement of operations, mine plans, including programs for reclamation and closure, shall be updated, at a minimum, every 5 years.

(2) Reclamation plans shall outline progressive reclamation activities for the 5 years following the date on which the plans are updated in accordance with subsection (1).

(3) After commencement of operations, the water balance and water management plans under section 10.1.12 of this code shall be reconciled annually and updated as required.

Governance

10.4.2 (1) The manager of a mine with one or more tailings storage facilities shall

(a) develop and maintain a Tailings Management System that considers the HSRC Guidance Document and includes regular system audits,

(b) designate a TSF qualified person for safe management of all Tailings Storage Facilities,

(c) establish an Independent Tailings Review Board, unless exempted by the chief inspector,

(d) review annually the tailings storage facility risk assessment to ensure that the quantifiable performance objectives and operating controls are current and manage the facility risks,

(e) maintain tailings storage facility emergency preparedness and response plans integrated into the Mine Emergency Response Plan required under section 3.7.1 of this code, and

(f) ensure document records for key information are maintained and readily available for tailings storage facilities.

(2) The composition of an Independent Tailings Review Board established under subsection (1) (c) shall be commensurate with the complexity of the tailings storage facility in consideration of the HSRC Guidance Document.

(3) The manager shall submit the terms of reference for the Independent Tailings Review Board including the qualifications of the board members to the chief inspector for approval.

(4) The terms of reference for the Independent Tailings Review Board shall be developed or updated as required in consideration of the review under subsection (1) (d).

Register of Tailings Storage Facilities and Dams

10.4.3 (1) The manager of a mine with one or more tailings storage facilities shall maintain a Register of Tailings Storage Facilities and Dams.

(2) The register shall be reviewed and updated at least annually.

Annual Reporting

10.4.4 The owner, agent or manager shall submit one or more annual reports in a summary form specified by the chief inspector or by the conditions of the permit by March 31 of the following year on the following:

(a) reclamation and environmental monitoring work performed under section 10.1.3 (e) of this code;

(b) tailings storage facility and dam safety inspections performed under section 10.5.3 of this code;

(c) a report of the activities of the Independent Tailings Review Board established under section 10.4.2 (1) (c) of this code that describes the following:

(i) a summary of the reviews conducted that year, including the number of meetings and attendees;

(ii) whether the work reviewed that year meets the Board's expectations of reasonably good practice;

(iii) any conditions that compromise tailings storage facility integrity or occurrences of non-compliance with recommendations from the engineer of record;

(iv) signed acknowledgement by the members of the Board, confirming that the report is a true and accurate representation of their reviews;

(d) a summary of tailings storage facility and dam safety recommendations including a scheduled completion date;

(e) performance of high-risk dumps under section 10.5.5 of this code;

(f) updates to the tailings storage facilities register as required;

(g) other information as directed by the chief inspector.

Other Reporting

10.4.5 The owner, agent or manager shall submit the following periodic reports with the annual reporting in a form specified by the chief inspector or by the conditions of the permit by March 31 of the year following their completion:

(a) mine plan, reclamation plan and closure plan updates under section 10.4.1 of this code;

(b) dam safety review reports performed under section 10.5.4 of this code;

(c) "as built" reports for tailings storage facilities and dams under section 10.5.1 of this code.

Operations

Construction of Tailings and Water Management Facilities

10.5.1 (1) The manager shall submit issued for construction drawings, specifications and quality assurance/quality control plans as well as a summary construction schedule to the chief inspector prior to commencing construction of a tailings storage or water management facility.

(2) The manager shall ensure that the initial operation of a tailings storage or water storage facility does not commence until an "as built" report under subsection (3) certifying that the facility was designed in accordance with this code and constructed according to design has been submitted to the chief inspector and a permit has been received.

(3) The manager shall prepare "as built" reports for each stage of construction of a tailings storage or water storage facility that include, as a minimum, the following:

(a) geotechnical foundation conditions;

(b) geometry;

(c) quality assurance/quality control data prepared by a Professional Engineer.

(4) The manager shall ensure that the engineer of record has certified that the tailings storage facility or dam has been constructed in a manner consistent with the design and specifications and that the structures are suitable for the intended use.

Operations, Maintenance and Surveillance (OMS) Manual

10.5.2 (1) An Operations, Maintenance and Surveillance Manual shall be prepared by one or more qualified person and submitted to the chief inspector prior to operation of the Tailings Storage Facility or dam.

(2) The Operations, Maintenance and Surveillance Manual shall be reviewed by the engineer of record and approved by the manager prior to implementation.

(3) All employees involved in the operation of a tailings storage facility or dam shall be trained and qualified, based on the OMS requirements, prior to commencing work at the facility.

(4) The Operations, Maintenance and Surveillance Manual shall be reviewed annually and revised as required during operations of a tailings storage facility or dam.

Annual Dam Safety Inspection

10.5.3 Tailings storage and water management facilities and associated dams shall be inspected annually and a report shall be prepared by the engineer of record in consideration of the HSRC Guidance Document

Dam Safety Reviews

10.5.4 A Dam Safety Review Report on the tailings storage, water management facilities and associated dams shall be prepared by an independent Professional Engineer in consideration of the HSRC Guidance Document at least every 5 years or as directed by the chief inspector.

Major Dumps

10.5.5 Major dumps shall be operated and monitored in accordance with the Interim Guidelines of the British Columbia Mine Waste Rock Pile Research Committee.

Spontaneous combustible material

10.5.6 Material with a high probability of spontaneous combustion shall be placed in a separate dump.

Materials Inventory

10.5.7 (1) Where required for the control of metal leaching and acid rock drainage, the owner, agent or manager shall maintain an inventory of identified material that includes

(a) composition, mass, volume, surface area, and storage locations,

(b) history and timing of excavation,

(c) monitoring data, and

(d) any other information required by the chief inspector.

(2) Upon closure, the manager shall submit the material inventory to the chief inspector.

Excavations Near Property Boundaries

10.5.8 The excavation of soil material such as clay, silt, earth, sand or gravel, in a surface mine shall not be carried on within a setback distance of at least 5 metres horizontal from the vertical plane of the property boundary, and

(a) there shall be no excavation of soil material below a surface sloping downwards into the property from the inside edge of the setback no steeper than 1.5 horizontal to 1 vertical, and

(b) material that sloughs from within this distance shall not be removed without the written approval of the inspector.

Excavation before April 1, 1997

10.5.9 The chief inspector may direct that any excavation that exists in soil materials on or before April 1, 1997 will not be considered to be out of compliance for not meeting setback requirements providing that all further excavation is conducted in a manner consistent with the requirements of section 10.5.8 of this code.

Alternative setbacks and slopes

10.5.10 Notwithstanding sections 10.5.8 and 10.5.9 of this code, the chief permitting officer may approve a mine plan, prepared by a Professional Engineer, with alternative setbacks and slopes that ensure that the property boundary will be adequately protected.

Rock excavation

10.5.11 Rock shall not be excavated within a distance of 5 m from the property boundary.

Waiver by adjoining property owners

10.5.12 The owners of adjoining properties may, by agreement in writing, waive the provisions of sections 10.5.8, 10.5.9 and 10.5.11 of this code.

Mine Closure

Notice Required

10.6.1 The owner, agent, or manager shall provide written notice of not less than 7 days to an inspector of intention to stop work in, on, or about a mine.

Cessation of operations

10.6.2 (1) If a mine ceases operation, the owner, agent, or manager shall

(a) continue to carry out the conditions of the permit, and

(b) carry out a program of site monitoring and maintenance.

(2) If a mine ceases operation for a period longer than one year, the owner, agent, or manager shall

(a) apply for an amendment to the permit setting out a revised program for approval by an inspector,

(b) identify the hazards and provide detailed engineered plans and drawings respecting the hazards to local emergency agencies, and update the drawings as required, and

(c) if practicable, make the plans and drawings available on site in a conspicuous location.

Filing of Plans

10.6.3 (1) On the closure of a mine, the owner, agent or manager shall, within 90 days, file with the chief inspector accurate drawings, on a scale consistent with good engineering practice, showing

(a) on a plan view

(i) the surface and underground workings of the mine up to the time of closure and the boundaries of the mineral claims, licenses, or leases in which the workings are situated, and

(ii) identification of underground workings that come to within 25 meters of the surface,

(b) a general long section and several cross section views of the surface and underground mine workings, and

(c) any other plans that may be requested by the chief inspector.

(2) The filed plans shall be preserved as a permanent record in the office of the chief inspector.

Securing of Openings

10.6.4 When a mine is closed for an indefinite period, or otherwise left unattended for any length of time, the owner, agent or manager shall take all practicable measures to prevent inadvertent access to mine entrances, pits and openings that are dangerous by reason of their depth or otherwise, by unauthorized persons and ensure that the mine workings and fixtures remain secure.

Major Dumps

10.6.5 The long-term stability of exposed slopes of any major dump shall meet the criteria provided in the Interim Guidelines of the British Columbia Mine Waste Rock Pile Research Committee at the time of permitting or as amended by the chief inspector.

Impoundments

10.6.6 (1) The long-term stability of exposed slopes of impoundments shall meet the criteria provided in the design at the time of permitting or as determined by the engineer of record.

(2) Impoundments not operated for a period of 12 or more months may be declared as closed by the chief inspector.

Closure of a tailings storage facility or dam

10.6.7 (1) Prior to closure or upon declared closure of a tailings storage facility or dam, the manager shall submit a final detailed closure plan to achieve the approved end land and water use objectives.

(2) The closure plan shall include a detailed construction cost estimate, schedule and monitoring plan for implementation.

(3) The closure plan shall be prepared by one or more qualified professionals in consideration of the HSRC Guidance Document.

Tailings Storage Facility Closure OMS Manual

10.6.8 (1) The manager shall submit a Tailings Storage Facility Operations, Maintenance and Surveillance Manual for closure and review and update the plans regularly to reflect significant ongoing changes during closure.

(2) The Tailings Storage Facility Operations, Maintenance and Surveillance Manual shall include requirements for monitoring and shall define appropriate resources and staffing to carry out the works and monitoring associated with closure.

On-going Management Requirements

10.6.9 Where a mine requires on-going mitigation, monitoring or maintenance, the owner, agent, or manager shall submit a closure management manual that

(a) describes and documents key aspects of the ongoing mitigation, monitoring and maintenance requirements, and

(b) tracks important changes to components of the system that effect long-term mitigation, monitoring and maintenance requirements.

Permanent Spillways

10.6.10 Permanent spillways shall be designed by a Professional Engineer in consideration of the HSRC Guidance Document and installed prior to the completion of closure of the tailings storage facility or dam.

Permit amendment or variance after closure

10.6.11 The manager of a tailings storage facility or dam that has completed closure but not achieved the release of permit obligations may apply for permit amendments or variances including but not limited to reduced frequency of monitoring, dam safety inspections and dam safety reviews.

Landforms

10.6.12 The manager of a tailings storage facility or dam that can be considered a landform may apply to the chief permitting officer for the release of permit obligations under the *Mines Act*.

Reactivation of impoundment

10.6.13 The owner, agent or manager may make an application for a permit to reactivate a closed or abandoned impoundment.

Decommissioning of Water Structures

10.6.14 A water reservoir or pond which is closed or declared inoperative by the chief inspector shall be breached or otherwise disposed of in accordance with the license under the *Water Sustainability Act* or permit under the *Environmental Management Act*.

Security

10.6.15 On the closure of a mine, and on the chief inspector being satisfied that some or all the conditions of the permit have been complied with, the person who deposited a security under section 10 (4) or 10 (5) of the *Mines Act* shall be entitled to refund of some or all of the security and any accumulated interest, less any amount paid out under section 10 (8) of the *Mines Act*.

Application for security release

10.6.16 An application for security release or a partial security release, that details the reclamation activities that have been completed under the requirements of the act, the code, and approved reclamation plan, shall be submitted to the chief inspector.

Reclamation Standards

Reclamation Defined

10.7.1 It is the duty of every owner, agent, and manager to institute and, during the life of the mine, to carry out a program of environmental protection and reclamation, in accordance with the standards described in section 10.7.4 to 10.7.21 of this code.

Pre-legislation Disturbances

10.7.2 Where environmental disturbance occurred at a site prior to the enactment of reclamation legislation in 1969, and has remained inactive since this time, the portion of environmental disturbance, which occurred before the enactment of reclamation legislation in 1969, is exempt from the re-vegetation provisions.

Exclusions

10.7.3 A reclamation standard prescribed under section 10.7.4 to 10.7.21 of this code does not apply where

(a) a mine is specifically excluded by a condition of its permit from complying with a particular standard, or

(b) a disturbance created by a mining activity has been reclaimed, inspected, and found to be satisfactory to an inspector.

Land Use

10.7.4 The land surface shall be reclaimed to an end land use approved by the chief permitting officer that considers previous and potential uses.

Capability

10.7.5 Excluding lands that are not to be reclaimed, the average land capability to be achieved on the remaining lands shall not be less than the average that existed prior to mining, unless the land capability is not consistent with the approved end land use or compromises long-term physical and/or geochemical stability.

Long Term Stability

10.7.6 Land, watercourses and access roads shall be left in a manner that ensures long-term physical and geochemical stability.

Re-vegetation

10.7.7 On all lands to be re-vegetated, land shall be re-vegetated to a self-sustaining state using appropriate plant species.

Growth Medium

10.7.8 On all lands to be re-vegetated, the growth medium shall satisfy land use, capability, and water quality objectives. All surficial soil materials removed for mining purposes shall be saved for use in reclamation programs unless these objectives can be otherwise achieved.

Landforms

10.7.9 Where practicable, land and watercourses shall be reclaimed in a manner that is consistent with the adjacent landforms.

Structures and Equipment

10.7.10 Prior to abandonment, and unless exempted by the chief inspector,

(a) all machinery, equipment and building superstructures shall be removed,

(b) concrete foundations shall be covered and re-vegetated, and

(c) all scrap material shall be disposed of in a manner acceptable to an inspector.

Dumps

10.7.11 Dumps shall be reclaimed to ensure long-term stability, and long-term erosion control.

Watercourses

10.7.12 Watercourses shall be reclaimed to a condition that ensures

(a) drainage is restored either to original watercourses or to new watercourses that will sustain themselves without maintenance, and

(b) the level of productive capacity shall not be less than existed prior to mining, unless the owner, agent or manager can provide evidence which demonstrates, to the satisfaction of the chief inspector, the impracticality of doing so.

Open Pits

10.7.13 (1) Pit walls constructed in overburden shall be reclaimed in the same manner as dumps unless an inspector is satisfied that to do so would be unsafe or conflict with other proposed land uses.

(2) Pit walls including benches constructed in rock, or steeply sloping footwalls, are not required to be re-vegetated.

(3) Where the pit floor is free from water, and safely accessible, vegetation shall be established.

(4) Where the pit floor will impound water and it is not part of a permanent water treatment system, provision must be made to create a body of water where use and productivity objectives are achieved.

Blocking Access Roads

10.7.14 All access roads to surface areas of the mine that may be dangerous shall be effectively blocked to prevent inadvertent vehicular access.

Securing openings

10.7.15 (1) All shafts, raises, stope openings, adits, or drifts opening to the surface shall be either capped with a stopping of reinforced concrete or filled with material so that subsidence of the material will not pose a future hazard.

(2) In the case of shafts or raises, the stopping shall be secured to solid rock or to a concrete collar secured to solid rock and capable of supporting a uniformly distributed load of 12 kPa or a concentrated load of 24 kN, whichever is greater.

(3) Where there is evidence or a potential for use by wildlife, mine openings may be fitted with a barrier that allows wildlife passage but prevents human entry.

Drains

10.7.16 When mine openings are permanently closed and where it may be possible for mine water to build dangerous pressures and cause a blow-out of the fill or concrete with sudden and dangerous force, a permanent and effective drain shall be installed.

Metal Uptake

10.7.17 When required by the chief inspector, vegetation shall be monitored for metal uptake.

Ecological Risk Assessment

10.7.18 (1) When required by the chief inspector, the owner, agent or manager shall commission an ecological risk assessment.

(2) Where there is a significant ecological risk, reclamation procedures shall ensure that levels are safe for plant and animal life and, where this cannot be achieved, other measures shall be taken to protect plant and animal life.

Disposal of Chemicals and Reagents

10.7.19 Chemicals or reagents, which cannot be returned to the manufacturer, shall be disposed of in compliance with municipal, regional, provincial and federal statutes.

Water Quality

10.7.20 If water quality from any component of the mine results in exceedance of applicable provincial water quality standards in the receiving environment, when required by the chief inspector, remediation strategies shall be implemented for as long as is necessary to mitigate the problem.

Monitoring

10.7.21 The owner, agent, or manager shall undertake monitoring programs, as required by the chief inspector, to demonstrate that reclamation and environmental protection objectives including land use, productivity, water quality and stability of structures are being achieved.

Release of Obligations

10.7.22 If all conditions of the Act, code and permit have been fulfilled to the satisfaction of the chief inspector and there are no on-going inspection, monitoring, mitigation or maintenance requirements, the owner, agent or manager will be released from all further obligations under the *Mines Act*.

End of Document

2021 SCC 25, 2021 CSC 25
Supreme Court of Canada

Sherman Estate v. Donovan

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

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

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

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

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

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Khalid Janmohamed, for Interveners, HIV & AIDS Legal Clinic Ontario, the HIV Legal Network and the Mental Health Legal Committee

Subject: Civil Practice and Procedure; Criminal; Estates and Trusts

APPEAL by estate trustees from judgment reported at *Donovan v. Sherman Estate* (2019), 2019 ONCA 376, 2019 CarswellOnt 6867, 47 E.T.R. (4th) 1, 56 C.P.C. (8th) 82 (Ont. C.A.), allowing appeal from judgment imposing sealing orders.

POURVOI formé par les fiduciaires d'une succession à l'encontre d'un jugement publié à *Donovan v. Sherman Estate* (2019), 2019 ONCA 376, 2019 CarswellOnt 6867, 47 E.T.R. (4th) 1, 56 C.P.C. (8th) 82 (Ont. C.A.), ayant accueilli l'appel interjeté à l'encontre d'un jugement imposant une ordonnance de mise sous scellés.

Kasirer J. **(Wagner C.J.C. and Moldaver, Karakatsanis, Brown, Rowe and Martin JJ. concurring):**

I. Overview

1 This Court has been resolute in recognizing that the open court principle is protected by the constitutionally-entrenched right of freedom of expression and, as such, it represents a central feature of a liberal democracy. As a general rule, the public can attend hearings and consult court files and the press — the eyes and ears of the public — is left free to inquire and comment on the workings of the courts, all of which helps make the justice system fair and accountable.

2 Accordingly, there is a strong presumption in favour of open courts. It is understood that this allows for public scrutiny which can be the source of inconvenience and even embarrassment to those who feel that their engagement in the justice system brings intrusion into their private lives. But this discomfort is not, as a general matter, enough to overturn the strong presumption that the public can attend hearings and that court files can be consulted and reported upon by the free press.

3 Notwithstanding this presumption, exceptional circumstances do arise where competing interests justify a restriction on the open court principle. Where a discretionary court order limiting constitutionally-protected openness is sought — for example, a sealing order, a publication ban, an order excluding the public from a hearing, or a redaction order — the applicant must demonstrate, as a threshold requirement, that openness presents a serious risk to a competing interest of public importance. That this requirement is considered a high bar serves to maintain the strong presumption of open courts. Moreover, the protection of open courts does not stop there. The applicant must still show that the order is necessary to prevent the risk and that, as a matter of proportionality, the benefits of that order restricting openness outweigh its negative effects.

4 This appeal turns on whether concerns advanced by persons seeking an exception to the ordinarily open court file in probate proceedings — the concerns for privacy of the affected individuals and their physical safety — amount to important public interests that are at such serious risk that the files should be sealed. The parties to this appeal agree that physical safety is an important public interest that could justify a sealing order but disagree as to whether that interest would be at serious risk, in the circumstances of this case, should the files be unsealed. They further disagree whether privacy is in itself an important interest that could justify a sealing order. The appellants say that privacy is a public interest of sufficient import that can justify limits on openness, especially in light of the threats individuals face as technology facilitates widespread dissemination of personally sensitive information. They argue that the Court of Appeal was mistaken to say that personal concerns for privacy, without more, lack the public interest component that is properly the subject-matter of a sealing order.

5 This Court has, in different settings, consistently championed privacy as a fundamental consideration in a free society. Pointing to cases decided in other contexts, the appellants contend that privacy should be recognized here as a public interest that, on the facts of this case, substantiates their plea for orders sealing the probate files. The respondents resist, recalling that privacy has generally been seen as a poor justification for an exception to openness. After all, they say, virtually every court proceeding entails some disquiet for the lives of those concerned and these intrusions on privacy must be tolerated because open courts are essential to a healthy democracy.

6 This appeal offers, then, an occasion to decide whether privacy can amount to a public interest in the open court jurisprudence and, if so, whether openness puts privacy at serious risk here so as to justify the kind of orders sought by the appellants.

7 For the reasons that follow, I propose to recognize an aspect of privacy as an important public interest for the purposes of the relevant test from *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522. Proceedings in open court can lead to the dissemination of highly sensitive personal information that would result not just in discomfort or embarrassment, but in an affront to the affected person's dignity. Where this narrower dimension of privacy, rooted in what I see as the public interest in protecting human dignity, is shown to be at serious risk, an exception to the open court principle may be justified.

8 In this case, and with this interest in mind, it cannot be said that the risk to privacy is sufficiently serious to overcome the strong presumption of openness. The same is true of the risk to physical safety here. The Court of Appeal was right in the circumstances to set aside the sealing orders and I would therefore dismiss the appeal.

II. Background

9 Prominent in business and philanthropic circles, Bernard Sherman and Honey Sherman were found dead in their Toronto home in December of 2017. Their deaths had no apparent explanation and generated intense public interest and press scrutiny. In January of the following year, the Toronto Police Service announced that the deaths were being investigated as homicides. As the present matter came before the courts, the identity and motive of those responsible remained unknown.

10 The couple's estates and estate trustees (collectively the "Trustees") [1] sought to stem the intense press scrutiny prompted by the events. The Trustees hoped to see to the orderly transfer of the couple's property, at arm's length from what they saw as the public's morbid interest in the unexplained deaths and the curiosity around apparently great sums of money involved.

11 When the time came to obtain certificates of appointment of estate trustee from the Superior Court of Justice, the Trustees sought a sealing order so that the estate trustees and beneficiaries ("affected individuals") might be spared any further intrusions into their privacy and be protected from what was alleged to be a risk to their safety. The Trustees argued that if the information in the court files was revealed to the public, the safety of the affected individuals would be at risk and their privacy compromised as long as the deaths were unexplained and those responsible for the tragedy remained at large. In support of their request, they argued that there was a real and substantial risk that the affected individuals would suffer serious harm from the public exposure of the materials in the circumstances.

12 Initially granted, the sealing orders were challenged by Kevin Donovan, a journalist who had written a series of articles on the couple's deaths, and Toronto Star Newspapers Ltd., for which he wrote (collectively the "Toronto Star"). [2] The Toronto Star said the orders violated its constitutional rights of freedom of expression and freedom of the press, as well as the attending principle that the workings of the courts should be open to the public as a means of guaranteeing the fair and transparent administration of justice.

III. Proceedings Below

A. Ontario Superior Court of Justice, 2018 ONSC 4706, 41 E.T.R. (4th) 126 (Dunphy J.)

13 In addressing whether the circumstances warranted interference with the open court principle, the application judge relied on this Court's judgment in *Sierra Club* . He noted that a confidentiality order should only be granted when: "(1) such an order is necessary ... to prevent a serious risk to an important interest because reasonable alternative measures will not prevent the risk; and (2) the salutary effects of the confidentiality order outweigh its deleterious effects, including the effects on the right to free expression and the public interest in open and accessible court proceedings" (para. 13(d)).

14 The application judge considered whether the Trustees' interests would be served by granting the sealing orders. In his view, the Trustees had correctly identified two legitimate interests in support of making an exception to the open court principle: "protecting the privacy and dignity of victims of crime and their loved ones" and "a reasonable apprehension of risk on behalf of those known to have an interest in receiving or administering the assets of the deceased" (paras. 22-25). With respect to the first interest, the application judge found that "[t]he degree of intrusion on that privacy and dignity has already been extreme and ... excruciating" (para. 23). For the second interest, although he noted that "it would have been preferable to include objective evidence of the gravity of that risk from, for example, the police responsible for the investigation", he concluded that "the lack of such evidence is not fatal" (para. 24). Rather, the necessary inferences could be drawn from the circumstances notably the "willingness of the perpetrator(s) of the crimes to resort to extreme violence to pursue whatever motive existed" (*ibid.*). He concluded that the "current uncertainty" was the source of a reasonable apprehension of the risk of harm and, further, that the foreseeable harm was "grave" (*ibid.*).

15 The application judge ultimately accepted the Trustees' submission that these interests "very strongly outweigh" what he called the proportionately narrow public interest in the "essentially administrative files" at issue (paras. 31 and 33). He therefore concluded that the harmful effects of the sealing orders were substantially outweighed by the salutary effects on the rights and interests of the affected individuals.

16 Finally, the application judge considered what order would protect the affected individuals while infringing upon the open court principle to the minimum extent possible. He decided no meaningful part of either file could be disclosed if one were to make the redactions necessary to protect the interests he had identified. Open-ended sealing orders did not, however, sit well with him. The application judge therefore sealed the files for an initial period of two years, with the possibility of renewal.

B. Court of Appeal for Ontario, 2019 ONCA 376, 47 E.T.R. (4th) 1 (Doherty, Rouleau and Hourigan JJ.A.)

17 The Toronto Star's appeal was allowed, unanimously, and the sealing orders were lifted.

18 The Court of Appeal considered the two interests advanced before the application judge in support of the orders to seal the probate files. As to the need to protect the privacy and dignity of the victims of violent crime and their loved ones, it recalled that the kind of interest that is properly protected by a sealing order must have a public interest component. Citing *Sierra Club*, the Court of Appeal wrote that "[p]ersonal concerns cannot, without more, justify an order sealing material that would normally be available to the public under the open court principle" (para. 10). It concluded that the privacy interest for which the Trustees sought protection lacked this quality of public interest.

19 While it recognized the personal safety of individuals as an important public interest generally, the Court of Appeal wrote that there was no evidence in this case that could warrant a finding that disclosure of the contents of the estate files posed a real risk to anyone's physical safety. The application judge had erred on this point: "the suggestion that the beneficiaries and trustees are somehow at risk because the Shermans were murdered is not an inference, but is speculation. It provides no basis for a sealing order" (para. 16).

20 The Court of Appeal concluded that the Trustees had failed the first stage of the test for obtaining orders sealing the probate files. It therefore allowed the appeal and set aside the orders.

C. Subsequent Proceedings

21 The Court of Appeal's order setting aside the sealing orders has been stayed pending the disposition of this appeal. The Toronto Star brought a motion to adduce new evidence on this appeal, comprised of land titles documents, transcripts of the cross-examination of a detective on the murder investigation, and various news articles. This evidence, it says, supports the conclusion that the sealing orders should be lifted. The motion was referred to this panel.

IV. Submissions

22 The Trustees have appealed to this Court seeking to restore the sealing orders made by the application judge. In addition to contesting the motion for new evidence, they maintain that the orders are necessary to prevent a serious risk to the privacy and physical safety of the affected individuals and that the salutary effects of sealing the court probate files outweigh the harmful effects of limiting court openness. The Trustees argue that two legal errors led the Court of Appeal to conclude otherwise.

23 First, they submit the Court of Appeal erred in holding that privacy is a personal concern that cannot, without more, constitute an important interest under *Sierra Club* . The Trustees say the application judge was right to characterize privacy and dignity as an important public interest which, as it was subject to a serious risk, justified the orders. They ask this Court to recognize that privacy in itself is an important public interest for the purposes of the analysis.

24 Second, the Trustees submit that the Court of Appeal erred in overturning the application judge's conclusion that there was a serious risk of physical harm. They argue that the Court of Appeal failed to recognize that courts have the ability to draw reasonable inferences by applying reason and logic even in the absence of specific evidence of the alleged risk.

25 The Trustees say that these errors led the Court of Appeal to mistakenly set aside the sealing orders. In answer to questions at the hearing, the Trustees acknowledged that an order redacting certain documents in the file or a publication ban could assist in addressing some of their concerns, but maintained neither is a reasonable alternative to the sealing orders in the circumstances.

26 The Trustees submit further that the protection of these interests outweighs the deleterious effects of the orders. They argue that the importance of the open court principle is attenuated by the nature of these probate proceedings. Given that it is non-contentious and not strictly speaking necessary for the transfer of property at death, probate is a court proceeding of an "administrative" character, which diminishes the imperative of applying the open court principle here (paras. 113-14).

27 The Toronto Star takes the position that the Court of Appeal made no mistake in setting aside the sealing orders and that the appeal should be dismissed. In the Toronto Star's view, while privacy can be an important interest where it evinces a public component, the Trustees have only identified a subjective desire for the affected individuals in this case to avoid further publicity, which is not inherently harmful. According to the Toronto Star and some of the interveners, the Trustees' position would allow that measure of inconvenience and embarrassment that arises in every court proceeding to take precedence over the interest in court openness protected by the *Canadian Charter of Rights and Freedoms* in which all of society has a stake. The Toronto Star argues further that the information in the court files is not highly sensitive. On the issue of whether the sealing orders were necessary to protect the affected individuals from physical harm, the Toronto Star submits that the Court of Appeal was right to conclude that the Trustees had failed to establish a serious risk to this interest.

28 In the alternative, even if there were a serious risk to one or another important interest, the Toronto Star says the sealing orders are not necessary because the risk could be addressed by an alternative, less onerous order. Furthermore, it says the orders are not proportionate. In seeking to minimize the importance of openness in probate proceedings, the Trustees invite an inflexible approach to balancing the effects of the order that is incompatible with the principle that openness applies to all court proceedings. In any event, there is a public interest in openness specifically here, given that the certificates sought can affect the rights of third parties and that openness ensures the fairness of the proceedings, whether they are contested or not.

V. Analysis

29 The outcome of the appeal turns on whether the application judge should have made the sealing orders pursuant to the test for discretionary limits on court openness from this Court's decision in *Sierra Club* .

30 Court openness is protected by the constitutional guarantee of freedom of expression and is essential to the proper functioning of our democracy (*Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*[1996] 3 S.C.R. 480, at para. 23; *Vancouver Sun (Re)*2004 SCC 43, [2004] 2 S.C.R. 332, at paras. 23-26). Reporting on court proceedings by a free press is often said to be inseparable from the principle of open justice. "In reporting what has been said and done at a public trial, the media serve as the eyes and ears of a wider public which would be absolutely entitled to attend but for purely practical reasons cannot do so" (*Khuja v. Times Newspapers Ltd*, 2017 UKSC 49, [2019] A.C. 161 (U.K. S.C.), at para. 16, citing *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, at pp. 1339-40, per Cory J.). Limits on openness in service of other public interests have been recognized, but sparingly and always with an eye to preserving a strong presumption that justice should proceed in public view (*Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, at p. 878; *R. v. Mentuck*2001 SCC 76, [2001] 3 S.C.R. 442, at paras. 32-39; *Sierra Club*, at para. 56). The test for discretionary limits on court openness is directed at maintaining this presumption while offering sufficient flexibility for courts to protect these other public interests where they arise (*Mentuck*, at para. 33). The parties agree that this is the appropriate framework of analysis for resolving this appeal.

31 The parties and the courts below disagree, however, about how this test applies to the facts of this case and this calls for clarification of certain points of the *Sierra Club* analysis. Most centrally, there is disagreement about how an important interest in the protection of privacy could be recognized such that it would justify limits on openness, and in particular when privacy can be a matter of public concern. The parties bring two settled principles of this Court's jurisprudence to bear in support of their respective positions. First, this Court has often observed that privacy is a fundamental value necessary to the preservation of a

free and democratic society (*Lavigne v. Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53, [2002] 2 S.C.R. 773, at para. 25; *Dagg v. Canada (Minister of Finance)*[1997] 2 S.C.R. 403, at paras. 65-66, per La Forest J. (dissenting but not on this point); *New Brunswick*, at para. 40). Courts have invoked privacy, in some instances, as the basis for an exception to openness under the *Sierra Club* test (see, e.g., *R. v. Henry*2009 BCCA 86, 270 B.C.A.C. 5, at paras. 11 and 17). At the same time, the jurisprudence acknowledges that some degree of privacy loss — resulting in inconvenience, even in upset or embarrassment — is inherent in any court proceeding open to the public (*New Brunswick*, at para. 40). Accordingly, upholding the presumption of openness has meant recognizing that neither individual sensibilities nor mere personal discomfort associated with participating in judicial proceedings are likely to justify the exclusion of the public from court (*Attorney General of Nova Scotia v. MacIntyre*, [1982] 1 S.C.R. 175, at p. 185; *New Brunswick*, at para. 41). Determining the role of privacy in the *Sierra Club* analysis requires reconciling these two ideas, which is the nub of the disagreement between the parties. The right of privacy is not absolute; the open court principle is not without exceptions.

32 For the reasons that follow, I disagree with the Trustees that the ostensibly unbounded privacy interest they invoke qualifies as an important public interest within the meaning of *Sierra Club* . Their broad claim fails to focus on the elements of privacy that are deserving of public protection in the open court context. That is not to say, however, that privacy can never ground an exceptional measure such as the sealing orders sought in this case. While the mere embarrassment caused by the dissemination of personal information through the open court process does not rise to the level justifying a limit on court openness, circumstances do exist where an aspect of a person's private life has a plain public interest dimension.

33 Personal information disseminated in open court can be more than a source of discomfort and may result in an affront to a person's dignity. Insofar as privacy serves to protect individuals from this affront, it is an important public interest relevant under *Sierra Club* . Dignity in this sense is a related but narrower concern than privacy generally; it transcends the interests of the individual and, like other important public interests, is a matter that concerns the society at large. A court can make an exception to the open court principle, notwithstanding the strong presumption in its favour, if the interest in protecting core aspects of individuals' personal lives that bear on their dignity is at serious risk by reason of the dissemination of sufficiently sensitive information. The question is not whether the information is "personal" to the individual concerned, but whether, because of its highly sensitive character, its dissemination would occasion an affront to their dignity that society as a whole has a stake in protecting.

34 This public interest in privacy appropriately focuses the analysis on the impact of the dissemination of sensitive personal information, rather than the mere fact of this dissemination, which is frequently risked in court proceedings and is necessary in a system that privileges court openness. It is a high bar — higher and more precise than the sweeping privacy interest relied upon here by the Trustees. This public interest will only be seriously at risk where the information in question strikes at what is sometimes said to be the core identity of the individual concerned: information so sensitive that its dissemination could be an affront to dignity that the public would not tolerate, even in service of open proceedings.

35 I hasten to say that applicants for an order making exception to the open court principle cannot content themselves with an unsubstantiated claim that this public interest in dignity is compromised any more than they could by an unsubstantiated claim that their physical integrity is endangered. Under *Sierra Club*, the applicant must show on the facts of the case that, as an important interest, this dignity dimension of their privacy is at "serious risk". For the purposes of the test for discretionary limits on court openness, this requires the applicant to show that the information in the court file is sufficiently sensitive such that it can be said to strike at the biographical core of the individual and, in the broader circumstances, that there is a serious risk that, without an exceptional order, the affected individual will suffer an affront to their dignity.

36 In the present case, the information in the court files was not of this highly sensitive character that it could be said to strike at the core identity of the affected persons; the Trustees have failed to show how the lifting of the sealing orders engages the dignity of the affected individuals. I am therefore not convinced that the intrusion on their privacy raises a serious risk to an important public interest as required by *Sierra Club* . Moreover, as I shall endeavour to explain, there was no serious risk of physical harm to the affected individuals by lifting the sealing orders. Accordingly, this is not an appropriate case in which to make sealing orders, or any order limiting access to these court files. In the circumstances, the admissibility of the Toronto Star's new evidence is moot. I propose to dismiss the appeal.

A. The Test for Discretionary Limits on Court Openness

37 Court proceedings are presumptively open to the public (*MacIntyre*, at p. 189; *A.B. v. Bragg Communications Inc.*2012 SCC 46, [2012] 2 S.C.R. 567, at para. 11).

38 The test for discretionary limits on presumptive court openness has been expressed as a two-step inquiry involving the necessity and proportionality of the proposed order (*Sierra Club*, at para. 53). Upon examination, however, this test rests upon three core prerequisites that a person seeking such a limit must show. Recasting the test around these three prerequisites, without altering its essence, helps to clarify the burden on an applicant seeking an exception to the open court principle. In order to succeed, the person asking a court to exercise discretion in a way that limits the open court presumption must establish that:

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

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

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

Only where all three of these prerequisites have been met can a discretionary limit on openness — for example, a sealing order, a publication ban, an order excluding the public from a hearing, or a redaction order — properly be ordered. This test applies to all discretionary limits on court openness, subject only to valid legislative enactments (*Toronto Star Newspapers Ltd. v. Ontario*2005 SCC 41, [2005] 2 S.C.R. 188, at paras. 7 and 22).

39 The discretion is structured and controlled in this way to protect the open court principle, which is understood to be constitutionalized under the right to freedom of expression at s. 2(b) of the Charter (*New Brunswick*, at para. 23). Sustained by freedom of expression, the open court principle is one of the foundations of a free press given that access to courts is fundamental to newsgathering. This Court has often highlighted the importance of open judicial proceedings to maintaining the independence and impartiality of the courts, public confidence and understanding of their work and ultimately the legitimacy of the process (see, e.g., *Vancouver Sun*, at paras. 23-26). In *New Brunswick*, La Forest J. explained the presumption in favour of court openness had become "'one of the hallmarks of a democratic society'" (citing *Re Southam Inc. and The Queen (No.1)*, (1983), 41 O.R. (2d) 113 (C.A.), at p. 119), that "acts as a guarantee that justice is administered in a non-arbitrary manner, according to the rule of law ... thereby fostering public confidence in the integrity of the court system and understanding of the administration of justice" (para. 22). The centrality of this principle to the court system underlies the strong presumption — albeit one that is rebuttable — in favour of court openness (para. 40; *Mentuck*, at para. 39).

40 The test ensures that discretionary orders are subject to no lower standard than a legislative enactment limiting court openness would be (*Mentuck*, at para. 27; *Sierra Club*, at para. 45). To that end, this Court developed a scheme of analysis by analogy to the *Oakes* test, which courts use to understand whether a legislative limit on a right guaranteed under the *Charter* is reasonable and demonstrably justified in a free and democratic society (*Sierra Club*, at para. 40, citing *R. v. Oakes*, [1986] 1 S.C.R. 103; see also *Dagenais*, at p. 878; *Vancouver Sun*, at para. 30).

41 The recognized scope of what interests might justify a discretionary exception to open courts has broadened over time. In *Dagenais*, Lamer C.J. spoke of a requisite risk to the "fairness of the trial" (p. 878). In *Mentuck*, Iacobucci J. extended this to a risk affecting the "proper administration of justice" (para. 32). Finally, in *Sierra Club*, Iacobucci J., again writing for a unanimous Court, restated the test to capture any serious risk to an "important interest, including a commercial interest, in the context of litigation" (para. 53). He simultaneously clarified that the important interest must be expressed as a public interest. For example, on the facts of that case, a harm to a particular business interest would not have been sufficient, but the "general commercial interest of preserving confidential information" was an important interest because of its public character (para. 55). This is consistent with the fact that this test was developed in reference to the *Oakes* jurisprudence that focuses on the "pressing and substantial" objective of legislation of general application (*Oakes*, at pp. 138-39; see also *Mentuck*, at para. 31). The term "important interest" therefore captures a broad array of public objectives.

42 While there is no closed list of important public interests for the purposes of this test, I share Iacobucci J.'s sense, explained in *Sierra Club*, that courts must be "cautious" and "alive to the fundamental importance of the open court rule" even at the earliest stage when they are identifying important public interests (para. 56). Determining what is an important public interest can be done in the abstract at the level of general principles that extend beyond the parties to the particular dispute (para. 55). By contrast, whether that interest is at "serious risk" is a fact-based finding that, for the judge considering the appropriateness of an order, is necessarily made in context. In this sense, the identification of, on the one hand, an important interest and, on the other, the seriousness of the risk to that interest are, theoretically at least, separate and qualitatively distinct operations. An order may therefore be refused simply because a valid important public interest is not at serious risk on the facts of a given case or, conversely, that the identified interests, regardless of whether they are at serious risk, do not have the requisite important public character as a matter of general principle.

43 The test laid out in *Sierra Club* continues to be an appropriate guide for judicial discretion in cases like this one. The breadth of the category of "important interest" transcends the interests of the parties to the dispute and provides significant flexibility to address harm to fundamental values in our society that unqualified openness could cause (see, e.g., P. M. Perell and J. W. Morden, *The Law of Civil Procedure in Ontario* (4th ed. 2020), at para. 3.185; J. Bailey and J. Burkell, "Revisiting the Open Court Principle in an Era of Online Publication: Questioning Presumptive Public Access to Parties' and Witnesses' Personal Information" (2016), 48 *Ottawa L. Rev*. 143, at pp. 154-55). At the same time, however, the requirement that a serious risk to an important interest be demonstrated imposes a meaningful threshold necessary to maintain the presumption of openness. Were it merely a matter of weighing the benefits of the limit on court openness against its negative effects, decision-makers confronted with concrete impacts on the individuals appearing before them may struggle to put adequate weight on the less immediate negative effects on the open court principle. Such balancing could be evasive of effective appellate review. To my mind, the structure provided by *Dagenais*, *Mentuck*, and *Sierra Club* remains appropriate and should be affirmed.

44 Finally, I recall that the open court principle is engaged by all judicial proceedings, whatever their nature (*MacIntyre* at pp. 185-86; *Vancouver Sun*, at para. 31). To the extent the Trustees suggested, in their arguments about the negative effects of the sealing orders, that probate in Ontario does not engage the open court principle or that the openness of these proceedings has no public value, I disagree. The certificates the Trustees sought from the court are issued under the seal of that court, thereby bearing the imprimatur of the court's authority. The court's decision, even if rendered in a non-contentious setting, will have an impact on third parties, for example by establishing the testamentary paper that constitutes a valid will (see *Otis v. Otis*, (2004), 7 E.T.R. (3d) 221 (Ont. S.C.), at paras. 23-24). Contrary to what the Trustees argue, the matters in a probate file are not quintessentially private or fundamentally administrative. Obtaining a certificate of appointment of estate trustee in Ontario is a court proceeding and the fundamental rationale for openness — discouraging mischief and ensuring confidence in the administration of justice through transparency — applies to probate proceedings and thus to the transfer of property under court authority and other matters affected by that court action.

45 It is true that other non-probate estate planning mechanisms may allow for the transfer of wealth outside the ordinary avenues of testate or intestate succession — that is the case, for instance, for certain insurance and pension benefits, and for certain property held in co-ownership. But this does not change the necessarily open court character of probate proceedings. That non-probate transfers keep certain information related to the administration of an estate out of public view does not mean that the Trustees here, by seeking certificates from the court, somehow do not engage this principle. The Trustees seek the benefits that flow from the public judicial probate process: transparency ensures that the probate court's authority is administered fairly and efficiently (*Vancouver Sun*, at para. 25; *New Brunswick*, at para. 22). The strong presumption in favour of openness plainly applies to probate proceedings and the Trustees must satisfy the test for discretionary limits on court openness.

B. The Public Importance of Privacy

46 As mentioned, I disagree with the Trustees that an unbounded interest in privacy qualifies as an important public interest under the test for discretionary limits on court openness. Yet in some of its manifestations, privacy does have social importance beyond the person most immediately concerned. On that basis, it cannot be excluded as an interest that could justify, in the right circumstances, a limit to court openness. Indeed, the public importance of privacy has been recognized by this Court in

various settings, and this sheds light on why the narrower aspect of privacy related to the protection of dignity is an important public interest.

47 I respectfully disagree with the manner in which the Court of Appeal disposed of the claim by the Trustees that there is a serious risk to the interest in protecting personal privacy in this case. For the appellate judges, the privacy concerns raised by the Trustees amounted to "[p]ersonal concerns" which cannot, "without more", satisfy the requirement from *Sierra Club* that an important interest be framed as a public interest (para. 10). The Court of Appeal in our case relied, at para. 10, on *H. (M.E.) v. Williams*, 2012 ONCA 35, 108 O.R. (3d) 321, in which it was held that "[p]urely personal interests cannot justify non-publication or sealing orders" (para. 25). Citing as authority judgments of this Court in *MacIntyre* and *Sierra Club*, the court continued by observing that "personal concerns of a litigant, including concerns about the very real emotional distress and embarrassment that can be occasioned to litigants when justice is done in public, will not, standing alone, satisfy the necessity branch of the test" (para. 25). Respectfully stated, the emphasis that the Court of Appeal placed on personal concerns as a means of deciding that the sealing orders failed to meet the necessity requirement in this case and in *Williams* is, I think, mistaken. Personal concerns that relate to aspects of the privacy of an individual who is before the courts can coincide with a public interest in confidentiality.

48 Like the Court of Appeal, I do agree with the view expressed particularly in the pre-*Charter* case of *MacIntyre*, that where court openness results in an intrusion on privacy which disturbs the "sensibilities of the individuals involved" (p. 185), that concern is generally insufficient to justify a sealing or like order and does not amount to an important public interest under *Sierra Club* . But I disagree with the Court of Appeal in this case and in *Williams* that this is because the intrusion only occasions "personal concerns". Certain personal concerns — even "without more" — can coincide with important public interests within the meaning of *Sierra Club* . To invoke the expression of Binnie J. in *F.N. (Re)*2000 SCC 35, [2000] 1 S.C.R. 880, at para. 10, there is a "public interest in confidentiality" that is felt, first and foremost, by the person involved and is most certainly a personal concern. Even in *Williams*, the Court of Appeal was careful to note that where, without privacy protection, an individual would face "a substantial risk of serious debilitating emotional ... harm", an exception to openness should be available (paras. 29-30). The means of discerning whether a privacy interest reflects a "public interest in confidentiality" is therefore not whether the interest reflects or is rooted in "personal concerns" for the privacy of the individuals involved. Some personal concerns relating to privacy overlap with public interests in confidentiality. These interests in privacy can be, in my view, important public interests within the meaning of *Sierra Club* . It is true that an individual's privacy is pre-eminently important to that individual. But this Court has also long recognized that the protection of privacy is, in a variety of settings, in the interest of society as a whole.

49 The proposition that privacy is important, not only to the affected individual but to our society, has deep roots in the jurisprudence of this Court outside the context of the test for discretionary limits on court openness. This background helps explain why privacy cannot be rejected as a mere personal concern. However, the key differences in these contexts are such that the public importance of privacy cannot be transposed to open courts without adaptation. Only specific aspects of privacy interests can qualify as important public interests under *Sierra Club* .

50 In the context of s. 8 of the *Charter* and public sector privacy legislation, La Forest J. cited American privacy scholar Alan F. Westin for the proposition that privacy is a fundamental value of the modern state, first in *R. v. Dyment*, [1988] 2 S.C.R. 417, at pp. 427-28 (concurring), and then in *Dagg*, at para. 65 (dissenting but not on this point). In the latter case, La Forest J. wrote: "The protection of privacy is a fundamental value in modern, democratic states. An expression of an individual's unique personality or personhood, privacy is grounded on physical and moral autonomy — the freedom to engage in one's own thoughts, actions and decisions" (para. 65 (citations omitted)). That statement was endorsed unanimously by this Court in *Lavigne*, at para. 25.

51 Further, in *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401* 2013 SCC 62, [2013] 3 S.C.R. 733 ("*UFCW*"), decided in the context of a statute regulating the use of information by organizations, the objective of providing an individual with some control over their information was recognized as "intimately connected to individual autonomy, dignity and privacy, self-evidently significant social values" (para. 24). The importance of privacy, its "quasi-constitutional status" and its role in protecting moral autonomy continues to find expression in our recent jurisprudence (see, e.g., *Lavigne*, at para. 24; *Bragg*, at para. 18, per Abella J., citing *Toronto Star Newspaper Ltd. v. R.*, 2012 ONCJ 27, 289

C.C.C. (3d) 549, at paras. 40-41 and 44; *Douez v. Facebook, Inc.* 2017 SCC 33, [2017] 1 S.C.R. 751, at para. 59). In *Douez*, Karakatsanis, Wagner (as he then was) and Gascon JJ. underscored this same point, adding that "the growth of the Internet, virtually timeless with pervasive reach, has exacerbated the potential harm that may flow from incursions to a person's privacy interests" (para. 59).

52 Privacy as a public interest is underlined by specific aspects of privacy protection present in legislation at the federal and provincial levels (see, e.g., *Privacy Act*, R.S.C. 1985, c. P-21; *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5 ("PIPEDA"); *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31; *Charter of Human Rights and Freedoms*, CQLR, c. C-12, s. 5; *Civil Code of Québec*, arts. 35 to 41). [3] Further, in assessing the constitutionality of a legislative exception to the open court principle, this Court has recognized that the protection of individual privacy can be a pressing and substantial objective (*Edmonton Journal*, at p. 1345, per Cory J.; see also the concurring reasons of Wilson J., at p. 1354, in which "the public interest in protecting the privacy of litigants generally in matrimonial cases against the public interest in an open court process" was explicitly noted). There is also continued support for the social and public importance of individual privacy in the academic literature (see, e.g., A. J. Cockfield, "Protecting the Social Value of Privacy in the Context of State Investigations Using New Technologies" (2007), 40 *U.B.C. L. Rev*. 41, at p. 41; K. Hughes, "A Behavioural Understanding of Privacy and its Implications for Privacy Law" (2012), 75 *Mod. L. Rev*. 806, at p. 823; P. Gewirtz, "Privacy and Speech" (2001), *Sup. Ct. Rev*. 139, at p. 139). It is therefore inappropriate, in my respectful view, to dismiss the public interest in protecting privacy as merely a personal concern. This does not mean, however, that privacy generally is an important public interest in the context of limits on court openness.

53 The fact that the case before the application judge concerned individuals who were advancing their own privacy interests, which were undeniably important to them as individuals, does not mean that there is no public interest at stake. In *F.N. (Re)*, this was the personal interest that young offenders had in remaining anonymous in court proceedings as a means of encouraging their personal rehabilitation (para. 11). All of society had a stake, according to Binnie J., in the young person's personal prospect for rehabilitation. This same idea from *F.N. (Re)* was cited in support of finding the interest in *Sierra Club* to be a public interest. That interest, rooted first in an agreement of personal concern to the contracting parties involved, was a private matter that evinced, alongside its personal interest to the parties, a "public interest in confidentiality" (*Sierra Club*, at para. 55). Similarly, while the Trustees have a personal interest in preserving their privacy, this does not mean that the public has no stake in this same interest because — as this Court has made clear — it is related to moral autonomy and dignity which are pressing and substantial concerns.

54 In this appeal, the Toronto Star suggests that legitimate privacy concerns would be effectively protected by a discretionary order where there is "something more" to elevate them beyond personal concerns and sensibilities (R.F., at para. 73). The Income Security Advocacy Centre, by way of example, submits that privacy serves the public interests of preventing harm and of ensuring individuals are not dissuaded from accessing the courts. I agree that these concepts are related, but in my view care must be taken not to conflate the public importance of privacy with that of other interests; aspects of privacy, such as dignity, may constitute important public interests in and of themselves. A risk to personal privacy may be tied to a risk to psychological harm, as it was in *Bragg* (para. 14; see also J. Rossiter, *Law of Publication Bans, Private Hearings, and Sealing Orders* (loose-leaf), s. 2.4.1). But concerns for privacy may not always coincide with a desire to avoid psychological harm, and may focus instead, for example, on protecting one's professional standing (see, e.g., *R. v. Paterson*(1998), 102 B.C.A.C. 200, at paras. 76, 78 and 87-88). Similarly, there may be circumstances where the prospect of surrendering the personal information necessary to pursue a legal claim may deter an individual from bringing that claim (see *S. v. Lamontagne*2020 QCCA 663, at paras. 34-35 (CanLII)). In the same way, the prospect of surrendering sensitive commercial information would have impaired the conduct of the party's defence in *Sierra Club* (at para. 71), or could pressure an individual into settling a dispute prematurely (K. Eltis, *Courts, Litigants and the Digital Age* (2nd ed. 2016), at p. 86). But this does not necessarily mean that a public interest in privacy is wholly subsumed by such concerns. I note, for example, that access to justice concerns do not apply where the privacy interest to be protected is that of a third party to the litigation, such as a witness, whose access to the courts is not at stake and who has no choice available to terminate the litigation and avoid any privacy impacts (see, e.g., *Himel v. Greenberg*2010 ONSC 2325, 93 R.F.L. (6th) 357, at para. 58; see also Rossiter, s. 2.4.2(2)). In any event, the recognition of these related and valid

important public interests does not answer the question as to whether aspects of privacy in and of themselves are important public interests and does not diminish the distinctive public character of privacy, considered above.

55 Indeed, the specific harms to privacy occasioned by open courts have not gone unnoticed nor been discounted as merely personal concerns. Courts have exercised their discretion to limit court openness in order to protect personal information from publicity, including to prevent the disclosure of sexual orientation (see, e.g., *Paterson*, at paras. 76, 78 and 87-88), HIV status (see, e.g., *A.B. v. Canada (Citizenship and Immigration)*2017 FC 629, at para. 9 (CanLII),) and a history of substance abuse and criminality (see, e.g., *R. v. Pickton*2010 BCSC 1198, at paras. 11 and 20 (CanLII)). This need to reconcile the public interest in privacy with the open court principle has been highlighted by this Court (see, e.g., *Edmonton Journal*, at p. 1353, per Wilson J.). Writing extra-judicially, McLachlin C.J. explained that "[i]f we are serious about peoples' private lives, we must preserve a modicum of privacy. Equally, if we are serious about our justice system, we must have open courts. The question is how to reconcile these dual imperatives in a fair and principled way" ("Courts, Transparency and Public Confidence — To the Better Administration of Justice" (2003), 8 *Deakin L. Rev*. 1, at p. 4). In seeking that reconciliation, the question becomes whether the relevant dimension of privacy amounts to an important public interest that, when seriously at risk, would justify rebutting the strong presumption favouring open courts.

C. The Important Public Interest in Privacy Bears on the Protection of Individual Dignity

56 While the public importance of privacy has clearly been recognized by this Court in various settings, caution is required in deploying this concept in the test for discretionary limits on court openness. It is a matter of settled law that open court proceedings by their nature can be a source of discomfort and embarrassment and these intrusions on privacy are generally seen as of insufficient importance to overcome the presumption of openness. The Toronto Star has raised the concern that recognizing privacy as an important public interest will lower the burden for applicants because the privacy of litigants will, in some respects, always be at risk in court proceedings. I agree that the requirement to show a serious risk to an important interest is a key threshold component of the analysis that must be preserved in order to protect the open court principle. The recognition of a public interest in privacy could threaten the strong presumption of openness if privacy is cast too broadly without a view to its public character.

57 Privacy poses challenges in the test for discretionary limits on court openness because of the necessary dissemination of information that openness implies. It bears recalling that when Dickson J., as he then was, wrote in *MacIntyre* that "covertness is the exception and openness the rule", he was explicitly treating a privacy argument, returning to and dismissing the view, urged many times before, "that the 'privacy' of litigants *requires* that the public be excluded from court proceedings" (p. 185 (emphasis added)). Dickson J. rejected the view that personal privacy concerns require closed courtroom doors, explaining that "[a]s a general rule the sensibilities of the individuals involved are no basis for exclusion of the public from judicial proceedings" (ibid).

58 Though writing before *Dagenais*, and therefore not commenting on the specific steps of the analysis as we now understand them, to my mind, Dickson J. was right to recognize that the open court principle brings necessary limits to the right to privacy. While individuals may have an expectation that information about them will not be revealed in judicial proceedings, the open court principle stands presumptively in opposition to that expectation. For example, in *Lac d'Amiante du Québec Ltée v. 2858-0702 Québec Inc.*, 2001 SCC 51, [2001] 2 S.C.R. 743, LeBel J. held that "a party who institutes a legal proceeding waives his or her right to privacy, at least in part" (para. 42). *MacIntyre* and cases like it recognize — in stating that openness is the rule and covertness the exception — that the right to privacy, however defined, in some measure gives way to the open court ideal. I share the view that the open court principle presumes that this limit on the right to privacy is justified.

59 The Toronto Star is therefore right to say that the privacy of individuals will very often be at some risk in court proceedings. Disputes between and concerning individuals that play out in open court necessarily reveal information that may have otherwise remained out of public view. Indeed, much like the Court of Appeal in this case, courts have explicitly adverted to this concern when concluding that mere inconvenience is insufficient to cross the initial threshold of the test (see, e.g., *3834310 Canada inc. v. Chamberland* 2004 CanLII 4122(Que. C.A.), at para. 30). Saying that any impact on individual privacy is sufficient to establish a serious risk to an important public interest for the purposes of the test for discretionary limits on court openness could

render this initial requirement moot. Many cases would turn on the balancing at the proportionality stage. Such a development would amount to a departure from *Sierra Club*, which is the appropriate framework and one which must be preserved.

60 Further, recognizing an important interest in privacy generally could prove to be too open-ended and difficult to apply. Privacy is a complex and contextual concept (*Dagg*, at para. 67; see also B. McIsaac, K. Klein and S. Brown, *The Law of Privacy in Canada* (loose-leaf), vol. 1, at pp. 1-4; D. J. Solove, "Conceptualizing Privacy" (2002), 90 *Cal. L. Rev.* 1087, at p. 1090). Indeed, this Court has described the nature of limits of privacy as being in a state of "theoretical disarray" (*R. v. Spencer*2014 SCC 43, [2014] 2 S.C.R. 212, at para. 35). Much turns on the context in which privacy is invoked. I agree with the Toronto Star that a bald recognition of privacy as an important interest in the context of the test for discretionary limits on court openness, as the Trustees advance here, would invite considerable confusion. It would be difficult for courts to measure a serious risk to such an interest because of its multi-faceted nature.

61 While I acknowledge these concerns have merit, I disagree that they require that privacy never be considered in determining whether there is a serious risk to an important public interest. I reach this conclusion for two reasons. First, the problem of privacy's complexity can be attenuated by focusing on the purpose underlying the public protection of privacy as it is relevant to the judicial process, in order to fix precisely on that aspect which transcends the interests of the parties in this context. That narrower dimension of privacy is the protection of dignity, an important public interest that can be threatened by open courts. Indeed, rather than attempting to apply a single unwieldy concept of privacy in all contexts, this Court has generally fixed on more specific privacy interests tailored to the particular situation (*Spencer*, at para. 35; *Edmonton Journal*, at p. 1362, per Wilson J.). That is what must be done here, with a view to identifying the public aspect of privacy that openness might inappropriately undermine.

62 Second, I recall that in order to pass the first stage of the analysis one must not simply invoke an important interest, but must also overcome the presumption of openness by showing a serious risk to this interest. The burden of showing a risk to such an interest on the facts of a given case constitutes the true initial threshold on the person seeking to restrict openness. It is never sufficient to plead a recognized important public interest on its own. The demonstration of a serious risk to this interest is still required. What is important is that the interest be accurately defined to capture only those aspects of privacy that engage legitimate public objectives such that showing a serious risk to that interest remains a high bar. In this way, courts can effectively maintain the guarantee of presumptive openness.

63 Specifically, in order to preserve the integrity of the open court principle, an important public interest concerned with the protection of dignity should be understood to be seriously at risk only in limited cases. Nothing here displaces the principle that covertness in court proceedings must be exceptional. Neither the sensibilities of individuals nor the fact that openness is disadvantageous, embarrassing or distressing to certain individuals will generally on their own warrant interference with court openness (*MacIntyre*, at p. 185; *New Brunswick*, at para. 40; *Williams*, at para. 30; *Coltsfoot Publishing Ltd. v. Foster-Jacques*2012 NSCA 83, 320 N.S.R. (2d) 166, at para. 97). These principles do not preclude recognizing the public character of a privacy interest as important when it is related to the protection of dignity. They merely require that a serious risk be shown to exist in respect of this interest in order to justify, exceptionally, a limit on openness, as is the case with any important public interest under *Sierra Club* . As Professors Sylvette Guillemard and Séverine Menétrey explain, [TRANSLATION] "[t]he confidentiality of the proceedings may be justified, in particular, in order to protect the parties' privacy .... However, the jurisprudence indicates that embarrassment or shame is not a sufficient reason to order that proceedings be held *in camera* or to impose a publication ban" (*Comprendre la procédure civile québécoise* (2nd ed. 2017), at p. 57).

64 How should the privacy interest at issue be understood as raising an important public interest relevant to the test for discretionary limits on court openness in this context? It is helpful to recall that the orders below were sought to limit access to documents and information in the court files. The Trustees' argument on this point focused squarely on the risk of immediate and widespread dissemination of the personally identifying and other sensitive information contained in the sealed materials by the Toronto Star. The Trustees submit that this dissemination would constitute an unwarranted intrusion into the privacy of the affected individuals beyond the upset they have already suffered as a result of the publicity associated with the death of the Shermans.

65 In my view, there is value in leaving individuals free to restrict when, how and to what extent highly sensitive information about them is communicated to others in the public sphere, because choosing how we present ourselves in public preserves our moral autonomy and dignity as individuals. This Court has had occasion to underscore the connection between the privacy interest engaged by open courts and the protection of dignity specifically. For example, in *Edmonton Journal*, Wilson J. noted that the impugned provision which would limit publication about matrimonial proceedings addressed "a somewhat different aspect of privacy, one more closely related to the protection of one's dignity ... namely the personal anguish and loss of dignity that may result from having embarrassing details of one's private life printed in the newspapers" (pp. 1363-64). In *Bragg*, as a further example, the protection of a young person's ability to control sensitive information was said to foster respect for "dignity, personal integrity and autonomy" (para. 18, citing *Toronto Star Newspaper Ltd.*, at para. 44).

66 Consistent with this jurisprudence, I note by way of example that the Quebec legislature expressly highlighted the preservation of dignity when the *Sierra Club* test was codified in the *Code of Civil Procedure*, CQLR, c. C-25.01 ("*C.C.P.*"), art. 12 (see also Ministère de la Justice, *Commentaires de la ministre de la Justice: Code de procédure civile*, *chapitre C-25.01* (2015), art. 12). Under art. 12 *C.C.P.*, a discretionary exception to the open court principle can be made by the court if "public order, in particular the preservation of the dignity of the persons involved or the protection of substantial and legitimate interests", requires it.

67 The concept of public order evidences flexibility analogous to the concept of an important public interest under *Sierra Club* yet it recalls that the interest invoked transcends, in importance and consequence, the purely subjective sensibilities of the persons affected. Like the "important public interest" that must be at serious risk to justify the sealing orders in the present appeal, public order encompasses a wide array of general principles and imperative norms identified by a legislature and the courts as fundamental to a given society (see *Goulet v. Transamerica Life Insurance Co. of Canada*2002 SCC 21, [2002] 1 S.C.R. 719, at paras. 42-44, citing *Godbout v. Longueuil (Ville de)*, [1995] R.J.Q. 2561 (C.A.), at p. 2570, aff'd [1997] 3 S.C.R. 844). As one Quebec judge wrote, referring to *Sierra Club* prior to the enactment of art. 12 *C.C.P.*, the interest must be understood as defined [TRANSLATION] "in terms of a public interest in confidentiality" (see *3834310 Canada inc.*, at para. 24, per Gendreau J.A. for the Court of appeal). From among the various considerations that make up the concept of public order and other legitimate interests to which art. 12 *C.C.P.* alludes, it is significant that dignity, and not an untailored reference to either privacy, harm or access to justice, was given pride of place. Indeed, it is that narrow aspect of privacy considered to be a fundamental right that courts had fixed upon before the enactment of art. 12 *C.C.P.* — [TRANSLATION] "what is part of one's personal life, in short, what constitutes a minimum personal sphere" (*Godbout*, at p. 2569, per Baudouin J.A.; see also *A. v. B.* 1990 CanLII 3132(Que. C.A.), at para. 20, per Rothman J.A.).

68 The "preservation of the dignity of the persons involved" is now consecrated as the archetypal public order interest in art. 12 *C.C.P.* It is the exemplar of the *Sierra Club* important public interest in confidentiality that stands as justification for an exception to openness (S. Rochette and J.-F. Côté, "Article 12", in L. Chamberland, ed., *Le grand collectif: Code de procédure civile — Commentaires et annotations* (5th ed. 2020), vol. 1, at p. 102; D. Ferland and B. Emery, *Précis de procédure civile du Québec* (6th ed. 2020), vol. 1, at para. 1-111). Dignity gives concrete expression to this public order interest because all of society has a stake in its preservation, notwithstanding its personal connections to the individuals concerned. This codification of *Sierra Club* 's notion of important public interest highlights the superordinate importance of human dignity and the appropriateness of limiting court openness on this basis as against an overbroad understanding of privacy that might be otherwise unsuitable to the open court context.

69 Consistent with this idea, understanding privacy as predicated on dignity has been advanced as useful in connection with challenges brought by digital communications (K. Eltis, "The Judicial System in the Digital Age: Revisiting the Relationship between Privacy and Accessibility in the Cyber Context" (2011), 56 *McGill L.J.* 289, at p. 314).

70 It is also significant, in my view, that the application judge in this case explicitly recognized, in response to the relevant arguments from the Trustees, an interest in "protecting the privacy *and dignity* of victims of crime and their loved ones" (para. 23 (emphasis added)). This elucidates that the central concern for the affected individuals on this point is not merely protecting their privacy for its own sake but privacy where it coincides with the public character of the dignity interests of these individuals.

71 Violations of privacy that cause a loss of control over fundamental personal information about oneself are damaging to dignity because they erode one's ability to present aspects of oneself to others in a selective manner (D. Matheson, "Dignity and Selective Self-Presentation", in I. Kerr, V. Steeves and C. Lucock, eds., *Lessons from the Identity Trail: Anonymity, Privacy and Identity in a Networked Society* (2009), 319, at pp. 327-28; L. M. Austin, "Re-reading Westin" (2019), 20 *Theor. Inq. L.* 53, at pp. 66-68; Eltis (2016), at p. 13). Dignity, used in this context, is a social concept that involves presenting core aspects of oneself to others in a considered and controlled manner (see generally Matheson, at pp. 327-28; Austin, at pp. 66-68). Dignity is eroded where individuals lose control over this core identity-giving information about themselves, because a highly sensitive aspect of who they are that they did not consciously decide to share is now available to others and may shape how they are seen in public. This was even alluded to by La Forest J., dissenting but not on this point, in *Dagg*, where he referred to privacy as "[a]n expression of an individual's unique personality or personhood" (para. 65).

72 Where dignity is impaired, the impact on the individual is not theoretical but could engender real human consequences, including psychological distress (see generally *Bragg*, at para. 23). La Forest J., concurring, observed in *Dyment* that privacy is essential to the well-being of individuals (p. 427). Viewed in this way, a privacy interest, where it shields the core information associated with dignity necessary to individual well-being, begins to look much like the physical safety interest also raised in this case, the important and public nature of which is neither debated, nor, in my view, seriously debatable. The administration of justice suffers when the operation of courts threatens physical well-being because a responsible court system is attuned to the physical harm it inflicts on individuals and works to avoid such effects. Similarly, in my view, a responsible court must be attuned and responsive to the harm it causes to other core elements of individual well-being, including individual dignity. This parallel helps to understand dignity as a more limited dimension of privacy relevant as an important public interest in the open court context.

73 I am accordingly of the view that protecting individuals from the threat to their dignity that arises when information revealing core aspects of their private lives is disseminated through open court proceedings is an important public interest for the purposes of the test.

74 Focusing on the underlying value of privacy in protecting individual dignity from the exposure of private information in open court overcomes the criticisms that privacy will always be at risk in open court proceedings and is theoretically complex. Openness brings intrusions on personal privacy in virtually all cases, but dignity as a public interest in protecting an individual's core sensibility is more rarely in play. Specifically, and consistent with the cautious approach to the recognition of important public interests, this privacy interest, while determined in reference to the broader factual setting, will be at serious risk only where the sensitivity of the information strikes at the subject's more intimate self.

75 If the interest is ultimately about safeguarding a person's dignity, that interest will be undermined when the information reveals something sensitive about them as an individual, as opposed to generic information that reveals little if anything about who they are as a person. Therefore the information that will be revealed by court openness must consist of intimate or personal details about an individual — what this Court has described in its jurisprudence on s. 8 of the *Charter* as the "biographical core" — if a serious risk to an important public interest is to be recognized in this context (*R. v. Plant*, [1993] 3 S.C.R. 281, at p. 293; *R. v. Tessling*2004 SCC 67, [2004] 3 S.C.R. 432, at para. 60; *R. v. Cole*, 2012 SCC 53, [2012] 3 S.C.R. 34, at para. 46). Dignity transcends personal inconvenience by reason of the highly sensitive nature of the information that might be revealed. This Court in *Cole* drew a similar line between the sensitivity of personal information and the public interest in protecting that information in reference to the biographical core. It held that "reasonable and informed Canadians" would be more willing to recognize the existence of a privacy interest where the relevant information cuts to the "biographical core" or, "[p]ut another way, the more personal and confidential the information" (para. 46). The presumption of openness means that mere discomfort associated with lesser intrusions of privacy will generally be tolerated. But there is a public interest in ensuring that openness does not unduly entail the dissemination of this core information that threatens dignity — even if it is "personal" to the affected person.

76 The test for discretionary limits on court openness imposes on the applicant the burden to show that the important public interest is at serious risk. Recognizing that privacy, understood in reference to dignity, is only at serious risk where the information in the court file is sufficiently sensitive erects a threshold consistent with the presumption of openness. This

threshold is fact specific. It addresses the concern, noted above, that personal information can frequently be found in court files and yet finding this sufficient to pass the serious risk threshold in every case would undermine the structure of the test. By requiring the applicant to demonstrate the sensitivity of the information as a necessary condition to the finding of a serious risk to this interest, the scope of the interest is limited to only those cases where the rationale for not revealing core aspects of a person's private life, namely protecting individual dignity, is most actively engaged.

77 There is no need here to provide an exhaustive catalogue of the range of sensitive personal information that, if exposed, could give rise to a serious risk. It is enough to say that courts have demonstrated a willingness to recognize the sensitivity of information related to stigmatized medical conditions (see, e.g., *A.B.*, at para. 9), stigmatized work (see, e.g., *Work Safe Twerk Safe v. Her Majesty the Queen in Right of Ontario*2021 ONSC 1100, at para. 28 (CanLII)), sexual orientation (see, e.g., *Paterson*, at paras. 76, 78 and 87-88), and subjection to sexual assault or harassment (see, e.g., *Fedeli v. Brown*2020 ONSC 994, at para. 9 (CanLII)). I would also note the submission of the intervener the Income Security Advocacy Centre, that detailed information about family structure and work history could in some circumstances constitute sensitive information. The question in every case is whether the information reveals something intimate and personal about the individual, their lifestyle or their experiences.

78 I pause here to note that I refer to cases on s. 8 of the *Charter* above for the limited purpose of providing insight into types of information that are more or less personal and therefore deserving of public protection. If the impact on dignity as a result of disclosure is to be accurately measured, it is critical that the analysis differentiate between information in this way. Helpfully, one factor in determining whether an applicant's subjective expectation of privacy is objectively reasonable in the s. 8 jurisprudence focuses on the degree to which information is private (see, e.g., *R. v. Marakah*2017 SCC 59, [2017] 2 S.C.R. 608, at para. 31; *Cole*, at paras. 44-46). But while these decisions may assist for this limited purpose, this is not to say that the remainder of the s. 8 analysis has any relevance to the application of the test for discretionary limits on court openness. For example, asking what the Trustees' reasonable expectation of privacy was here could invite a circular analysis of whether they reasonably expected their court files to be open to the public or whether they reasonably expected to be successful in having them sealed. Therefore, it is only for the limited purpose described above that the s. 8 jurisprudence is useful.

79 In cases where the information is sufficiently sensitive to strike at an individual's biographical core, a court must then ask whether a serious risk to the interest is made out in the full factual context of the case. While this is obviously a fact-specific determination, some general observations may be made here to guide this assessment.

80 I note that the seriousness of the risk may be affected by the extent to which information would be disseminated without an exception to the open court principle. If the applicant raises a risk that the personal information will come to be known by a large segment of the public in the absence of an order, this is a plainly more serious risk than if the result will be that a handful of people become aware of the same information, all else being equal. In the past, the requirement that one be physically present to acquire information in open court or from a court record meant that information was, to some extent, protected because it was "practically obscure" (D. S. Ardia, "Privacy and Court Records: Online Access and the Loss of Practical Obscurity"(2017), 4 *U. Ill. L. Rev*. 1385, at p. 1396). However, today, courts should be sensitive to the information technology context, which has increased the ease with which information can be communicated and cross-referenced (see Bailey and Burkell, at pp. 169-70; Ardia, at pp. 1450-51). In this context, it may well be difficult for courts to be sure that information will not be broadly disseminated in the absence of an order.

81 It will be appropriate, of course, to consider the extent to which information is already in the public domain. If court openness will simply make available what is already broadly and easily accessible, it will be difficult to show that revealing the information in open court will actually result in a meaningful loss of that aspect of privacy relating to the dignity interest to which I refer here. However, just because information is already accessible to some segment of the public does not mean that making it available through the court process will not exacerbate the risk to privacy. Privacy is not a binary concept, that is, information is not simply either private or public, especially because, by reason of technology in particular, absolute confidentiality is best thought of as elusive (see generally *R. v. Quesnelle*2014 SCC 46, [2014] 2 S.C.R. 390, at para. 37; *UFCW*, at para. 27). The fact that certain information is already available somewhere in the public sphere does not preclude further harm to the privacy interest by additional dissemination, particularly if the feared dissemination of highly sensitive information

is broader or more easily accessible (see generally Solove, at p. 1152; Ardia, at p. 1393-94; E. Paton-Simpson, "Privacy and the Reasonable Paranoid: The Protection of Privacy in Public Places" (2000), 50 *U.T.L.J.* 305, at p. 346).

82 Further, the seriousness of the risk is also affected by the probability that the dissemination the applicant suggests will occur actually occurs. I hasten to say that implicit in the notion of risk is that the applicant need not establish that the feared dissemination will certainly occur. However, the risk to the privacy interest related to the protection of dignity will be more serious the more likely it is that the information will be disseminated. While decided in a different context, this Court has held that the magnitude of risk is a product of both the gravity of the feared harm and its probability (*R. v. Mabior*2012 SCC 47, [2012] 2 S.C.R. 584, at para. 86).

83 That said, the likelihood that an individual's highly sensitive personal information will be disseminated in the absence of privacy protection will be difficult to quantify precisely. It is best to note as well that probability in this context need not be identified in mathematical or numerical terms. Rather, courts may merely discern probability in light of the totality of the circumstances and balance this one factor alongside other relevant factors.

84 Finally, and as discussed above, individual sensitivities alone, even if they can be notionally associated with "privacy", are generally insufficient to justify a restriction on court openness where they do not rise above those inconveniences and discomforts that are inherent to court openness (*MacIntyre*, at p. 185). An applicant will only be able to establish that the risk is sufficient to justify a limit on openness in exceptional cases, where the threatened loss of control over information about oneself is so fundamental that it strikes meaningfully at individual dignity. These circumstances engage "social values of superordinate importance" beyond the more ordinary intrusions inherent to participating in the judicial process that Dickson J. acknowledged could justify curtailing public openness (pp. 186-87).

85 To summarize, the important public interest in privacy, as understood in the context of the limits on court openness, is aimed at allowing individuals to preserve control over their core identity in the public sphere to the extent necessary to preserve their dignity. The public has a stake in openness, to be sure, but it also has an interest in the preservation of dignity: the administration of justice requires that where dignity is threatened in this way, measures be taken to accommodate this privacy concern. Although measured by reference to the facts of each case, the risk to this interest will be serious only where the information that would be disseminated as a result of court openness is sufficiently sensitive such that openness can be shown to meaningfully strike at the individual's biographical core in a manner that threatens their integrity. Recognizing this interest is consistent with this Court's emphasis on the importance of privacy and the underlying value of individual dignity, but is also tailored to preserve the strong presumption of openness.

D. The Trustees Have Failed to Establish a Serious Risk to an Important Public Interest

86 As *Sierra Club* made plain, a discretionary order limiting court openness can only be made where there is a serious risk to an important public interest. The arguments on this appeal concerned whether privacy is an important public interest and whether the facts here disclose the existence of serious risks to privacy and safety. While the broad privacy interest invoked by the Trustees cannot be relied on to justify a limit on openness, the narrower concept of privacy understood in relation to dignity is an important public interest for the purposes of the test. I also recognize that a risk to physical safety is an important public interest, a point on which there is no dispute here. Accordingly, the relevant question at the first step is whether there is a serious risk to one or both of these interests. For reasons that follow, the Trustees have failed to establish a serious risk to either. This alone is sufficient to conclude that the sealing orders should not have been issued.

(1) The Risk to Privacy Alleged in this Case Is Not Serious

87 As I have said, the important public interest in privacy must be understood as one tailored to the protection of individual dignity and not the broadly defined interest the Trustees have asked this Court to recognize. In order to establish a serious risk to this interest, the information in the court files about which the Trustees are concerned must be sufficiently sensitive in that it strikes at the biographical core of the affected individuals. If it is not, there is no serious risk that would justify an exception to openness. If it is, the question becomes whether a serious risk is made out in light of the facts of this case.

88 The application judge never explicitly identified a serious risk to the privacy interest he identified but, to the extent he implicitly reached this conclusion, I respectfully do not share his view. His finding was limited to the observation that "[t]he degree of intrusion on that privacy and dignity [i.e., that of the victims and their loved ones] has already been extreme and, I am sure, excruciating" (para. 23). But the intense scrutiny faced by the Shermans up to the time of the application is only part of the equation. As the sealing orders can only protect against the disclosure of the information in these court files relating to probate, the application judge was required to consider the sensitivity of the specific information they contained. He made no such measure. His conclusion about the seriousness of the risk then focused entirely on the risk of physical harm, with no indication that he found that the Trustees met their burden as to the serious risk to the privacy interest. Said very respectfully and with the knowledge that the application judge did not have the benefit of the above framework, the failure to assess the sensitivity of the information constituted a failure to consider a required element of the legal test. This warranted intervention on appeal.

89 Applying the appropriate framework to the facts of this case, I conclude that the risk to the important public interest in the affected individuals' privacy, as I have defined it above in reference to dignity, is not serious. The information the Trustees seek to protect is not highly sensitive and this alone is sufficient to conclude that there is no serious risk to the important public interest in privacy so defined.

90 There is little controversy in this case about the likelihood and extent of dissemination of the information contained in the estate files. There is near certainty that the Toronto Star will publish at least some aspects of the estate files if it is provided access. Given the breadth of the audience of its media organization, and the high-profile nature of the events surrounding the death of the Shermans, I have no difficulty in concluding that the affected individuals would lose control over this information to a significant extent should the files be open.

91 With regard to the sensitivity of the information, however, the information contained in these files does not reveal anything particularly private about the affected individuals. What would be revealed might well cause inconvenience and perhaps embarrassment, but it has not been shown that it would strike at their biographical core in a way that would undermine their control over the expression of their identities. Their privacy would be troubled, to be sure, but the relevant privacy interest bearing on the dignity of the affected persons has not been shown to be at serious risk. At its highest, the information in these files will reveal something about the relationship between the deceased and the affected individuals, in that it may reveal to whom the deceased entrusted the administration of their estates and those who they wished or were deemed to wish to be beneficiaries of their property at death. It may also reveal some basic personal information, such as addresses. Some of the beneficiaries might well, it may fairly be presumed, bear family names other than Sherman. I am mindful that the deaths are being investigated as homicides by the Toronto Police Service. However, even in this context, none of this information provides significant insight into who they are as individuals, nor would it provoke a fundamental change in their ability to control how they are perceived by others. The fact of being linked through estate documents to victims of an unsolved murder is not in itself highly sensitive. It may be the source of discomfort but has not been shown to constitute an affront to dignity in that it does not probe deeply into the biographical core of these individuals. As a result, the Trustees have failed to establish a serious risk to an important public interest as required by *Sierra Club* .

92 The fact that some of the affected individuals may be minors is also insufficient to cross the seriousness threshold. While the law recognizes that minors are especially vulnerable to intrusions of privacy (see *Bragg*, at para. 17), the mere fact that information concerns minors does not displace the generally applicable analysis (see, e.g., *Bragg*, at para. 11). Even taking into account the increased vulnerability of minors who may be affected individuals in the probate files, there is no evidence that they would lose control of information about themselves that reveals something close to the core of their identities. Merely associating the beneficiaries or trustees with the Shermans' unexplained deaths is not enough to constitute a serious risk to the identified important public interest in privacy, defined in reference to dignity.

93 Further, while the intense media scrutiny on the family following the deaths suggests that the information would likely be widely disseminated, it is not in itself indicative of the sensitivity of the information contained in the probate files.

94 Showing that the information that would be revealed by court openness is sufficiently sensitive and private such that it goes to the biographical core of the affected individual is a necessary prerequisite to showing a serious risk to the relevant public interest aspect of privacy. The Trustees did not advance any specific reason why the contents of these files are more sensitive than they may seem at first glance. When asserting a privacy risk, it is essential to show not only that information about individuals will escape the control of the person concerned — which will be true in every case — but that this particular information concerns who the individuals are as people in a manner that undermines their dignity. This the Trustees have not done.

95 Therefore, while some of the material in the court files may well be broadly disseminated, the nature of the information has not been shown to give rise to a serious risk to the important public interest in privacy, as appropriately defined in this context in reference to dignity. For that reason alone, I conclude that the Trustees have failed to show a serious risk to this interest.

(2) The Risk to Physical Safety Alleged in this Case is Not Serious

96 Unlike the privacy interest raised in this case, there was no controversy that there is an important public interest in protecting individuals from physical harm. It is worth underscoring that the application judge correctly treated the protection from physical harm as a distinct important interest from that of the protection of privacy and found that this risk of harm was "foreseeable" and "grave" (paras. 22-24). The issue is whether the Trustees have established a serious risk to this interest for the purpose of the test for discretionary limits on court openness. The application judge observed that it would have been preferable to include objective evidence of the seriousness of the risk from the police service conducting the homicide investigation. He nevertheless concluded there was sufficient proof of risk to the physical safety of the affected individuals to meet the test. The Court of Appeal says that was a misreading of the evidence, and the Toronto Star agrees that the application judge's conclusion as to the existence of a serious risk to safety was mere speculation.

97 At the outset, I note that direct evidence is not necessarily required to establish a serious risk to an important interest. This Court has held that it is possible to identify objectively discernable harm on the basis of logical inferences (*Bragg*, at paras. 15-16). But this process of inferential reasoning is not a licence to engage in impermissible speculation. An inference must still be grounded in objective circumstantial facts that reasonably allow the finding to be made inferentially. Where the inference cannot reasonably be drawn from the circumstances, it amounts to speculation (*R. v. Chanmany*2016 ONCA 576, 352 O.A.C. 121, at para. 45).

98 As the Trustees correctly argue, it is not just the probability of the feared harm, but also the gravity of the harm itself that is relevant to the assessment of serious risk. Where the feared harm is particularly serious, the probability that this harm materialize need not be shown to be likely, but must still be more than negligible, fanciful or speculative. The question is ultimately whether this record allowed the application judge to objectively discern a serious risk of physical harm.

99 This conclusion was not open to the application judge on this record. There is no dispute that the feared physical harm is grave. I agree with the Toronto Star, however, that the probability of this harm occurring was speculative. The application judge's conclusion as to the seriousness of the risk of physical harm was grounded on what he called "the degree of mystery that persists regarding both the perpetrator and the motives" associated with the deaths of the Shermans and his supposition that this motive might be "transported" to the trustees and beneficiaries (para. 5; see also paras. 19 and 23). The further step in reasoning that the unsealed estate files would lead to the perpetrator's next crime, to be visited upon someone mentioned in the files, is based on speculation, not the available affidavit evidence, and cannot be said to be a proper inference or some kind of objectively discerned harm or risk thereof. If that were the case, the estate files of every victim of an unsolved murder would pass the initial threshold of the test for a sealing order.

100 Further, I recall that what is at issue here is not whether the affected individuals face a safety risk in general, but rather whether they face such a risk as a result of the openness of these court files. In light of the contents of these files, the Trustees had to point to some further reason why the risk posed by this information becoming publicly available was more than negligible.

101 The speculative character of the chain of reasoning leading to the conclusion that a serious risk of physical harm exists in this case is underlined by differences between these facts and those cases relied on by the Trustees. In *X. v. Y.*, 2011 BCSC 943, 21

B.C.L.R. (5th) 410, the risk of physical harm was inferred on the basis that the plaintiff was a police officer who had investigated "cases involving gang violence and dangerous firearms" and wrote sentencing reports for such offenders which identified him by full name (para. 6). In *R. v. Esseghaier*, 2017 ONCA 970, 356 C.C.C. (3d) 455, Watt J.A. considered it "self-evident" that the disclosure of identifiers of an undercover operative working in counter-terrorism would compromise the safety of the operative (para. 41). In both cases, the danger flowed from facts establishing that the applicants were in antagonistic relationships with alleged criminal or terrorist organizations. But in this case, the Trustees asked the application judge to infer not only the fact that harm would befall the affected individuals, but also that a person or persons exist who wish to harm them. To infer all this on the basis of the Shermans' deaths and the association of the affected individuals with the deceased is not reasonably possible on this record. It is not a reasonable inference but, as the Court of Appeal noted, a conclusion resting on speculation.

102 Were the mere assertion of grave physical harm sufficient to show a serious risk to an important interest, there would be no meaningful threshold in the analysis. Instead, the test requires the serious risk asserted to be well grounded in the record or the circumstances of the particular case (*Sierra Club*, at para. 54; *Bragg*, at para. 15). This contributes to maintaining the strong presumption of openness.

103 Again, in other cases, circumstantial facts may allow a court to infer the existence of a serious risk of physical harm. Applicants do not necessarily need to retain experts who will attest to the physical or psychological risk related to the disclosure. But on this record, the bare assertion that such a risk exists fails to meet the threshold necessary to establish a serious risk of physical harm. The application judge's conclusion to the contrary was an error warranting the intervention of the Court of Appeal.

E. There Would Be Additional Barriers to a Sealing Order on the Basis of the Alleged Risk to Privacy

104 While not necessary to dispose of the appeal, it bears mention that the Trustees would have faced additional barriers in seeking the sealing orders on the basis of the privacy interest they advanced. I recall that to meet the test for discretionary limits on court openness, a person must show, in addition to a serious risk to an important interest, that the particular order sought is necessary to address the risk and that the benefits of the order outweigh its negative effects as a matter of proportionality (*Sierra Club*, at para. 53).

105 Even if the Trustees had succeeded in showing a serious risk to the privacy interest they assert, a publication ban — less constraining on openness than the sealing orders — would have likely been sufficient as a reasonable alternative to prevent this risk. The condition that the order be necessary requires the court to consider whether there are alternatives to the order sought and to restrict the order as much as reasonably possible to prevent the serious risk (*Sierra Club*, at para. 57). An order imposing a publication ban could restrict the dissemination of personal information to only those persons consulting the court record for themselves and prohibit those individuals from spreading the information any further. As I have noted, the likelihood and extent of dissemination may be relevant factors in determining the seriousness of a risk to privacy in this context. While the Toronto Star would be able to consult the files subject to a publication ban, for example, which may assist it in its investigations, it would not be able to publish and thereby broadly disseminate the contents of the files. A publication ban would seem to protect against this latter harm, which has been the focus of the Trustees' argument, while allowing some access to the file, which is not possible under the sealing orders. Therefore, even if a serious risk to the privacy interest had been made out, it would likely not have justified a sealing order, because a less onerous order would have likely been sufficient to mitigate this risk effectively. I hasten to add, however, that a publication ban is not available here since, as noted, the seriousness of the risk to the privacy interest at play has not been made out.

106 Further, the Trustees would have had to show that the benefits of any order necessary to protect from a serious risk to the important public interest outweighed the harmful effects of the order, including the negative impact on the open court principle (*Sierra Club*, at para. 53). In balancing the privacy interests against the open court principle, it is important to consider whether the information the order seeks to protect is peripheral or central to the judicial process (paras. 78 and 86; *Bragg*, at paras. 28-29). There will doubtless be cases where the information that poses a serious risk to privacy, bearing as it does on individual dignity, will be central to the case. But the interest in important and legally relevant information being aired in open court may well overcome any concern for the privacy interests in that same information. This contextual balancing, informed

by the importance of the open court principle, presents a final barrier to those seeking a discretionary limit on court openness for the purposes of privacy protection.

VI. Conclusion

107 The conclusion that the Trustees have failed to establish a serious risk to an important public interest ends the analysis. In such circumstances, the Trustees are not entitled to any discretionary order limiting the open court principle, including the sealing orders they initially obtained. The Court of Appeal rightly concluded that there was no basis for asking for redactions because the Trustees had failed at this stage of the test for discretionary limits on court openness. This is dispositive of the appeal. The decision to set aside the sealing orders rendered by the application judge should be affirmed. Given that I propose to dismiss the appeal on the existing record, I would dismiss the Toronto Star's motion for new evidence as being moot.

108 For the foregoing reasons, I would dismiss the appeal. The Toronto Star requests no costs given the important public issues in dispute. As such, there will be no order as to costs.

Appeal dismissed.

Pourvoi rejeté.

Footnotes

1 As noted in the title of proceedings, the appellants in this matter have been referred to consistently as the "Estate of Bernard Sherman and Trustees of the Estate and Estate of Honey Sherman and Trustees of the Estate." In these reasons the appellants are referred to throughout as the "Trustees" for convenience.

2 The use of "Toronto Star" as a collective term referring to both respondents should not be taken to suggest that only Toronto Star Newspapers Ltd. is participating in this appeal. Mr. Donovan is the only respondent to have been a party throughout. Toronto Star Newspapers Ltd. was a party in first instance, but was removed as a party on consent at the Court of Appeal. By order of Karakatsanis J. dated March 25, 2020, Toronto Star Newspapers Ltd. was added as a respondent in this Court.

3 At the time of writing the House of Commons is considering a bill that would replace part one of *PIPEDA*: Bill C-11, *An Act to enact the Consumer Privacy Protection Act and the Personal Information and Data Protection Tribunal Act and to make consequential and related amendments to other Acts*, 2nd Sess., 43rd Parl., 2020.

2022 ONSC 6354
Ontario Superior Court of Justice

Just Energy Group Inc. et. al. v. Morgan Stanley Capital Group Inc. et. al.

2022 CarswellOnt 16700, 2022 ONSC 6354, 2022 A.C.W.S. 5355, 6 C.B.R. (7th) 386

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF JUST ENERGY GROUP INC., JUST ENERGY CORP., ONTARIO ENERGY COMMODITIES INC., UNIVERSALE ENERGY CORPORATION, JUST ENERGY FINANCE CANDA ULC, HUDSON ENERGY CANADA CORP., JUST MANAGEMENT CORP., JUST ENERGY FINANCE HOLDING INC., 11929747 CANADA INC., 12175592 CANADA INC., JE SERVICES HOLDCO I INC., JE SERVICES HOLDCO II INC., 8704104 CANADA INC., JUST ENERGY ADVANCED SOLUTIONS CORP., JUST ENERGY (U.S.) CORP., JUST ENERGY ILLINOIS CORP., JUST ENERGY INDIANA CORP., JUST ENERGY MASSACHUSETTS CORP., JUST ENERGY NEW YORK CORP., JUST ENERGY TEXAS I CORP., JUST ENERGY, LLC, JUST ENERGY PENNSYLVANIA CORP., JUST ENERGY MICHIGAN CORP., JUST ENERGY SOLUTIONS INC., HUDSON ENERGY SERVICES LLC, HUDSON ENERGY CORP., INTERACTIVE ENERGY GROUP LLC , HUDSON PARENT HOLDINGS LLC, DRAG MARKETING LLC JUST ENERGY ADVANCED SOLUTIONS LLC, FULCRUM RETAIL ENERGY LLC, FULCRUM RETAIL HOLDINGS LLC, TARA ENERGY, LLC, JUST ENERGY MARKETING CORP., JUST ENERGY CONNECTICUT CORP., JUST ENERGY LIMITED, JUST SOLAR HOLDINGS CORP. and JUST ENERGY (FINANCE) HUNGARY ZRT. (Applicants) and MORGAN STANLEY CAPITAL GROUP INC. (Respondents)

McEwen J.

Heard: November 2, 2022
Judgment: November 14, 2022
Docket: CV-21-00658423-00CL

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Tim Pinos, Ryan Jacobs, Alan Merskey, for LVS III SPE XV LP, TOCU XVII LLC, HVS XVI LLC, OC II LVS XIV LP, OC III LFE I LP and CBHT Energy I LLC
David H. Botter, Sarah Link Schultz, for LVS III SPE XV LP, TOCU XVII LLC, HVS XVI LLC, OC II LVS XIV LP, OC III LFE I LP and CBHT Energy I LLC
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Howard A. Gorman, Ryan E. Manns, for Shell Energy North American (Canada) Inc. and Shell Energy North America (U.S.)
Danielle Glatt, for U.S. Counsel for Fira Donin and Inna Golovan, in their capacity as proposed class representatives in Donin et al. v. Just Energy Group Inc. et al. and Counsel to U.S. Counsel for Trevor Jordet, in his capacity as proposed class representative in Jordet v. Just Energy Solutions Inc.
David Rosenfeld, James Harnum, for Haidar Omarali in his capacity as Representative Plaintiff in Omarali v. Just Energy
Robert Kennedy, for BP Energy Company and certain of its affiliates
Jessica MacKinnon, for Macquarie Energy LLC and Macquarie Energy Canada Ltd.
Bevan Brooksbank, for Chubb Insurance Co. of Canada
Alexandra McCawley, for Counsel to Fortis BC Energy Inc.
Robert I. Thornton, Rebecca Kennedy, Rachel B. Nicholson, Puya Fesharaki, for FTI Consulting Canada Inc., as Monitor
John F. Higgins, for FTI Consulting Canada Inc., as Monitor
Ganesh Yadav, for himself
Mohammad Jaafari, for himself

Subject: Corporate and Commercial; Insolvency

APPLICATION by group of energy companies for approval of reverse vesting order and transaction in bankruptcy proceedings.

***McEwen J.*:**

1 The Applicants (collectively the "Just Energy Entities") bring a motion seeking approval of a going-concern sale transaction (the "Transaction") for their business. They seek to implement the Transaction through a proposed draft reverse vesting order (the "RVO") and other related relief.

2 The Just Energy Entities provided the court with two draft orders in furtherance of their position. The first is the RVO for the Transaction. The second is an order (the "Monitor's Order") giving FTI Consulting Canada Inc. (the "Monitor") enhanced powers to implement the RVO and other related relief, including a stay extension, approval of the Monitor's reports and fees and a sealing order.

3 I granted the two orders with reasons to follow. I am now providing those reasons.

BACKGROUND

4 Just Energy Group Inc. ("Just Energy") and its subsidiaries collectively form the Just Energy Entities. Just Energy is primarily a holding company that operates subsidiaries in Canada and the U.S.

5 Just Energy is incorporated under the*Canada* Business Corporations Act, R.S.C. 1985, c. C–44 ("CBCA") . It maintains dual headquarters in Ontario and Texas. Just Energy's shares are listed on the Toronto Stock Exchange and the New York Stock Exchange.

6 The Just Energy Entities are a retail energy provider. Their principal line of business consists of purchasing retail energy and natural gas commodities from large energy suppliers and reselling them to residential and commercial customers. The Just Energy Entities service over 950,000 residential and commercial customers across Canada and the U.S. and employ over 1,000 employees.

7 The Just Energy Entities' business is highly regulated. This is because of its nature. The business depends on many licenses, authorizations and permits across multiple jurisdictions in both Canada and the U.S. Without these approvals the Just Energy Entities cannot market or sell energy to its customers.

8 On March 9, 2022, the Just Energy Entities obtained protection under the Companies' Creditors Arrangement Act,R.S.C. 1985, c.C–36 (the "*CCAA*") pursuant to anInitial Order under the *CCAA*.

9 The Just Energy Entities were forced to file for protection under the *CCAA* after an extreme winter storm in Texas. The February 2021 storm, together with Texas regulators' response to the storm, posed a significant liquidity challenge that precipitated the filing. In or about the time of the filing, the Just Energy Entities held an aggregate book value of approximately CDN $1.069 billion, with an aggregate book value of liabilities around CDN $1.28 billion.

10 There is a complicated array of secured creditors. Insofar as the Transaction is concerned, the Pacific Investment Management Company LLC ("PIMCO") manages a number of funds which comprise a portion of the secured creditors and/or the DIP Lenders. These entities constitute the purchaser in the Transaction (the "Purchaser").

11 There are also several other secured creditors, including the Credit Facility Lenders and secured suppliers. They have reached an agreement with the Just Energy Entities and the Purchaser with respect to the Transaction.

12 In September 2021, this court granted aClaims Process Order to establish a process to determine the nature, quantum and validity of the claims against the Just Energy Entities.

13 In May 2022, the Just Energy Entities brought a motion (the "Meetings Order Motion") seeking, amongst other things, authorization to hold a creditors' meeting to vote on their proposed Plan of Compromise and Arrangement.

14 Some unsecured litigation claimants opposed the Meetings Order Motion: primarily, two uncertified U.S. class actions (together the "U.S. Class Actions"), a certified Ontario class action (the "Omarali Class Action") and plaintiffs in four actions brought in Texas by approximately 250 claimants (the "Mass Tort Claims").

15 Following my June 10, 2022 Endorsement, the Plan Sponsor — that consisted of the DIP Lenders, one of their affiliates and other stakeholders — withdrew their support for the proposed Plan of Compromise and Arrangement.

16 Thereafter, the Just Energy Entities, the Plan Sponsor and other supporting stakeholders pivoted to implementing a sales and investment solicitation process (the "SISP") in accordance with the new Support Agreement dated August 4, 2022 (the "SISP Support Agreement"). The SISP included a stalking-horse bid by the Purchaser.

17 On August 18, 2022, I granted an order (the "SISP Approval Order") that, amongst other things, approved the SISP and SISP Support Agreement with modest modifications.

18 The SISP was conducted over a 10-week period. It was conducted in accordance with the SISP Approval Order and was well-publicized. The Just Energy Entities negotiated non-disclosure agreements with potential bidders, facilitated access to the data room for those parties, responded to numerous due diligence requests and offered management presentation meetings. Four written notices of intention to bid ("NOIs") were received. Ultimately, however, no bids were received; therefore, the Transaction was declared the successful bid, subject to court approval.

19 It bears noting that, in addition to the SISP, the business of the Just Energy Entities was broadly and extensively marketed over the past approximately three years. No meaningful proposals were ever received.

20 Also, at the time of the SISP ApprovalOrder, the Just Energy Entities had been negotiating with their key stakeholders for roughly 1.5 years.

21 Further, U.S. Class Actions were involved in the SISP but ultimately did not file a NOI or engage in further discussions with the Just Energy Entities in the SISP.

22 The value that the Purchaser is paying for the Just Energy Entities is approximately U.S. $444 million plus the assumption of several liabilities, all of which provides recovery for the approximately CDN $1 billion in secured claims.

23 Last, all equity interests of Just Energy and Just Energy (U.S.) Corp. ("JEUS") that exist prior to the proposed implementation of the RVO will be deemed to be terminated, cancelled or redeemed following the closing. The Purchaser will own all the issued and outstanding shares of JEUS. In turn, JEUS will own all of the issued and outstanding shares of Just Energy and the other acquired entities. The Just Energy Entities will continue to control their own assets, other than the excluded assets, and will remain liable for their respective assumed liabilities.

THE ISSUES

24 There are two issues on this motion:

- whether the Transaction should be approved, including the RVO and related relief; and
- whether the Monitor should receive the enhanced powers requested in the Monitor's Order with respect to the implementation of the RVO and the related relief, including the stay extension, approval of the Monitor's reports and fees and a sealing order.

25 The secured creditors consent to the relief sought. Neither the U.S. Class Actions, the Omarali Class Action nor the Mass Tort Claims opposed the relief sought. The only opposition comes from Mr. Ganesh Yadav, a shareholder, and Mr. Mohammad

Jaafari, a former employee of Just Energy who is pursuing a claim in the Tokyo District Court of Japan alleging wrongful termination.

26 I will first deal with the issues surrounding the RVO and the Monitor's Order. Thereafter I will outline the two specific claims of Mr. Yadav and Mr. Jaafari and explain why I do not believe their claims affect the relief sought by the Just Energy Entities.

REVERSE VESTING ORDERS

27 A reverse vesting order generally involves a series of steps, whereby:

(a) the purchaser becomes the sole shareholder of the debtor company;

(b) the debtor company retains its assets, including key contracts and permits; and

(c) the liabilities not assumed by the purchaser are vested out and transferred, together with any excluded assets, into a newly incorporated entity or entities. [1]

The assets and liabilities are vested out in the separate entity or entities (which are referred to in the RVO as "Residual Cos.") which may then be addressed through a bankruptcy or similar process. The reverse vesting order is therefore contrasted with a traditional vesting order in which the assets of a debtor company that the purchaser acquires are vested in the purchaser free and clear of any encumbrances or claims, other than those assumed by the purchaser, as contemplated by s. 36(4) of the CCAA. The purchase price stands in place of the assets and is available to satisfy creditor claims, in whole or in part, in accordance with their pre-existing priority.

The Law relating to Reverse Vesting Orders

28 I begin my analysis with a general review of the law.

29 The jurisdiction to approve a transaction through a reverse vesting order is found in s. 11 of the CCAA. Section 11 gives this court broad powers to make orders that it sees fit, subject to the restrictions set out in the statute. There is no provision in the *CCAA* that prohibits a reverse vesting order structure: see QuestUniversity (Re), 2020 BCSC 1883, at para. 157.

30 Some courts have also held that s. 36***o***f the CCAA confers jurisdiction. Section 36 contemplates court approval for the sale of a debtor company's assets out of the ordinary course of business: see *Black Rock Metals Inc.*; *Quest University (Re)*, at para. 40.

31 In any event, it is settled law that courts have jurisdiction to approve a transaction involving a reverse vesting order. Moreover, courts agree that the factors set out in s. 36(3) of the CCAA should also be considered on a motion to approve a sale, including one involving a reverse vesting order. Section 36(3) stipulates that the court is to consider, among other things,

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

(b) whether the monitor approved the process leading to the proposed sale or disposition;

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

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

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

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

32 In *Harte Gold Corp. (Re)*, 2022 ONSC 653, Penny J. held that the s. 36(3) criteria largely correspond to the principles articulated in *Royal Bank of Canada v. Soundair Corp*, (1991), 4 O.R. (3d) 1 (C.A) for the approval of the sale of assets in an insolvency. They are as follows:

- whether sufficient effort has been made to obtain the best price and that the debtor has not acted improvidently;
- the interests of all parties;
- the efficacy and integrity of the process by which offers have been obtained; and
- whether there has been unfairness in the working out of the process.

33 Reverse vesting orders are relatively new structures. I agree that reverse vesting orders should not be the "norm" and that a court should carefully consider whether a reverse vesting order is warranted in the circumstances: see *Harte Gold Corp. (Re)* , at para. 38; *Black Rock Metals Inc.*, at para. 99. That said, reverse vesting orders have been deemed appropriate in a number of cases: see *Quest University (Re)* , at para. 168, *Harte Gold Corp. (Re)* , at para. 77 and *Black Rock Metals Inc.*, at para. 114.

34 The aforementioned cases approved reverse vesting orders in circumstances where:

- The debtor operated in a highly-regulated environment in which its existing permits, licenses or other rights were difficult or impossible to reassign to a purchaser.
- The debtor is a party to certain key agreements that would be similarly difficult or impossible to assign to a purchaser.
- Where maintaining the existing legal entities would preserve certain tax attributes that would otherwise be lost in a traditional vesting order transaction.

35 Given the supporting jurisprudence, I will now discuss why the RVO should be granted and why the Transaction should be approved.

The RVO should be granted

36 The Just Energy Entities' business, as noted, is highly regulated and depends almost entirely on a substantial number of licenses, authorizations and permits in multiple jurisdictions in Canada and the U.S.

37 As set out in the affidavit of Mr. Michael Carter, the Chief Financial Officer to the Just Energy Entities (at para. 57), the value of the Just Energy Entities' business arises predominantly from the gross margin in their customer contracts. The business is wholly dependent on the Just Energy Entities holding several non-transferable licenses and authorizations that permit their operation in Canada and the U.S. and in their agreements with over 100 public utilities, which allow the Just Energy Entities to provide natural gas and electricity in certain markets to their customers.

38 Currently the Just Energy Entities hold at least:

- Seventeen separate licenses and authorizations in five provinces in Canada which allows them to market natural gas and electricity in the applicable provincial markets, eight of which are non-transferrable and non-assignable, with the remaining nine only assignable with leave of the regulator.
- Five separate import and export orders issued by the Canadian Energy Regulator ("CER"), all of which are non-transferrable and non-assignable.
- Three separate registrations with the Alberta Electricity System Operator (the "AESO") in Alberta and with the Independent Electricity System Operator ("IESO") in Ontario, all of which are either non-transferrable or only assignable with leave.

• Six licenses in Nevada and New Jersey to allow them to market natural gas and/or electricity in the applicable states, all of which are non-transferrable.

• Twenty-five licenses in Connecticut, Delaware, Maine, Maryland, Ohio, Pennsylvania and Virginia to allow them to market natural gas and/or electricity in the applicable states, all of which may only be transferred with the prior authorization of the applicable regulator in each jurisdiction.

• Eighteen electricity and/or natural gas provider licenses or authorizations in California, Illinois, Massachusetts, Michigan, and New York, where no process for transferring the licenses or authorizations is prescribed in the applicable statutes.

• Five retail electricity provider certifications in Texas which may only be transferred with the authorization of the Public Utility Commission of Texas ("PUCT").

• Three separate export authorizations issued by the Department of Energy ("DOE") in the U.S., all of which may only be transferred with the prior authorization of the DOE's assistant secretary.

• Seven separate market-based authorizations issued by the Federal Energy Regulatory Commission ("FERC") in the U.S. which may only be transferred with the prior authorization of FERC.

39 As further deposed by Mr. Carter, all the provincial, state, market participation, export and import orders, licenses and authorizations held by the Just Energy Entities are either non-transferrable, capable of transfer only with the approval of the applicable regulator, or provide for no clear regulatory process for the transfer of such authorizations.

40 On Mr. Carter's analysis, the RVO would not hamper the existing licenses, authorizations, orders and agreements. As such, he deposes that the RVO structure is the only feasible structure for the Transaction (at para. 59). Any other structure would risk exposing most of the 89 licenses upon which the Just Energy Entities' business is founded. Mr. Carter also deposes (at para. 75) that if a traditional vesting order was granted, the Purchaser would be required to participate in a separate regulatory process in five Canadian provinces, 15 U.S. states and with federal agencies in both Canada and the U.S. to try and obtain transfers of the 89 licenses, authorizations and certifications or the issuance of new licenses, authorizations and certifications. This risk and uncertainty would affect the value of a sale to any other purchaser. For this reason, the benefit of the RVO is clear: it preserves the necessary approvals to conduct business.

41 Additionally, Mr. Carter (at para. 60) deposes that the Just Energy Entities are party to a myriad of hedging transactions. This includes hedge transactions with commodity suppliers to minimize commodity and volume risk, foreign exchange hedge transactions and hedges for renewal energy credits, many of which are fundamental to the Just Energy Entities' ability to effectively operate their business and non-transferrable. Moreover, any U.S. tax attributes resident in the Just Energy Entities would generally be unable to be utilized in the go-forward business where the Transaction structure has a traditional asset sale vesting order.

42 No stakeholder disputes Mr. Carter's evidence. More specifically, no stakeholder disputes the importance of maintaining the 89 current licenses, authorizations and certifications listed above. And, no stakeholder disputes the fact that under a traditional asset sale and approval and vesting order structure, a purchaser would have to apply to the various agencies and regulators for transfers of the aforementioned licenses, etc.

43 I agree with the Just Energy Entities, who are supported by the Monitor. Given the above, the RVO sought is the only way to achieve the preservation of the licenses, authorizations and certifications necessary for the ongoing business operations of the Just Energy Entities. This includes transferring the excluded assets into the two Residual Cos., one in Canada and one in the U.S. as is typically the case in reverse vesting orders.

44 The fact that the Just Energy Entities has been operating for approximately 19 months since the *CCAA* filing is critical. As noted by Penny J. in *Harte Gold Corp. (Re)* , at para. 72, time is not on the side of a debtor company facing financial challenges. I agree.

45 For all the reasons above, I am satisfied that the RVO is appropriate.

46 I now turn to the s. 36(3) factors.

The Transaction is fair and reasonable

The process leading to the proposed sale was reasonable

47 The Transaction was developed by the Just Energy Entities in consultation with the Monitor and its financial advisor, Mr. Mark Caiger, the Managing Director, Mergers & Acquisitions at BMO Nesbitt Burns Inc., as well as the Purchaser and other secured lenders. As noted, the SISP was approved by this court and thereafter conducted as per the provisions of the SISP Approval Order. As set out in Mr. Carter's affidavit, the SISP was undertaken in accordance with the SISP Approval Order in two stages.

48 The overview of the SISP structure is well described in Mr. Caiger's October 19, 2022 affidavit. Amongst other things, in the first stage, the Just Energy Entities and Mr. Caiger prepared a list of potential bidders, established a data room and published a press release announcing the SISP. Mr. Caiger contacted 41 potential bidders, non-disclosure agreements were negotiated and four NOIs were received.

49 The process then moved into the second stage. The Just Energy Entities prepared a form of transaction agreement that included a form of approval and RVO for completion by bidders as part of receiving submissions of a qualified bid. Three of the four second stage participants eventually indicated that they were not going to proceed. The remaining party did not submit a bid. It advised the Monitor that it saw no value beyond the stalking-horse bid.

50 The Transaction before this court is therefore the only going-concern Transaction available to the Just Energy Entities. I am satisfied in the circumstances that the market was thoroughly canvassed and, as noted, in addition to the SISP, the business of the Just Energy Entities has been marketed broadly and extensively for approximately three years. The U.S. Class Actions previously indicated that they may advance their own restructuring plan for consideration and voting by the Just Energy Entities creditors. During this process, they were allowed full participation but ultimately did not file a NOI or further engage in the SISP process.

The Monitor has approved the process

51 As noted, the Monitor approved the process that lead to the Transaction. The Monitor concluded that the RVO is the only efficient means to ensure that all the licenses, authorizations and agreements remain in place. The Monitor is also of the view that any potential prejudice to the individual creditors is far outweighed by the overall benefit of the Transaction. Importantly, the Monitor also believes that the RVO represents the only viable alternative to implement the Transaction for the benefit of the Just Energy Entities' stakeholders.

The Transaction is more beneficial to the creditors than a sale or disposition in bankruptcy

52 The Monitor assisted the Just Energy Entities in preparing a liquidation analysis when the Just Energy Entities were pursuing approval of the Plan of Compromise and Arrangement. The analysis has been updated. The Monitor and the Just Energy Entities concluded, on the basis of the updated liquidation analysis, that not only would a liquidation produce no recovery for unsecured creditors, but it would result in a shortfall to secured creditors. This, of course, would be less beneficial than closing the Transaction.

The creditors were consulted

53 As noted in this endorsement, extensive consultation was undertaken both with the secured creditors, the U.S. Class Actions, the Omarali Class Action and the Mass Tort Claims. There is no suggestion in the record that any creditors were ignored or overlooked.

The effect of the Transaction on creditors and other interested parties

54 I am of the belief that the RVO is the only viable option for a going-concern exit from the *CCAA* proceedings.

55 No other offers have been obtained, not only during the SISP but also in the past three years when the Just Energy Entities' business was being broadly and extensively marketed. No other plan or proposal has been put forward.

56 The Transaction, in my view, provides a number of positive benefits, including:

- preserving the going-concern value of the business for the benefit of stakeholders;
- maintaining the Just Energy Entities' relationships with the majority of its commodity suppliers, vendors, trade creditors and other counter-parties;
- providing for the continued operation of the Just Energy Entities across Canada and the U.S.;
- continuing to supply uninterrupted energy to the Just Energies Entities approximately 950,000 customers;
- preserving the ongoing employment of most of the more than 1,000 employees of the Just Energy Entities;
- maintaining the aforementioned regulatory and licensing relationships across Canada and the U.S.;
- satisfying or assuming in full all secured claims and priority payables;
- preserving U.S. tax attributes and tax pools; and
- permitting the Just Energy Entities to exit these proceedings with a significantly deleveraged balance sheet and a U.S. $250 million new credit facility bringing an end to the *CCAA* proceedings aside from the limited matters related to the Residual Cos.

57 As discussed, the Transaction does not provide any recovery for unsecured creditors or shareholders. I accept the submissions of the Just Energy Entities, however, that this is not a result of the RVO structure. Rather, this reflects the fact that the Just Energy Entities' value, as tested through the market through the SISP and through previous marketing attempts over three years, is not high enough to generate value for the unsecured creditors and shareholders. This was also the situation in *Black Rock Metals Inc.* (see paras. 109, 120). I agree with the comments in *Black Rock Metals Inc.* wherein Chief Justice Paquette stated that the unsecured creditors and shareholders are therefore not in a worse position with the reverse vesting order than they would have been under a traditional asset sale. Either way, they have no economic interest because the purchase price would not generate any value for the unsecured creditors and shareholders.

58 There is no other viable option being presented to this court. Further, it bears noting that the shareholders' interests amount to claims in equity. As noted in *Harte Gold Corp. (Re)* , at para. 64, shareholders have no economic interest in an insolvent enterprise and therefore they are not entitled to a vote in any plan. The portion of the order requested relating to the cancellation of the existing shares is, therefore, justified in the circumstances.

59 The consideration to be received for the assets is fair and reasonable. The Just Energy Entities' business was extensively marketed both prior to and during the *CCAA*. There have been no offers, except that put forth by the Purchaser. Therefore, I accept that the consideration is fair and reasonable.

60 While it is unfortunate that there is no recovery for unsecured creditors or shareholders, this is a function of the market. In this regard, it is noteworthy that PIMCO holds over U.S. $250 million in unsecured debt that it will not recover.

61 There is also evidence above that the purchaser is paying more than the Just Energy Entities would be worth in a bankruptcy. Furthermore, the Monitor is satisfied that the consideration is fair in the circumstances.

Other considerations

62 Based on the foregoing analysis of the s. 36(3) provisions, I am also satisfied that the criteria set out above in *Soundair* have been met: there has been a sufficient effort to obtain the best price; the debtor has not acted improvidently; the interests of the parties have been properly considered; the process has been carried out with efficacy and integrity; and there is no unfairness in the circumstances.

63 The Transaction will provide for a fair and reasonable resolution of the Just Energy Entities' insolvency and obtain the best value for its assets. In sum, employment is preserved for most employees and energy will continued to be provided for approximately 950,000 customers.

Related relief

64 With respect to the shareholdings in the Just Energy Entities, it is reasonable to cancel the existing shares and issue new common shares to the Purchaser via JEUS. Similar approaches have been used in other reverse vesting order transactions: see *Black Rock Metals Inc.*, at para. 122; *Harte Gold Corp. (Re)* , at paras. 59-64. Since the existing shareholders have no economic interest in the company, there is no entitlement to recovery unless all creditors are paid in full: *Canwest Global Communications Corp. (Re)*, 2010 ONSC 4209, 70 C.B.R. (5th) 1.

65 The *CBCA* provides that the share conditions of a *CBCA* corporation under *CCAA* protection can be changed by articles of reorganization. Section 191(1) of the CBCA recognizes that a "reorganization" includes a court order made under any Act of Parliament that affects the rights among the corporation, its shareholders and other creditors (see s. 191(1)(c)). This includes the *CCAA*: see *Canwest*, at para. 34; *Black Rock Metals Inc.*, at para. 122; *Harte Gold Corp. (Re)* , at para. 61 (dealing with the equivalent provision of Ontario's Business Corporations Act, R.S.O. 1990, c.B.16. (*OBCA*)).

66 Pursuant to ss. 173, 176(1)(b) and191(2) of the *CBCA* , courts have accepted that, under a *CCAA* proceeding, they can approve the cancellation of outstanding shares as part of a corporate reorganization that gives effect to a *CCAA* restructuring transaction and that the shareholders are not entitled to vote: see *Harte Gold Corp. (Re)*, at para. 62; *Black Rock Metals Inc.*, at para. 122; *Canwest*, at para. 34.

67 There are also a number of other orders requested in the RVO that I have approved. I will briefly deal with the noteworthy ones below, as follows:

- It is appropriate that the RVO provides that all former employees of the Just Energy Entities be transferred to the Canadian Residual Cos. This will assist these former employees in relation to their entitlements under the Wage Earner Protection Program Act,S.C. 2005, c.47, s.1. Similar relief was granted in *Quest University (Re)*, which also involved a reverse vesting order.

- The releases sought are proportional in scope and consistent with releases granted in other similar *CCAA* proceedings. I have analyzed the factors set out by Penny J. in *Harte Gold Corp. (Re)* , at paras. 81-86. As in that case, the releases are rationally connected to the purposes of the restructuring; the releasees contributed to the restructuring; the releases are not overly broad; the releases will enhance the certainty and finality of the Transaction; the releases benefit the Just Energy Entities, its creditors and other stakeholders by reducing the potential for the released parties to seek indemnification; and all creditors on the service list were made aware of the releases sought and the nature and effect of the release.

- The specific relief in the RVO concerning the ongoing litigation with the Electric Reliability Council of Texas Inc. ("ERCOT") is fair and reasonable. The wording was negotiated with ERCOT and preserves the Just Energy Entities' and ERCOT's rights in the ongoing litigation between them as set out para. 11.

- Similarly, the paragraphs of the RVO concerning the Omarali Class Action are fair and reasonable and have been negotiated with the Omarali Class Action solicitors and are not prejudicial to the insurers noted therein.

• All remaining ancillary relief is fair and reasonable. I have simply touched upon the most significant ancillary relief above.

THE MONITOR'S ORDER

68 As outlined, I granted the Monitor'sOrder.

69 First, it is necessary that the Monitor carry on in order to implement the steps required with respect to the Residual Cos. in Canada and the U.S. and to implement the provisions of the RVO.

70 Second, the stay extension to January 31, 2023 is also necessary given the steps that must be undertaken.

71 I have reviewed the activities of the Monitor's reports and fees and they are fair and reasonable.

72 Last, I agree that a sealing order should be issued with respect to confidential Exhibit "F" of Mr. Caiger's affidavit. Exhibit "F" is comprised of the four NOIs received by the Just Energy Entities. The NOIs contain confidential, commercially sensitive information regarding the identities of the four participants and their respective corporate, operational and financial information disclosed in support of the requirement of each NOI. Additionally, the NOIs contain confidential and commercially sensitive information regarding the scope and subject matter of each proposed bid. Dissemination of this information at this time, would pose a legitimate risk to the commercial interests of the SISP participants and the Just Energy Entities and their stakeholders should the Transaction fail to close. Thus, the public's interest in maintaining the confidentiality of this commercially sensitive information creates an important commercial interest. Accordingly, I am satisfied that the test set out in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522, at para. 53, as recast in *Sherman Estate v. Donovan*, 2021 SCC 25, 458 D.L.R. (4th) 361, at para. 38, has been met. The sealing order is being made on an interim basis pending further order of the court.

CLAIMS OF BP ENERGY COMPANY

73 At the request of the Just Energy Entities and the BP Energy Company, I will now turn to agreed-upon terms as between the Just Energy Entities and the BP Energy Company.

74 The Just Energy Entities and BP Energy Company and certain of its affiliates (collectively "BP") and the Just Energy Entities have reached an agreement, which is not opposed by any other stakeholders, that BP, being beneficiaries of the Priority Commodity/ISO Charge in these proceedings, are not opposing this motion on the basis that the New Intercreditor Agreement will be on terms consistent with those set forth in the term sheet included in Exhibit "I" to the Affidavit of Mr. Carter sworn August 4, 2022 (the "ICA Term Sheet").

75 To the extent that the terms of the New Intercreditor Agreement are inconsistent with the ICA Term Sheet or contain material changes to the current Intercreditor Agreement that are not specifically set forth in the ICA Term Sheet, BP is reserving its rights to return to this Court to (a) oppose the future release of the Priority Commodity/ISO Charge contemplated by the Reverse Vesting Order and (b) take such action as it reasonably deems necessary to assure its future extensions and credit and accommodations are terminated.

76 I have reviewed this agreement with counsel and find it to be fair and reasonable in the circumstances of the Transaction.

THE OPPOSING STAKEHOLDERS

77 As noted, two stakeholders raised objections to the orders sought by the Just Energy Entities. I will deal with each in turn.

Ganesh Yadav

78 Mr. Yadav is a shareholder.

79 Mr. Yadav did not file any affidavit evidence or any other evidence in a proper form. Rather, he filed what he described as a "motion record" in which he attached various documents relating to the Just Energy Entities' financial performances and outlined his objections.

80 Essentially, he submits that the Just Energy Entities have significant liquidity, far in excess of the stalking-horse bid and the calculations performed by the Just Energy Entities and the Monitor. He primarily submits that the Just Energy Entities have significant future equity in its hedges, that energy prices are increasing and that the hedges are placed at very attractive prices. To support this argument, he relies upon the Just Energy Entities' 2022 annual report describing the derivative instruments. Mr. Yadav stresses that there are significant cash flows and that the future value of the Just Energy Entities is very promising.

81 The difficulty with Mr. Yadav's submissions, however, is the fact that there is no evidentiary basis for these submissions other than a loose connection of documents that, in and of themselves, do not support his argument.

82 More importantly, the Just Energy Entities' business was marketed for over three years and was widely canvassed during the SISP. During this entire time period there has not been a single offer in excess of the stalking-horse offer. Further, Mr. Yadav's submissions concerning value run contrary to the Just Energy Entities and the Monitor's valuation of the company and are unsupported by any other stakeholder.

83 Based on the foregoing, there is no cogent evidence in the record to support Mr. Yadav's submissions, nor has he adduced proper evidence to this court by way of affidavit or expert's report.

84 As a shareholder, he has an equity claim for which there is no recovery in the Transaction.

Mohammad Jaafari

85 Mr. Jaafari also did not file any affidavit evidence at this motion. He, too, simply provided a number of documents. [2]

86 Mr. Jaafari is a former Director and Representative Director of Just Energy Japan Kabushiki Kaisha ("JEJKK"), a former subsidiary of Just Energy. JEJKK operated the Just Energy Entities' businesses in Japan.

87 Mr. Jaafari was terminated from his position in August 2018, allegedly for cause.

88 In November 2018, he commenced litigation in the Tokyo District Court against Just Energy and JEJKK.

89 In April 2020, the Just Energy Entities sold their Japanese business. Mr. Jaafari submitted a Proof of Claim in the *CCAA* proceeding that was disallowed by the Monitor.

90 Mr. Jaafari apparently has continued his litigation in Tokyo. As noted above, although there is no affidavit evidence, the documentation that he has filed with this court includes apparent endorsements by the Tokyo District Court which, if accurate, accept that Mr. Jaafari was an employee of Just Energy.

91 Mr. Jaafari submits that as part of the RVO, I should order that money be paid in trust until the litigation in Tokyo is resolved. As I understand it, he is seeking a payment of approximately CDN $2 million.

92 The Just Energy Entities submit that Mr. Jaafari's ongoing litigation is in violation of the Initial Order and that he was never an employee of Just Energy. Counsel also advises that they recently heard from their former Japanese counsel (although there is no evidence to support this) that Mr. Jaafari's action against Just Energy was dismissed.

93 In any event, the Just Energy Entities submit that, at best, Mr. Jaafari has an unsecured claim that is incapable of recovery since unsecured creditors are receiving no money as a result of the Transaction. Therefore, even if he is successful, there is no recovery.

94 The Monitor, in support of the Just Energy Entities' submissions, confirms that there is no recovery for Mr. Jaafari even if he is successful. The Monitor further submits that a payment into court or into some sort of trust would constitute a preference, which is inappropriate where other unsecured creditors are not receiving any money as a result of the Transaction.

95 Based on the incomplete record in front of me, there is no meaningful way to determine the status and legitimacy of Mr. Jaafari's claim for wrongful dismissal.

96 In any event, I accept the submissions of the Just Energy Entities, supported by the Monitor, that Mr. Jaafari's claim constitutes an unsecured claim for which there will be no recovery in the circumstances of this case.

97 As the Monitor points out, Just Energy no longer has any assets or operations in Japan and no longer owns JEJKK. The stay of proceedings does not extend to JEJKK, which is now owned by another corporation. The Monitor submits that Mr. Jaafari is free to pursue such claims in Japan without the involvement of the Just Energy Entities. To allow Mr. Jaafari's claim to continue against the Just Energy Entities in Japan would require the Just Energy Entities to incur expenses, perhaps make a payment into court or into trust and would deplete the Just Energy Entities' estate to the detriment of the other stakeholders with no foreseeable benefits to Mr. Jaafari.

98 I therefore accept the Monitor's submission that this court order that Mr. Jaafari's claim can be addressed by the Just Energy Entities, in consultation with the Monitor, in accordance with the terms of the Claims Procedure Order. I am specifically not making an order that any money be paid into court or into a trust account.

CONCLUSION

99 For the reasons above, the RVO and theMonitor's Order should be approved. A reverse vesting order is permitted pursuant to the above provisions of the *CCAA*. Given the nature of the Just Energy Entities' business, the RVO structure is necessary and appropriate to preserve the going-concern value of the business. The Transaction is the only viable transaction that has emerged in the 19 months since the *CCAA* filing. It is currently the only option for a going-concern exit from the *CCAA* proceedings. The Transaction is the product of months of negotiations between the Just Energy Entities' key stakeholders as well as a robust court-approved SISP.

100 Overall, the Transaction provides tangible benefits to the Just Energy Entities and their stakeholders. The fact that the Transaction provides no recovery for the general unsecured creditors or shareholders is a function of the market, not the RVO structure.

DISPOSITION

101 For the reasons above, I grant both the RVO and the Monitor's Order.

Application granted.

Footnotes

1 Arrangement relatif à BlackRock Metals Inc., 2022 QCCS 2828, at para. 85, leave to appeal to QCCA refused, 2022 QCCA 1073.

2 Mr. Jaafari continued to improperly send documents directly to me, after I signed the two orders, which I have not considered in preparing these reasons.

End of Document

2015 ONSC 7574
Ontario Superior Court of Justice

Target Canada Co., Re

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

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

Morawetz R.S.J.

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

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

Subject: Insolvency

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

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

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

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

3 Such is not the case in this matter.

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

5 The essence of the opposition is that the request of the Monitor to obtain approval of its activities — particularly in these liquidation proceedings — is both premature and unnecessary and that providing such approval, in the absence of full and complete disclosure of all of the underlying facts, would be unfair to the creditors, especially if doing so might in future

be asserted and relied upon by the Applicants, or any other party, seeking to limit or prejudice the rights of creditors or any steps they may wish to take.

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

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

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

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

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

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

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

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

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

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

> (a) allows the monitor and stakeholders to move forward confidently with the next step in the proceeding by fostering the orderly building-block nature of CCAA proceedings;
>
> (b) brings the monitor's activities in issue before the court, allowing an opportunity for the concerns of the court or stakeholders to be addressed, and any problems to be rectified in a timely way;
>
> (c) provides certainty and finality to processes in the CCAA proceedings and activities undertaken (eg., asset sales), all parties having been given an opportunity to raise specific objections and concerns;
>
> (d) enables the court, tasked with supervising the CCAA process, to satisfy itself that the monitor's court-mandated activities have been conducted in a prudent and diligent manner;
>
> (e) provides protection for the monitor, not otherwise provided by the CCAA; and
>
> (f) protects creditors from the delay in distribution that would be caused by:
>
> a. re-litigation of steps taken to date; and
>
> b. potential indemnity claims by the monitor.

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

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

> 25. "TD and Vriend point out that the doctrine of *res judicata* is not limited to issue estoppel, but includes cause of action estoppel as well. The distinction between these two related components of *res judicata* was concisely explained by Cromwell J.A., as he then was, in *Hoque v. Montreal Trust Co. of Canada* (1997), 162 N.S.R. (2d) 321 (C.A.) at para. 21:
>
> > 21 *Res judicata* is mainly concerned with two principles. First, there is a principle that "... prevents the contradiction of that which was determined in the previous litigation, by prohibiting the relitigation of issues already actually addressed.": see Sopinka, Lederman and Bryant, *The Law of Evidence in Canada* (1991) at p. 997. The second principle is that parties must bring forward all of the claims and defences with respect to the cause of action at issue in the first proceeding and that, if they fail to do so, they will be barred from asserting them in a subsequent action. This "... prevents fragmentation of litigation by prohibiting the litigation of matters that were never actually addressed in the previous litigation, but which properly belonged to it.": *ibid* at 998. Cause of action estoppel is usually concerned with the application of this second principle because its operation bars all of the issues properly belonging to the earlier litigation.
>
> . . . . .
>
> 30. It is salutary to keep in mind Mr. Justice Cromwell's caution against an overly broad application of cause of action estoppel. In *Hoque* at paras. 25, 30 and 37, he wrote:
>
> > 25. The appellants submit, relying on these and similar statements, that cause of action estoppel is broad in scope and inflexible in application. With respect, I think this overstates the true position. In my view, this very broad language which suggests an inflexible application of cause of action estoppel to all matters that "could" have been raised does not fully reflect the present law.
> >
> > . . . . .
> >
> > 30. The submission that all claims that could have been dealt with in the main action are barred is not borne out by the Canadian cases. With respect to matter not actually raised and decided, the test appears to me to be that the party should have raised the matter and, in deciding whether the party should have done so, a number of factors are considered.
> >
> > . . . . .
> >
> > 37. Although many of these authorities cite with approval the broad language of *Henderson v. Henderson*, *supra*, to the effect that any matter which the parties had the opportunity to raise will be barred, I think, however, that this language is somewhat too wide. The better principle is that those issues which the parties had the opportunity to raise and, in all the circumstances, should have raised, will be barred. In determining whether the matter should have been raised, a court will consider whether proceeding constitutes a collateral attack on the earlier findings, whether it simply assets a new legal conception of facts previously litigated, whether it relies on "new" evidence that could have been discovered in the earlier proceeding with reasonable diligence, whether the two proceedings relate to separate and distinct causes of action and whether, in all the circumstances, the second proceeding constitutes an abuse of process.

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

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

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

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

19 On motions of the type, where the evidence is considered and findings of fact are made, the resulting decision affects the rights of all stakeholders. This is recognized in the jurisprudence with the acknowledgment that res judicata and related doctrines apply to approval of a Monitor's report in these circumstances. (See: *Toronto Dominion Bank v. Preston Springs Gardens Inc.*, [2006] O.J. No. 1834 (Ont. S.C.J. [Commercial List]); *Toronto Dominion Bank v. Preston Springs Gardens Inc.*, 2007 ONCA 145 (Ont. C.A.) and *Bank of America Canada v. Willann Investments Ltd.*, [1993] O.J. No. 3039 (Ont. Gen. Div.)).

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

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

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

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

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

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

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

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

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

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

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

(ii) potential indemnity claims by the Monitor.

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

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

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

Application granted in part.

End of Document

2023 ONSC 3400
Ontario Superior Court of Justice [Commercial List]

Triple-I Capital Partners Limited v. 12411300 Canada Inc.

2023 CarswellOnt 8707, 2023 ONSC 3400

APPLICATION UNDER Section 243(1) of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, as amended, and Section 101 of the Courts of Justice Act, R.S.O. 1990, c. C.43, as amended

Triple-I Capital Partners Limited (Applicant) and 12411300 Canada Inc. (Respondent / Debtor)

Peter J. Osborne J.

Heard: June 6, 2023
Judgment: June 6, 2023
Docket: CV-22-00684372-00CL

Counsel: Kevin Sherkin, Monica Faheim, Hans Rizarri, for Receiver, Crow Soberman Inc.
Avi Freedland, for Respondent / Debtor

Subject: Civil Practice and Procedure; Corporate and Commercial; Insolvency; Property

MOTION by receiver for approval of third report and activities, approval of statement of receipts and disbursements, approval of fees and disbursements, and discharge.

***Peter J. Osborne J.*:**

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

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

Chronology of This Matter

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Material Filed and Positions of the Parties

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

17 The Debtor relies on an affidavit from its own counsel who argued the motion sworn in support of its position. This practice is not to be preferred, particularly for matters that are contentious. Here, the Receiver submits that the affidavit should not be relied upon. In the main, it appears to contain a summary of the chronology of certain key events and other statements that are more in the nature of argument or submissions and therefore more properly belong in a factum.

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

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

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

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

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

The Test

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

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

b. the complications and difficulties encountered;

c. the degree of assistance provided by the debtor;

d. the time spent;

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

f. the diligence and thoroughness displayed;

g. the responsibilities assumed;

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

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

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

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

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

Application of the Test to This Case

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

45 The Receiver submits, and I accept, that its efforts undertaken with respect to the sale process were appropriate, in accordance with Court approval, and the fact that ultimately, a refinancing was concluded such that a sale was not necessary, does not render, retroactively, those efforts unnecessary nor the fees in respect of those efforts inappropriate and unrecoverable.

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

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

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

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

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

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

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

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

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

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

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

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

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

58 I am satisfied that while the receivership property consisted largely of one piece of land and the building thereon, it does not follow that the issues confronting the Receiver were necessarily straightforward or uncomplicated. As admitted and indeed

emphasized by the Debtor, the value of the asset reflected its unique and single-purpose: operation of a cannabis facility. That in turn required a Health Canada licence which was not issued until later in the process.

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

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

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

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

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

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

Approval of the Third Report and Activities

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

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

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

Costs

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

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

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

71 Order to go in accordance with these reasons.

Order accordingly.

