

**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: WEDNESDAY, JUNE 11, 2025 AT 9:00 AM
BEFORE THE HONOURABLE MR. JUSTICE CHARTIER**

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

J.J. BURNELL / ANJALI SANDHU
Phone: (204) 957-4663 / (204) 957-4760
Fax: (204) 957-0840

File No. 0088420.00003

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PART I DOCUMENTS AND AUTHORITIES RELIED UPON

A. Documents To Be Relied Upon:

1. Order (Appointing Receiver) pronounced August 29, 2023 (the “**Receivership Order**”);
2. First Report of the Receiver dated November 16, 2023 (the “**First Report**”);
3. Second Report of the Receiver dated November 27, 2024 (the “**Second Report**”);
4. Order pronounced December 2, 2025;
5. Third Report of the Receiver dated January 23, 2025 (the “**Third Report**”);
6. Supplement to the Third Report dated January 29, 2025 (the “**Third Supplement**”);
7. Fourth Report of the Receiver dated June 5, 2025 (the “**Fourth Report**”);
8. Confidential Supplement to the Fourth Report dated June 5, 2025 (the “**Confidential Supplement**”); and
9. Affidavit of Service of Brittany Chapdelaine sworn June 10, 2025 (the “**Affidavit of Service**”).

B. Cases and Statutory Provisions and Authorities To Be Relied Upon:

TAB

1. *The Court of King’s Bench Act*, C.C.S.M. c. C280 (the “**KB Act**”), ss. 37(1) & 77(1);
2. *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the “**BIA**”), ss. 14.06(7), 81.4(4), and 81.6(2), 243, 247;
3. *The Builders’ Liens Act*, C.C.S.M. c. B91 (the “**BLA**”), s. 31;
4. *Royal Bank v Soundair Corp.* (1991) 4 OR (3d) 1;
5. *Royal Bank of Canada v Keller & Sons Farming Ltd.*, 2016 MBQB 77;
6. *Sherman Estate v Donovan*, 2021 SCC 25;
7. *Just Energy Group Inc. et al. v Morgan Stanley Capital Group Inc. et al*, 2022 ONSC 6354;
8. *Ontario Securities Commission v Bridging Finance Inc.*, 2023 ONSC 4203;
9. *Target Canada Co (Re)*, 2015 ONSC 7574;

10. *Triple-I Capital Partners Limited v 12411300 Canada Inc.*, 2023 ONSC 3400;
11. *Skeena Resources Ltd. v. Mill*, 2024 BCCA 249;
12. *Ed Mirvish Enterprises Ltd v Stinson Hospitality Inc.*, [2009] OJ No 4265;
13. *West Face Capital Inc v Chieftain Metals Inc.*, 2020 ONSC 5161;
14. Compare of draft Sale Approval and Vesting Order to the Manitoba Model Sale Approval and Vesting Order; and
15. Compare of draft Discharge and Distribution Order to the Manitoba Model Discharge Order.

PART II INTRODUCTION

1. On August 29, 2023, KMPG Inc. was appointed receiver and manager (the “**Receiver**”) over the assets, undertakings and property of Bokhari Development Inc. (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 “**Land**”), including the development of the project (the “**Project**”) located thereon and all proceeds thereof (collectively, the “**Property**”) pursuant to the Order (Appointing Receiver) pronounced by the Honourable Mr. Justice Chartier (the “**Receivership Order**”).

2. By Amended Order pronounced on December 2, 2024 by the Honourable Mr. Justice Chartier, this Court, *inter alia*, approved of a sales process (the “**Sales Process**”) in respect of the Project, which was carried out by the Receiver.

3. On the conclusion of the Sales Process, the Receiver entered into an Asset Purchase Agreement dated February 13, 2025, as amended by an Extension Agreement dated April 14, 2025, Amendment Agreement No. 2 dated May 9, 2025 and Amendment Agreement No. 3 dated May 12, 2025 (together, the “**Sale Agreement**”), between the Receiver in its capacity as Receiver of the Property, as vendor, and Erickson Heights Ltd. (the “**Purchaser**”), as purchaser.

4. The Receiver has brought the within motion seeking an Order, *inter alia*: (i) validating service; (ii) approving the sale transaction (the “**Transaction**”) contemplated by the Sale Agreement and vesting in the Purchaser the Debtor’s right, title and interest

in and to the assets described in the Sale Agreement (the “**Purchased Assets**”); (iii) approving certain payments and distributions by the Receiver; (iv) sealing the Confidential Supplement; (v) approving the Receiver’s actions and activities; (vi) approving the Receiver and its counsel’s fees and disbursements and estimated fees and disbursements; (vii) declaring the Unclaimed Container (as hereinafter defined) abandoned and Property under the Receivership Order; and (viii) discharging and releasing the Receiver.

5. Once the foregoing activities have been completed, the administration of these receivership proceedings will be substantially complete.

PART III FACTS

6. On August 29, 2023 the Receiver was appointed Receiver over the Property, including the Project located thereon and the proceeds thereof pursuant to the Receivership Order.

Receivership Order, KB Doc. No. 10

7. The Project involves the development of an affordable housing complex consisting of 13 mid-rise buildings (the “**Buildings**”).

First Report, paras 9 and 22

(a) Sales Process

8. By Amended Order pronounced December 2, 2024 by the Honourable Mr. Justice Chartier, this Court, *inter alia*, approved the Sales Process in respect of the Project, and the engagement of Colliers International Group Inc. as broker (the “**Broker**”) by the Receiver to assist with the Sales Process.

Order pronounced December 2, 2025, para 2, KB Doc. No. 28

9. During the Sales Process, the Project was marketed to approximately 1,258 parties, 22 of whom executed confidentiality agreements in connection with the Sales Process and were granted access to an electronic data room containing information concerning the Project. Six parties conducted site visits at the Project premises.

Fourth Report, paras 19-20

10. The Receiver received five non-binding letters of interests in advance of the initial bid deadline of January 17, 2025. Pursuant to the Court-approved terms of the Sales Process the non-binding letter of interest submitted by Erickson Heights Ltd. (the “**Purchaser**”) was selected by the Receiver as the “Lead Bid”.

Fourth Report, para 24-25

11. The second highest bidder was not prepared to increase the purchase price in its Bid, and the other offers were far below the Lead Bid.

Fourth Report, para 25

12. The Applicant, Peoples Trust Company (the “**Applicant**”, or “**Peoples**”) was supportive of the Receiver moving forward with the Lead Bid, and the Receiver invited the Purchaser to submit a binding offer.

Fourth Report, para 26

13. On February 13, 2025, and as amended on April 14, 2025, May 9, 2025 and May 12, 2025 the Receiver, as vendor, and the Purchaser, as purchaser, entered into the Sale Agreement, subject to this Honourable Court’s approval.

**Fourth Report, paras 28 – 29, Appendix A
Confidential Supplement, Appendix 2**

14. The key terms of the Sale Agreement include:

- a. The assets purchased (the “**Purchased Assets**”) under the Sale Agreement are:
 - i. Title No. 3015541/3

LOTS 1 AND 2 BLOCK 1 PLAN 1810 PLTO
EXC ALL MINES AND MINERALS VESTED IN THE
CROWN (MANITOBA) BY THE REAL PROPERTY ACT
IN RL 56 AND 57 PARISH OF PORTAGE LA PRAIRIE
(the “**Lands**”); and
 - ii. The right, title and interest of the Vendor (as defined in the Sale Agreement), if any, in the property (including all materials and equipment), assets and undertakings located on, or affixed to, the Lands.
- b. The payment of a first deposit by the Purchaser upon execution of the Sale Agreement in an amount equal to 2% of the purchase price, and a second

deposit upon satisfaction of the Conditions Precedent (as defined in the Sale Agreement) on or before the expiry of the due diligence period in an amount equal to 5% of the purchase price (together, the “**Deposits**”). The Deposits have been paid to counsel for the Receiver, in trust;

- c. The closing date is the later of: (i) 10 days after the date the Sale Approval and Vesting Order in respect of the Transaction is approved by this Honourable Court; and (ii) 10 days following the final resolution, dismissal or withdrawal of any appeal properly brought by a party with standing to appeal the Sale Approval and Vesting Order in respect of the Transaction, or (iii) any other date the parties agree to in writing;
- d. The Sale Agreement has an outside date of June 27, 2025, or such other date the parties may agree to in writing; and
- e. The Purchased Assets are to be sold on an “as-is, where-is” basis.

**Fourth Report, para 31, Appendix A
Confidential Supplement, Appendix 2**

(b) Proposed Distributions

15. The Receiver seeks to make the following payments and distributions from the net sale proceeds from the Proposed Transaction (the “**Net Proceeds of Sale**”), and any cash on hand:

- a. Payment of the brokerage commission (the “**Commission**”) in the amount set out in the Broker Engagement Letter appended to the Second Report;
- b. Payment of the sum of \$10,723,000 in aggregate to the Applicant, in repayment and full satisfaction of the Receiver’s borrowings certificates (the “**Receiver’s Borrowings**”);

- c. An interim distribution (the “**Interim Distribution**”) to the Applicant in the amount of \$600,000
- d. The accrued and unpaid expenses in the amount of approximately \$175,000, consisting of approximately \$100,000 of accrued operating costs in respect of the Project Premises, and \$75,000 of accrued fees of the Receiver and the Receiver’s Counsel (the “**Accrued Obligations**”);
- e. The remaining costs in the estimated amount of \$212,500 (the “**Remaining Costs**”), including the remaining operating and administrative expenses of these proceedings in the amount of approximately \$67,500, and the Receiver and its counsel’s estimated fees and disbursements to bring these proceedings to a conclusion in the amount of approximately \$145,000 (the “**Estimated Receiver Fees**”); and
- f. Following the payment of the Commission, the Receiver’s Borrowings (as defined in the Fourth Report), the Interim Distribution, the Accrued Obligations, the Remaining Costs and the completion of the Remaining Activities (as hereinafter defined), a final distribution (the “**Final Distribution**”) of any remaining available cash on hand to the Applicant.
(together, the “**Proposed Distributions**”)

Fourth Report, paras 70-79

(c) Unclaimed Container

- 16. The Receiver had previously determined that 6332189 Manitoba Ltd. (“**Gateway**”) had provided sufficient evidence to prove its ownership of one shipping container (the

“**Unclaimed Container**”) that has been on the Project premises since prior to the Receiver’s appointment.

Fourth Report, para 36

17. Since at least February 2025, the Receiver has made numerous attempts to arrange for Gateway to retrieve the Unclaimed Container, but to date, Gateway has failed to do so.

Fourth Report, paras 39 - 42

18. On May 30, 2025 the Receiver advised Gateway that should the Unclaimed Container not be retrieved on or before June 10, 2025, it would be considered abandoned property, and the Receiver would seek an Order of this Court such that it would be free to deal with it as Property under the Receivership Order. As at the date of this brief, Gateway has still not retrieved the Unclaimed Container.

Fourth Report, para 41, Appendix B

(d) Remaining Activities to be Completed in Receivership Proceedings

19. The Receiver is of the view that after the completion of the actions contemplated by the Receiver’s Notice of Motion filed herein, the administration of these receivership proceedings will be substantially complete, and the remaining activities to be completed include:

- a. Attending to various outstanding tax-related matters;
- b. Releasing the interest earned on the Contractor Holdback to the Contractor (each as defined in the Fourth Report);
- c. Collecting GST refunds and any future receivables;
- d. Completing the Final Distribution;

- e. Preparing the Section 246(3) Report;
- f. Closing the Receiver's estate trust accounts; and
- g. Any incidental tasks that may be required in connection with concluding these proceedings.

(together, the "**Remaining Activities**")

Fourth Report, para 87 - 88

PART IV ISSUES

1. The primary issues to be determined by this Honourable Court are:
 - a. Should this Honourable Court grant the Sale Approval and Vesting Order (the “**SAVO**”) approving the Sale Agreement and the Transaction?
 - b. Should the Proposed Distributions be approved?
 - (i) Should the fees and disbursements of the Receiver and its counsel, the Accrued Obligations and the Remaining Costs, including the estimated fees and disbursements of the Receiver and its counsel be approved?
 - c. Should the Confidential Supplement be sealed?
 - d. Should the Third Report, the Third Supplement, the Fourth Report and the Confidential Supplement and the activities and actions of the Receiver as described therein, including the Receiver’s Statement of Receipts and Disbursements be approved?
 - e. Should this Court make a declaration that the Unclaimed Container is deemed abandoned and is Property under the Receivership Order?
 - f. Should the Receiver be discharged and released?

PART V ARGUMENT

A. Should this Honourable Court grant the SAVO approving the Sale Agreement and the Transaction?

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

- a. market any or all of the Property, including advertising and soliciting offers in respect of the Property or any part or parts thereof and negotiate such terms and conditions of sale as the Receiver in its discretion may deem appropriate;
- b. sell, convey, transfer, lease or assign the Property or any part or parts thereof out of the ordinary course of business:
 - (i) without the approval of this Court in respect of any transaction not exceeding \$100,000, provided that the aggregate consideration for all such transactions does not exceed \$500,000; and
 - (ii) with the approval of this Court in respect of any transaction in which the purchase price or the aggregate purchase price exceeds the applicable amount set out in the preceding clause;

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

For greater certainty and without limitation, subject to subparagraphs (b)(i) and (ii) above, the Receiver shall have the power and authority to 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; and

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

Receivership Order at paras 3(i)-(n)

15. Pursuant to the Order pronounced by the Honourable Mr. Justice Chartier on December 2, 2024, the Sales Process was approved, and the Receiver carried out the Sales Process in accordance with said Order.

Order pronounced December 2, 2025, para 2, KB Doc. No. 28

Fourth Report, para 17

16. In determining whether the Sale Agreement and Transaction ought to be approved, Courts have considered the following factors outlined by the Ontario Court of Appeal in *Royal Bank v Soundair Corp.*:

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

***Royal Bank v Soundair Corp.*, (1991) 4 OR (3d) 1 (ONCA) (“Soundair”), para 16
[Tab 4]**

***Royal Bank of Canada v Keller & Sons Farming Ltd.*, 2016 MBQB 77 at para 14
[Tab 5]**

17. In approving sale transactions in receivership proceedings, Courts have also considered whether prior approval for the sales process was granted by the Court, and whether the Court-approved process was followed.

***Royal Bank of Canada v Keller & Sons Farming Ltd.*, 2016 MBQB 77 at para 31
[Tab 5]**

18. The Receiver submits that the Sale Agreement should be approved by this Honourable Court as:

- a. The Sales Process was: (i) approved by this Honourable Court; (ii) was carried out with the assistance of the Broker; and (iii) had efficacy and integrity;
- b. The offer made by the Purchaser for the Purchased Assets is fair and reasonable;
- c. Sufficient effort has been made to obtain the best price for the Purchased Assets and the Receiver has not acted improvidently;
- d. The Sale Agreement and the Transaction contemplated therein is in the best interests of the Debtor and its stakeholders, as, *inter alia*:
 - (i) The mortgagee, Peoples is supportive of the Transaction; and
 - (ii) The net proceeds from the sale of the Purchased Assets will stand in the stead and place of the Purchased Assets accordingly, no secured or unsecured creditors will be prejudiced by the transaction; and
- e. There has been no unfairness in the working out of the process. The Sales Process was conducted in a fair, transparent and reasonable manner, and

has succeeded in obtaining a reasonable value for the Purchased Assets from a purchaser capable of closing the Transaction.

**Fourth Report, para 32, Appendix A
Confidential Report, Appendix 2**

B. Should the Proposed Distributions be approved?

(a) Brokerage Commission

19. Paragraph 2 of the Order pronounced by the Honourable Mr. Justice Chartier on December 2, 2024 approved and authorized the engagement of the Broker in accordance with the Broker Engagement Letter appended to the Second Report, which sets out a fair and reasonable minimum and maximum amount of the Brokerage Commission.

(b) Receiver's Borrowings

20. Paragraph 22 of the Receivership Order provides a super priority charge for the Receiver's Borrowings:

The whole of the Property shall be and is hereby charged by way of a fixed and specific charge (the "**Receiver's Borrowings Charge**") as security for the payment of the monies borrowed, together with interest and charges thereon, in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person, but subordinate in priority to the Receiver's Charge and the charges as set out in sections 14.06(7), 81.4(4), and 81.6(2) of the BIA.

Receivership Order, para 22

(c) Interim and Final Distributions to Peoples

21. The Receiver's independent legal counsel has opined on the Applicant's security (the "**Peoples Security**") over, *inter alia*: (i) the Lands; and (ii) all present and future undertaking and property, both real and personal, of the Debtor, or any party comprising the Debtor, located at, arising from, or in any way relating to the Lands, and, subject to

customary qualifications, assumptions and limitations, has concluded that the Peoples Security is valid and enforceable.

Fourth Report, para 69

22. There are also seven builders' liens (the "**Registered Builders' Liens**") registered against the Lands under the BLA by six different lien claimants (the "**Lien Claimants**").

Fourth Report, para 67

23. Section 31 of the BLA provides that all payments made, before the registration of a claim for lien, on account of a conveyance or mortgage, have priority over the lien:

A lien has priority over all judgments, executions, assignments, attachments, garnishments and receiving orders, recovered, issued or made or registered in the registry office after the lien arises, and over all payments or advances made on account of any conveyance or mortgage after registration of a claim for the lien in accordance with this Act but all payments made, before registration of a claim for lien, on account of a conveyance or mortgage, have priority over the lien.

BLA, s. 31 [Tab 3]

24. Peoples Trust made its last advance of funds to the Debtor on May 26, 2023.. The Registered Builders' Liens were registered on title to the Lands on July 7, 2023, July 27, 2023, August 2, 2023, September 8, 2023, September 14, 2023, and September 27, 2023, respectively, after the funds were advanced by the Applicant, and therefore the Registered Builders' Liens are subordinate to the Peoples' Mortgage.

Fourth Report, paras 66 & 68

25. The Receiver is not aware of any priority claims that would rank ahead of the Applicant at the time of the Interim Distribution or the Final Distribution, other than the Receiver's Charge and the Receiver's Borrowings Charge.

Fourth Report, para 76

26. The Net Proceeds of Sale will not be sufficient to pay the indebtedness owing by the Applicant in full, which is secured by the Peoples Security. Accordingly, there will be no distribution in these proceedings to the Lien Claimants or to the Debtors' unsecured creditors.

Fourth Report, para 78

(d) *Should the fees and disbursements of the Receiver and its counsel, the Accrued Obligations and the Remaining Costs, including the estimated fees and disbursements of the Receiver and its counsel be approved?*

27. 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

28. Paragraph 20 of the Receivership Order provides that "*...the Receiver and its legal counsel shall pass their accounts from time to time...*"

Receivership Order, para 20

29. All parties on the Service List for these proceedings have been served with the Fourth Report, which contains a summary of the professional fees of Receiver and its counsel.

Affidavit of Service

30. The fees and disbursements of the Receiver and its counsel as outlined in the Fourth Report 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.

Fourth Report, paras 84 – 85, Appendices C & D

31. The Receiver is seeking approval of its fees and disbursements from October 1, 2024 to April 30, 2025 (the “**Receiver’s Fee Period**”), and those of the Receiver’s Counsel, from October 16, 2024 to May 31, 2025 (the “**Counsel Fee Period**”) in connection with the performance of their duties in these receivership proceedings.

Fourth Report, para 81, Appendices C & D

32. Total fees and disbursements of the Receiver during the Receiver’s Fee Period amounts to \$298,565 and \$1,646, respectively, both excluding sales taxes.

Fourth Report, para 82, Appendix C

33. The fees for services rendered and disbursements incurred during the Counsel Fee Period, MLT Aikins LLP (“**MLT Aikins**”) amounts to \$136,055 and \$1,392, respectively, both excluding sales taxes. The blended hourly rate for MLT Aikins is \$445.94. The Receiver is of the view that the fees and disbursements of MLT Aikins are reasonable.

Fourth Report, paras 81 & 85, Appendix D

34. The Receiver submits that the Accrued Obligations and the Remaining Costs, including the Estimated Receiver Fees, are reasonable and necessary to allow the Receiver to complete the receivership proceedings, including the Remaining Activities. The Accrued Obligations and Remaining Costs are not subject to the stay of proceeding provisions imposed under the Receivership Order, and ought to be paid in the normal

course. All parties on the Service List have been provided with the Fourth Report, which sets out the amount of the Accrued Obligations and the Remaining Costs.

Affidavit of Service

35. The Estimated Receiver Fees represent a reasonable estimate of the activities required to be completed by the Receiver and its counsel in order to complete the receivership proceedings, including the Remaining Activities.

Fourth Report, para 86

36. Based on the foregoing, the Receiver respectfully submits that this Honourable Court should approve the fees and disbursements of the Receiver for the Receiver's Fee Period and the fees and disbursements of its counsel for the Counsel Fee Period, and the Estimated Receiver Fees.

37. In summary, the Proposed Distributions are recommended by the Receiver and are consistent with the priorities set out in the BIA, the Receivership Order, and the opinion provided by the Receiver's independent legal counsel. The Receiver respectfully submits that this Honourable Court should authorize and direct the Receiver to implement the Proposed Distributions for the reasons set out herein and in paragraphs 65 to 79 of the Fourth Report.

Fourth Report, paras 65-79

C. Should the Confidential Supplement be Sealed?

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

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

KB Act, s. 77(1) [Tab 1]

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

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

***Sherman Estate v Donovan*, 2021 SCC 25 (“Sherman Estate”) at para 38 [Tab 6]**

40. 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 6]

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

***Just Energy Group Inc. et al. v Morgan Stanley Capital Group Inc. et al*, 2022 ONSC 6354 at para 72 [Tab 7]**

***Ontario Securities Commission v Bridging Finance Inc.*, 2023 ONSC 4203 at para 29 [Tab 8]**

42. The Confidential Supplement contains *inter alia* the unredacted Sale Agreement, which contains the purchase price for the Purchased Assets and a summary of the key terms of letters of intent received during the Sales Process, as well as other commercially sensitive information.

Confidential Supplement

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

Fourth Report, para 30

44. In the circumstances, the sealing order provides the least restrictive manner to preserve the confidentiality of the information contained in the Confidential Supplement and to protect the Debtors and their respective stakeholders, and there is no reasonably alternative measures that will prevent the risks thereto.

45. The sealing order will only be in effect for a limited time period, until the closing of the Transaction or upon further order by this Court.

46. The Receiver respectfully submits that the sealing order will not prejudice any of the Debtor's stakeholders. The benefits of the sealing order sought outweigh any negative effects.

47. In these circumstances, the Receiver submits that the prerequisites outlined in Sherman Estate are met and the granting of the sealing order is just and appropriate.

D. Should the Third Report, the Third Supplement, the Fourth Report and the Confidential Supplement and the activities and actions of the Receiver as described therein, including the Receiver's Statement of Receipts and Disbursements be approved?

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

***Target Canada Co (Re)*, 2015 ONSC 7574 at para 2 [Tab 9]**

49. In *Triple-I Capital Partners Limited v 12411300 Canada Inc.*, the Ontario Superior Court of Justice 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 10]**

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

51. Based on the foregoing, the Receiver respectfully submits that the Third Report, Third Supplement, Fourth Report and Confidential Supplement and its activities and actions as described therein be approved, including the Statements of Receipts and Disbursements.

E. Should this Court make a declaration that the Unclaimed Container is deemed abandoned and is Property under the Receivership Order?

52. 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]**

53. 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]**

54. The Unclaimed Container has been left at the Project premises for almost two years. Despite the Receiver's repeated efforts to arrange for Gateway to retrieve the Unclaimed Container over at least the past four months, it has failed to do so.

Fourth Report, paras 39-42, Appendix B

55. Gateway was expressly advised by the Receiver that if it failed to retrieve the Unclaimed Container by June 10, 2025, it would be considered abandoned property, and the Receiver would seek an Order of this Court such that it would be free to deal with it as Property under the Receivership Order. Notwithstanding receiving this notice, as at the date of this brief, Gateway has still not retrieved the Unclaimed Container.

Fourth Report, para 41, Appendix B

56. The Receiver submits that Gateway's conduct clearly indicates that it has abandoned the Unclaimed Container.

57. Based on the foregoing, the Receiver respectfully submits that this Honourable Court should declare that the Unclaimed Container has been abandoned, and is "*Property*" as defined in the Receivership Order.

F. Should the Receiver be discharged?

58. In these circumstances, the Receiver's appointment was limited to the Property, and substantially all of the Property will be sold pursuant to the Sale Agreement.

Receivership Order, para 2

59. Once the matters set out in the Notice of Motion have been completed by the Receiver, the administration of these receivership proceedings are substantially complete.

Fourth Report, para 88

60. Courts have held that a Court officer may seek to be discharged once it has completed the "*...substance of its mandate*". The discharge of a Receiver is further appropriate where the Court is satisfied with the Receiver's reports and where no party is opposed to the requested discharge, where the requested fees and disbursements appear to be reasonable in the circumstances and the receiver has substantially completed its duties.

***Ed Mirvish Enterprises Ltd v Stinson Hospitality Inc*, [2009] OJ No 4265 at para 8-9 [Tab 12]**
***West Face Capital Inc v Chieftain Metals Inc.*, 2020 ONSC 5161 at para 11 [Tab 13]**

61. The Receiver respectfully submits that once it has completed the substance of its mandate and its duties, that it should be discharged upon filing of a Receiver's Discharge Certificate after the Transaction has closed and the Proposed Distributions have been paid.

PART VI CONCLUSION

56. 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 10TH DAY OF JUNE, 2025.

MLT AIKINS LLP

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

Tab "1"



MANITOBA

THE COURT OF KING'S BENCH ACT

C.C.S.M. c. C280

LOI SUR LA COUR DU BANC DU ROI

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

As of 10 June 2025, 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 10 juin 2025. Son contenu était à jour pendant la période indiquée en bas de page.

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

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

(c) a rule or order of the court.

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

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

c) une règle ou une ordonnance de la Cour.

Rules of law and equity

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

Rules of equity to prevail

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

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

Declaratory orders

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

Relief against penalties

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

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

Damages

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

Vesting orders

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

Règles de common law et d'equity

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

Prépondérance des règles d'equity

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

Ordonnances déclaratoires

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

Pénalités

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

Dommages-intérêts

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

Ordonnance d'envoi en possession

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

PART XIII

PUBLIC ACCESS

Hearings open to public

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

Exception

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

Disclosure of what transpires

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

Sealing confidential documents

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

Documents public

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

- (a) a list of the proceedings in the court, or
- (b) a document that is filed in a proceeding,

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

PARTIE XIII

DROIT D'ACCÈS DU PUBLIC

Audiences publiques

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

Exception

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

Divulgence de renseignements

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

Documents confidentiels

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

Droit d'accès à certains documents

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

- a) soit à une liste des instances dont le tribunal est saisi;
- b) soit à un document déposé dans le cadre d'une instance.

Tab "2"



CANADA

CONSOLIDATION

CODIFICATION

Bankruptcy and Insolvency Act

Loi sur la faillite et l'insolvabilité

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

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

Current to May 12, 2025

À jour au 12 mai 2025

Last amended on December 12, 2024

Dernière modification le 12 décembre 2024

Liability ceases on compliance

(4) A person who complies with a direction given pursuant to subsection (1) is not liable for any act done by the person only to comply with the direction.

1992, c. 27, s. 9; 1997, c. 12, s. 14; 1999, c. 31, s. 18(E); 2005, c. 47, s. 16; 2007, c. 36, s. 8(F).

Removal and appointment

14.04 The court, on the application of any interested person, may for cause remove a trustee and appoint another licensed trustee in the trustee's place.

1992, c. 27, s. 9.

Where there is no licensed trustee, etc.

14.05 Where a debtor resides or carries on business in a locality in which there is no licensed trustee, and no licensed trustee can be found who is willing to act as trustee, the court or the official receiver may appoint a responsible person residing in the locality of the debtor to administer the estate of the debtor, and that person, for that purpose, has all the powers of a licensed trustee under this Act, and the provisions of this Act apply to that person as if a licence had been issued to that person under paragraph 5(3)(a).

1992, c. 27, s. 9.

No trustee is bound to act

14.06 (1) No trustee is bound to assume the duties of trustee in matters relating to assignments, bankruptcy orders or proposals, but having accepted an appointment in relation to those matters the trustee shall, until discharged or another trustee is appointed in the trustee's stead, perform the duties required of a trustee under this Act.

Application

(1.1) In subsections (1.2) to (6), a reference to a trustee means a trustee in a bankruptcy or proposal and includes

- (a)** an interim receiver;
- (b)** a receiver within the meaning of subsection 243(2); and
- (c)** any other person who has been lawfully appointed to take, or has lawfully taken, possession or control of any property of an insolvent person or a bankrupt that was acquired for, or is used in relation to, a business carried on by the insolvent person or bankrupt.

Suppression de la responsabilité

(4) Quiconque obtempère aux instructions données en application du paragraphe (1) échappe à toute responsabilité pour les actes posés dans le seul but de s'y conformer.

1992, ch. 27, art. 9; 1997, ch. 12, art. 14; 1999, ch. 31, art. 18(A); 2005, ch. 47, art. 16; 2007, ch. 36, art. 8(F).

Révocation et nomination

14.04 Le tribunal, à la demande de tout intéressé, peut révoquer pour un motif suffisant un syndic et nommer à sa place un autre syndic autorisé.

1992, ch. 27, art. 9.

Localité sans syndic autorisé

14.05 Lorsque le débiteur réside ou exerce un commerce dans une localité où il n'y a pas de syndic autorisé, et qu'il est impossible d'en trouver un qui consente à agir comme syndic, le tribunal ou le séquestre officiel peut nommer une personne digne de confiance résidant dans la localité du débiteur pour administrer l'actif de celui-ci, et, à cette fin, cette personne possède tous les pouvoirs que la présente loi accorde à un syndic autorisé, et les dispositions de la présente loi s'appliquent à cette personne tout comme si elle avait été régulièrement autorisée en vertu de l'alinéa 5(3)a).

1992, ch. 27, art. 9.

Non-obligation du syndic

14.06 (1) Le syndic n'est pas tenu d'assumer les fonctions de syndic relativement à des cessions, à des ordonnances de faillite ou à des propositions concordataires; toutefois, dès qu'il accepte sa nomination à ce titre, il doit accomplir les fonctions que la présente loi lui impose, jusqu'à ce qu'il ait été libéré ou qu'un autre syndic ait été nommé à sa place.

Application

(1.1) Les paragraphes (1.2) à (6) s'appliquent également aux syndics agissant dans le cadre d'une faillite ou d'une proposition ainsi qu'aux personnes suivantes :

- a)** les séquestres intérimaires;
- b)** les séquestres au sens du paragraphe 243(2);
- c)** les autres personnes qui sont nommément habilitées à prendre — ou ont pris légalement — la possession ou la responsabilité d'un bien acquis ou utilisé par une personne insolvable ou un failli dans le cadre de ses affaires.

No personal liability in respect of matters before appointment

(1.2) Despite anything in federal or provincial law, if a trustee, in that position, carries on the business of a debtor or continues the employment of a debtor's employees, the trustee is not by reason of that fact personally liable in respect of a liability, including one as a successor employer,

- (a)** that is in respect of the employees or former employees of the debtor or a predecessor of the debtor or in respect of a pension plan for the benefit of those employees; and
- (b)** that exists before the trustee is appointed or that is calculated by reference to a period before the appointment.

Status of liability

(1.3) A liability referred to in subsection (1.2) is not to rank as costs of administration.

Liability of other successor employers

(1.4) Subsection (1.2) does not affect the liability of a successor employer other than the trustee.

Liability in respect of environmental matters

(2) Notwithstanding anything in any federal or provincial law, a trustee is not personally liable in that position for any environmental condition that arose or environmental damage that occurred

- (a)** before the trustee's appointment; or
- (b)** after the trustee's appointment unless it is established that the condition arose or the damage occurred as a result of the trustee's gross negligence or wilful misconduct or, in the Province of Quebec, the trustee's gross or intentional fault.

Reports, etc., still required

(3) Nothing in subsection (2) exempts a trustee from any duty to report or make disclosure imposed by a law referred to in that subsection.

Non-liability re certain orders

(4) Notwithstanding anything in any federal or provincial law but subject to subsection (2), where an order is made which has the effect of requiring a trustee to remedy any environmental condition or environmental damage affecting property involved in a bankruptcy, proposal or receivership, the trustee is not personally liable for failure to comply with the order, and is not personally

Immunité

(1.2) Par dérogation au droit fédéral et provincial, le syndic qui, en cette qualité, continue l'exploitation de l'entreprise du débiteur ou lui succède comme employeur est déchargé de toute responsabilité personnelle découlant de quelque obligation du débiteur, notamment à titre d'employeur successeur, si celle-ci, à la fois :

- a)** l'oblige envers des employés ou anciens employés du débiteur, ou de l'un de ses prédécesseurs, ou découle d'un régime de pension pour le bénéfice de ces employés;
- b)** existait avant sa nomination ou est calculée sur la base d'une période la précédant.

Obligation exclue des frais

(1.3) L'obligation visée au paragraphe (1.2) ne peut être imputée à l'actif au titre des frais d'administration.

Responsabilité de l'employeur successeur

(1.4) Le paragraphe (1.2) ne dégage aucun employeur successeur, autre que le syndic, de sa responsabilité.

Responsabilité en matière d'environnement

(2) Par dérogation au droit fédéral et provincial, le syndic est, ès qualités, déchargé de toute responsabilité personnelle découlant de tout fait ou dommage lié à l'environnement survenu avant ou après sa nomination, sauf celui causé par sa négligence grave ou son inconduite délibérée ou, dans la province de Québec, par sa faute lourde ou intentionnelle.

Rapports

(3) Le paragraphe (2) n'a pas pour effet de soustraire le syndic à une obligation de faire rapport ou de communiquer des renseignements prévue par le droit applicable en l'espèce.

Immunité — ordonnances

(4) Par dérogation au droit fédéral et provincial, mais sous réserve du paragraphe (2), le syndic est, ès qualités, déchargé de toute responsabilité personnelle découlant du non-respect de toute ordonnance de réparation de tout fait ou dommage lié à l'environnement et touchant un bien visé par une faillite, une proposition ou une mise sous séquestre administrée par un séquestre, et de toute

liable for any costs that are or would be incurred by any person in carrying out the terms of the order,

(a) if, within such time as is specified in the order, within ten days after the order is made if no time is so specified, within ten days after the appointment of the trustee, if the order is in effect when the trustee is appointed, or during the period of the stay referred to in paragraph (b), the trustee

(i) complies with the order, or

(ii) on notice to the person who issued the order, abandons, disposes of or otherwise releases any interest in any real property, or any right in any immovable, affected by the condition or damage;

(b) during the period of a stay of the order granted, on application made within the time specified in the order referred to in paragraph (a), within ten days after the order is made or within ten days after the appointment of the trustee, if the order is in effect when the trustee is appointed, by

(i) the court or body having jurisdiction under the law pursuant to which the order was made to enable the trustee to contest the order, or

(ii) the court having jurisdiction in bankruptcy for the purposes of assessing the economic viability of complying with the order; or

(c) if the trustee had, before the order was made, abandoned or renounced or been divested of any interest in any real property, or any right in any immovable, affected by the condition or damage.

Stay may be granted

(5) The court may grant a stay of the order referred to in subsection (4) on such notice and for such period as the court deems necessary for the purpose of enabling the trustee to assess the economic viability of complying with the order.

Costs for remedying not costs of administration

(6) If the trustee has abandoned or renounced any interest in any real property, or any right in any immovable, affected by the environmental condition or environmental damage, claims for costs of remedying the condition or damage shall not rank as costs of administration.

Priority of claims

(7) Any claim by Her Majesty in right of Canada or a province against the debtor in a bankruptcy, proposal or receivership for costs of remedying any environmental condition or environmental damage affecting real

responsabilité personnelle relativement aux frais engagés par toute personne exécutant l'ordonnance :

a) si, dans les dix jours suivant l'ordonnance ou dans le délai fixé par celle-ci, dans les dix jours suivant sa nomination si l'ordonnance est alors en vigueur ou pendant la durée de la suspension visée à l'alinéa b) :

(i) il s'y conforme,

(ii) il abandonne, après avis à la personne ayant rendu l'ordonnance, tout droit sur l'immeuble en cause ou tout intérêt sur le bien réel en cause, en dispose ou s'en dessaisit;

b) pendant la durée de la suspension de l'ordonnance qui est accordée, sur demande présentée dans les dix jours suivant l'ordonnance visée à l'alinéa a) ou dans le délai fixé par celle-ci, ou dans les dix jours suivant sa nomination si l'ordonnance est alors en vigueur :

(i) soit par le tribunal ou l'autorité qui a compétence relativement à l'ordonnance, en vue de permettre au syndic de la contester,

(ii) soit par le tribunal qui a compétence en matière de faillite, en vue d'évaluer les conséquences économiques du respect de l'ordonnance;

c) si, avant que l'ordonnance ne soit rendue, il avait abandonné tout droit sur l'immeuble en cause ou tout intérêt sur le bien réel en cause ou y avait renoncé, ou s'en était dessaisi.

Suspension

(5) En vue de permettre au syndic d'évaluer les conséquences économiques du respect de l'ordonnance, le tribunal peut en ordonner la suspension après avis et pour la période qu'il estime indiqués.

Frais

(6) Si le syndic a abandonné tout droit sur l'immeuble en cause ou tout intérêt sur le bien réel en cause ou y a renoncé, les réclamations pour les frais de réparation du fait ou dommage lié à l'environnement et touchant le bien ne font pas partie des frais d'administration.

Priorité des réclamations

(7) En cas de faillite, de proposition ou de mise sous séquestre administrée par un séquestre, toute réclamation de Sa Majesté du chef du Canada ou d'une province contre le débiteur pour les frais de réparation

property or an immovable of the debtor is secured by security on the real property or immovable affected by the environmental condition or environmental damage and on any other real property or immovable of the debtor that is contiguous with that real property or immovable and that is related to the activity that caused the environmental condition or environmental damage, and the security

(a) is enforceable in accordance with the law of the jurisdiction in which the real property or immovable is located, in the same way as a mortgage, hypothec or other security on real property or immovables; and

(b) ranks above any other claim, right, charge or security against the property, despite any other provision of this Act or anything in any other federal or provincial law.

Claim for clean-up costs

(8) Despite subsection 121(1), a claim against a debtor in a bankruptcy or proposal for the costs of remedying any environmental condition or environmental damage affecting real property or an immovable of the debtor shall be a provable claim, whether the condition arose or the damage occurred before or after the date of the filing of the proposal or the date of the bankruptcy.

1992, c. 27, s. 9; 1997, c. 12, s. 15; 2004, c. 25, s. 16; 2005, c. 47, s. 17; 2007, c. 36, s. 9.

Effect of defect or irregularity in appointment

14.07 No defect or irregularity in the appointment of a trustee vitiates any act done by the trustee in good faith.

1992, c. 27, s. 9.

Corporations as Trustees

Majority of officers and directors must hold licences

14.08 A body corporate may hold a licence as a trustee only if a majority of its directors and a majority of its officers hold licences as trustees.

1992, c. 27, s. 9.

Acts of body corporate

14.09 A body corporate that holds a licence as a trustee may perform the duties and exercise the powers of a trustee only through a director or officer of the body corporate who holds a licence as a trustee.

1992, c. 27, s. 9.

Not carrying on business of trust company

14.1 Every body corporate that is incorporated by or under an Act of Parliament and that holds a licence as a

du fait ou dommage lié à l'environnement et touchant un de ses immeubles ou biens réels est garantie par une sûreté sur le bien en cause et sur ceux qui sont contigus à celui où le dommage est survenu et qui sont liés à l'activité ayant causé le fait ou le dommage; la sûreté peut être exécutée selon le droit du lieu où est situé le bien comme s'il s'agissait d'une hypothèque ou autre garantie sur celui-ci et, par dérogation aux autres dispositions de la présente loi et à toute règle de droit fédéral et provincial, a priorité sur tout autre droit, charge, sûreté ou réclamation visant le bien.

Précision

(8) Malgré le paragraphe 121(1), la réclamation pour les frais de réparation du fait ou dommage lié à l'environnement et touchant l'immeuble ou le bien réel du débiteur constitue une réclamation prouvable, que la date du fait ou dommage soit antérieure ou postérieure à celle de la faillite ou du dépôt de la proposition.

1992, ch. 27, art. 9; 1997, ch. 12, art. 15; 2004, ch. 25, art. 16; 2005, ch. 47, art. 17; 2007, ch. 36, art. 9.

Vice ou irrégularité dans la nomination

14.07 Aucune erreur ou irrégularité dans la nomination d'un syndic ne vicie un acte accompli de bonne foi par lui.

1992, ch. 27, art. 9.

Sociétés

Administrateurs titulaires de licences

14.08 Une personne morale ne peut être titulaire d'une licence de syndic que si la majorité de ses administrateurs et la majorité de ses dirigeants sont titulaires d'une telle licence.

1992, ch. 27, art. 9.

Actes des personnes morales

14.09 La personne morale titulaire d'une licence de syndic ne peut exercer ses fonctions à ce titre que par l'intermédiaire d'un de ses administrateurs ou dirigeants qui est lui-même titulaire d'une telle licence.

1992, ch. 27, art. 9.

Distinction entre les sociétés de fiducie

14.1 Toute personne morale de droit fédéral, titulaire d'une licence de syndic, peut exercer les fonctions de

current assets and is subrogated in and to all rights of the clerk, servant, travelling salesperson, labourer or worker in respect of the amounts paid to that person by the trustee.

Claims of officers and directors

(6) No officer or director of the bankrupt is entitled to have a claim secured under this section.

Non-arm's length

(7) A person who, in respect of a transaction, was not dealing at arm's length with the bankrupt is not entitled to have a claim arising from that transaction secured by this section unless, in the opinion of the trustee, having regard to the circumstances — including the remuneration for, the terms and conditions of and the duration, nature and importance of the services rendered — it is reasonable to conclude that they would have entered into a substantially similar transaction if they had been dealing with each other at arm's length.

Proof by delivery

(8) A claim referred to in this section is proved by delivering to the trustee a proof of claim in the prescribed form.

Definitions

(9) The following definitions apply in this section.

compensation includes vacation pay but does not include termination or severance pay. (*rémunération*)

receiver means a receiver within the meaning of subsection 243(2) or an interim receiver appointed under subsection 46(1), 47(1) or 47.1(1). (*séquestre*)

2005, c. 47, s. 67; 2007, c. 36, s. 38; 2009, c. 2, s. 355(F).

Security for unpaid wages, etc. — receivership

81.4 (1) The claim of a clerk, servant, travelling salesperson, labourer or worker who is owed wages, salaries, commissions or compensation by a person who is subject to a receivership for services rendered during the six months before the first day on which there was a receiver in relation to the person is secured, as of that day, to the extent of \$2,000 — less any amount paid for those services by a receiver or trustee — by security on the person's current assets that are in the possession or under the control of the receiver.

disposition, et est subrogé dans tous leurs droits jusqu'à concurrence des sommes ainsi payées.

Réclamations des dirigeants et administrateurs

(6) Aucun dirigeant ou administrateur du failli n'a droit à la garantie prévue au présent article.

Lien de dépendance

(7) La personne qui, alors qu'elle avait avec lui un lien de dépendance, a conclu une transaction avec un failli n'a pas droit à la garantie prévue au présent article pour toute réclamation découlant de cette transaction, sauf si, compte tenu des circonstances, notamment la rétribution, les conditions de la prestation, ainsi que la durée, la nature et l'importance des services rendus, le syndic peut raisonnablement conclure que la transaction en cause est en substance pareille à celle qu'elle aurait conclue si elle n'avait pas eu de lien de dépendance avec le failli.

Remise de preuve

(8) Toute réclamation visée au présent article est prouvée par la remise, au syndic, d'une preuve de la réclamation établie en la forme prescrite.

Définitions

(9) Les définitions qui suivent s'appliquent au présent article.

rémunération S'entend notamment de l'indemnité de vacances, mais non de l'indemnité de départ ou de préavis. (*compensation*)

séquestre Séquestre au sens du paragraphe 243(2) ou séquestre intérimaire nommé en vertu des paragraphes 46(1), 47(1) ou 47.1(1). (*receiver*)

2005, ch. 47, art. 67; 2007, ch. 36, art. 38; 2009, ch. 2, art. 355(F).

Sûreté relative aux salaires non payés — mise sous séquestre

81.4 (1) La réclamation de tout commis, préposé, voyageur de commerce, journalier ou ouvrier à qui la personne faisant l'objet d'une mise sous séquestre doit des gages, salaires, commissions ou autre rémunération pour services rendus au cours des six mois précédant la date à laquelle le séquestre entre en fonctions est garantie, à compter de cette date et jusqu'à concurrence de deux mille dollars, moins toute somme qu'un séquestre ou syndic peut lui avoir versée pour ces services, par une sûreté portant sur les actifs à court terme en cause qui sont en la possession ou sous la responsabilité du séquestre en fonctions.

Commissions

(2) For the purposes of subsection (1), commissions payable when goods are shipped, delivered or paid for, if shipped, delivered or paid for during the six-month period referred to in that subsection, are deemed to have been earned in those six months.

Security for disbursements

(3) The claim of a travelling salesperson who is owed money by a person who is subject to a receivership for disbursements properly incurred in and about the person's business during the six months before the first day on which there was a receiver in relation to the person is secured, as of that day, to the extent of \$1,000 — less any amount paid for those disbursements by a receiver or trustee — by security on the person's current assets that are in the possession or under the control of the receiver.

Rank of security

(4) A security under this section ranks above every other claim, right, charge or security against the person's current assets — regardless of when that other claim, right, charge or security arose — except rights under sections 81.1 and 81.2.

Liability of receiver

(5) If the receiver takes possession or in any way disposes of current assets covered by the security, the receiver is liable for the claim of the clerk, servant, travelling salesperson, labourer or worker to the extent of the amount realized on the disposition of the current assets and is subrogated in and to all rights of the clerk, servant, travelling salesperson, labourer or worker in respect of the amounts paid to that person by the receiver.

Claims of officers and directors

(6) No officer or director of the person who is subject to a receivership is entitled to have a claim secured under this section.

Non-arm's length

(7) A person who, in respect of a transaction, was not dealing at arm's length with a person who is subject to a receivership is not entitled to have a claim arising from that transaction secured by this section unless, in the opinion of the receiver, having regard to the circumstances — including the remuneration for, the terms and conditions of and the duration, nature and importance of the services rendered — it is reasonable to conclude that they would have entered into a substantially similar transaction if they had been dealing with each other at arm's length.

Commissions

(2) Pour l'application du paragraphe (1), les commissions payables sur expédition, livraison ou paiement de marchandises sont réputées, dans le cas où celles-ci ont été expédiées, livrées ou payées pendant la période visée à ce paragraphe, avoir été gagnées pendant cette période.

Sûreté relative aux débours non payés

(3) La réclamation de tout voyageur de commerce à qui la personne faisant l'objet d'une mise sous séquestre est redevable des sommes qu'il a régulièrement déboursées pour son entreprise ou relativement à celle-ci au cours des six mois précédant la date à laquelle le séquestre entre en fonctions est garantie, à compter de cette date et jusqu'à concurrence de mille dollars, moins toute somme qu'un séquestre ou syndic peut lui avoir versée à ce titre, par une sûreté portant sur les actifs à court terme en cause qui sont en la possession ou sous la responsabilité du séquestre en fonctions.

Priorité

(4) La sûreté visée au présent article a priorité sur tout autre droit, sûreté, charge ou réclamation — quelle que soit la date à laquelle ils ont pris naissance — grevant les actifs à court terme en cause, à l'exception des droits prévus aux articles 81.1 et 81.2.

Responsabilité du séquestre

(5) Le séquestre qui prend possession ou dispose des actifs à court terme grevés par la sûreté est responsable de la réclamation du commis, du préposé, du voyageur de commerce, du journalier ou de l'ouvrier jusqu'à concurrence du produit de la disposition, et est subrogé dans tous leurs droits jusqu'à concurrence des sommes ainsi payées.

Réclamations des dirigeants et administrateurs

(6) Aucun dirigeant ou administrateur de la personne faisant l'objet d'une mise sous séquestre n'a droit à la garantie prévue au présent article.

Lien de dépendance

(7) La personne qui, alors qu'elle avait avec elle un lien de dépendance, a conclu une transaction avec une personne faisant l'objet d'une mise sous séquestre n'a pas droit à la garantie prévue au présent article pour toute réclamation découlant de cette transaction, sauf si, compte tenu des circonstances, notamment la rétribution, les conditions de la prestation, ainsi que la durée, la nature et l'importance des services rendus, le syndic peut raisonnablement conclure que la transaction en cause est en substance pareille à celle qu'elle aurait conclue si elle

Rank of security

(2) A security under this section ranks above every other claim, right, charge or security against the bankrupt's assets, regardless of when that other claim, right, charge or security arose, except

- (a)** rights under sections 81.1 and 81.2;
- (b)** amounts referred to in subsection 67(3) that have been deemed to be held in trust; and
- (c)** securities under sections 81.3 and 81.4.

Liability of trustee

(3) If the trustee disposes of assets covered by the security, the trustee is liable for the amounts referred to in subsection (1) to the extent of the amount realized on the disposition of the assets, and is subrogated in and to all rights of the fund established for the purpose of the pension plan in respect of those amounts.

2005, c. 47, s. 67; 2012, c. 16, s. 80; 2023, c. 6, s. 3.

Security for unpaid amounts re prescribed pensions plan — receivership

81.6 (1) If a person who is subject to a receivership is an employer who participated or participates in a prescribed pension plan for the benefit of the person's employees, the following amounts that are unpaid immediately before the first day on which there was a receiver in relation to the person are secured by security on all the person's assets:

- (a)** an amount equal to the sum of all amounts that were deducted from the employees' remuneration for payment to the fund;
- (b)** if the prescribed pension plan is regulated by an Act of Parliament,
 - (i)** an amount equal to the normal cost, within the meaning of subsection 2(1) of the *Pension Benefits Standards Regulations, 1985*, that was required to be paid by the employer to the fund, and
 - (i.1)** an amount equal to the sum of all special payments, determined in accordance with section 9 of the *Pension Benefits Standards Regulations, 1985*, that would be required to be paid by the employer to the fund referred to in section 81.5 and this section to liquidate an unfunded liability or a solvency deficiency,
 - (i.2)** any amount required to liquidate any other unfunded liability or solvency deficiency of the fund,

Priorité

(2) La sûreté visée au présent article a priorité sur tout autre droit, sûreté, charge ou réclamation — peu importe la date à laquelle ils ont pris naissance — grevant les biens du failli, à l'exception :

- a)** des droits prévus aux articles 81.1 et 81.2;
- b)** des sommes mentionnées au paragraphe 67(3) qui sont réputées être détenues en fiducie;
- c)** de la sûreté prévue aux articles 81.3 et 81.4.

Responsabilité du syndic

(3) Le syndic qui dispose d'éléments d'actif grevés par la sûreté est responsable des sommes mentionnées au paragraphe (1) jusqu'à concurrence du produit de la disposition, et est subrogé dans tous les droits du fonds établi dans le cadre du régime de pension jusqu'à concurrence des sommes ainsi payées.

2005, ch. 47, art. 67; 2012, ch. 16, art. 80; 2023, ch. 6, art. 3.

Sûreté relative aux régimes de pension prescrits — mise sous séquestre

81.6 (1) Si la personne faisant l'objet d'une mise sous séquestre est un employeur qui participe ou a participé à un régime de pension prescrit institué pour ses employés, les sommes ci-après qui, à la date à laquelle le séquestre commence à agir, n'ont pas été versées au fonds établi dans le cadre de ce régime sont garanties, à compter de cette date, par une sûreté sur les éléments d'actif de la personne :

- a)** les sommes qui ont été déduites de la rémunération des employés pour versement au fonds;
- b)** dans le cas d'un régime de pension prescrit régi par une loi fédérale :
 - (i)** les coûts normaux, au sens du paragraphe 2(1) du *Règlement de 1985 sur les normes de prestation de pension*, que l'employeur serait tenu de verser au fonds,
 - (i.1)** la somme égale au total des paiements spéciaux, établis conformément à l'article 9 du *Règlement de 1985 sur les normes de prestation de pension*, que l'employeur est tenu de verser au fonds visé à l'article 81.5 et au présent article pour la liquidation d'un passif non capitalisé ou d'un déficit de solvabilité,
 - (i.2)** toute somme requise pour la liquidation de tout autre passif non capitalisé ou déficit de solvabilité du fonds,

(ii) an amount equal to the sum of all amounts that were required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the *Pension Benefits Standards Act, 1985*,

(iii) an amount equal to the sum of all amounts that were required to be paid by the employer to the administrator of a pooled registered pension plan, as defined in subsection 2(1) of the *Pooled Registered Pension Plans Act*; and

(c) in the case of any other prescribed pension plan,

(i) an amount equal to the amount that would be the normal cost, within the meaning of subsection 2(1) of the *Pension Benefits Standards Regulations, 1985*, that the employer would be required to pay to the fund if the prescribed plan were regulated by an Act of Parliament,

(i.1) an amount equal to the sum of all special payments, determined in accordance with section 9 of the *Pension Benefits Standards Regulations, 1985*, that would have been required to be paid by the employer to the fund referred to in section 81.5 and this section to liquidate an unfunded liability or a solvency deficiency if the prescribed plan were regulated by an Act of Parliament,

(i.2) any amount required to liquidate any other unfunded liability or solvency deficiency of the fund,

(ii) an amount equal to the sum of all amounts that would have been required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the *Pension Benefits Standards Act, 1985*, if the prescribed plan were regulated by an Act of Parliament, and

(iii) an amount equal to the sum of all amounts that would have been required to be paid by the employer in respect of a prescribed plan, if it were regulated by the *Pooled Registered Pension Plans Act*.

Rank of security

(2) A security under this section ranks above every other claim, right, charge or security against the person's assets, regardless of when that other claim, right, charge or security arose, except rights under sections 81.1 and 81.2 and securities under sections 81.3 and 81.4.

(ii) les sommes que l'employeur est tenu de verser au fonds au titre de toute disposition à cotisations déterminées au sens du paragraphe 2(1) de la *Loi de 1985 sur les normes de prestation de pension*,

(iii) les sommes que l'employeur est tenu de verser à l'administrateur d'un régime de pension agréé collectif au sens du paragraphe 2(1) de la *Loi sur les régimes de pension agréés collectifs*;

c) dans le cas de tout autre régime de pension prescrit :

(i) la somme égale aux coûts normaux, au sens du paragraphe 2(1) du *Règlement de 1985 sur les normes de prestation de pension*, que l'employeur serait tenu de verser au fonds si le régime était régi par une loi fédérale,

(i.1) la somme égale au total des paiements spéciaux, établis conformément à l'article 9 du *Règlement de 1985 sur les normes de prestation de pension*, que l'employeur serait tenu de verser au fonds visé à l'article 81.5 et au présent article pour la liquidation d'un passif non capitalisé ou d'un déficit de solvabilité si le régime était régi par une loi fédérale,

(i.2) toute somme requise pour la liquidation de tout autre passif non capitalisé ou déficit de solvabilité du fonds,

(ii) les sommes que l'employeur serait tenu de verser au fonds au titre de toute disposition à cotisations déterminées au sens du paragraphe 2(1) de la *Loi de 1985 sur les normes de prestation de pension* si le régime était régi par une loi fédérale,

(iii) les sommes que l'employeur serait tenu de verser à l'égard du régime s'il était régi par la *Loi sur les régimes de pension agréés collectifs*.

Priorité

(2) La sûreté visée au présent article a priorité sur tout autre droit, sûreté, charge ou réclamation — peu importe la date à laquelle ils ont pris naissance — grevant les biens de la personne, à l'exception des droits prévus aux articles 81.1 et 81.2 et de la sûreté prévue aux articles 81.3 et 81.4.

Liability of receiver

(3) If the receiver disposes of assets covered by the security, the receiver is liable for the amounts referred to in subsection (1) to the extent of the amount realized on the disposition of the assets, and is subrogated in and to all rights of the fund established for the purpose of the pension plan in respect of those amounts.

Definitions

(4) The following definitions apply in this section.

person who is subject to a receivership means a person any of whose property is in the possession or under the control of a receiver. (*personne faisant l'objet d'une mise sous séquestre*)

receiver means a receiver within the meaning of subsection 243(2) or an interim receiver appointed under subsection 46(1), 47(1) or 47.1(1). (*séquestre*)

2005, c. 47, s. 67; 2007, c. 36, s. 39; 2012, c. 16, s. 81; 2023, c. 6, s. 4.

Trustee to have right to sell patented articles

82 (1) If any property of a bankrupt vesting in a trustee consists of articles that are subject to a patent or to a certificate of supplementary protection issued under the *Patent Act* and were sold to the bankrupt subject to any restrictions or limitations, the trustee is not bound by the restrictions or limitations but may sell and dispose of the articles free and clear of the restrictions or limitations.

Right of manufacturer

(2) If the manufacturer or vendor of the articles referred to in subsection (1) objects to the disposition of them by the trustee as provided by this section and gives to the trustee notice in writing of the objection before their sale or disposition, that manufacturer or vendor has the right to purchase the articles at their invoice prices, subject to any reasonable deduction for depreciation or deterioration.

R.S., 1985, c. B-3, s. 82; 1993, c. 34, s. 10(E); 2017, c. 6, s. 122.

Copyright and manuscript to revert to author

83 (1) Notwithstanding anything in this Act or in any other statute, the author's manuscripts and any copyright or any interest in a copyright in whole or in part assigned to a publisher, printer, firm or person becoming bankrupt shall,

(a) if the work covered by the copyright has not been published and put on the market at the time of the

Responsabilité du séquestre

(3) Le séquestre qui dispose d'éléments d'actif grevés par la sûreté est responsable des sommes mentionnées au paragraphe (1) jusqu'à concurrence du produit de la disposition, et est subrogé dans tous les droits du fonds établi dans le cadre du régime de pension jusqu'à concurrence des sommes ainsi payées.

Définitions

(4) Les définitions qui suivent s'appliquent au présent article.

personne faisant l'objet d'une mise sous séquestre Personne dont tout bien est en la possession ou sous la responsabilité d'un séquestre. (*person who is subject to a receivership*)

séquestre Séquestre au sens du paragraphe 243(2) ou séquestre intérimaire nommé en vertu des paragraphes 46(1), 47(1) ou 47.1(1). (*receiver*)

2005, ch. 47, art. 67; 2007, ch. 36, art. 39; 2012, ch. 16, art. 81; 2023, ch. 6, art. 4.

Le syndic a droit de vendre des marchandises brevetées

82 (1) Lorsque les biens d'un failli, attribués à un syndic, consistent en articles qui sont visés par un brevet ou par un certificat de protection supplémentaire délivré en vertu de la *Loi sur les brevets* et qui avaient été vendus au failli sous réserve de restrictions ou limitations quelconques, le syndic n'est pas lié par ces restrictions ou limitations et peut vendre et aliéner ces articles, libres de ces restrictions ou limitations.

Droit du fabricant

(2) Lorsque le fabricant ou le vendeur des articles visés au paragraphe (1) s'oppose à ce que le syndic les aliène comme le prévoit le présent article, et qu'il donne au syndic un avis écrit de cette opposition, avant qu'ils soient vendus ou aliénés, ce fabricant ou vendeur a le droit d'acheter ces articles à leur prix de facture, sous réserve d'une déduction raisonnable pour dépréciation ou détérioration.

L.R. (1985), ch. B-3, art. 82; 1993, ch. 34, art. 10(A); 2017, ch. 6, art. 122.

Le droit d'auteur et les manuscrits retournent à l'auteur

83 (1) Nonobstant les autres dispositions de la présente loi ou toute autre loi, les manuscrits de l'auteur et tout droit d'auteur ou intérêt dans un droit d'auteur totalement ou partiellement cédé à un éditeur, à un imprimeur, à une firme ou à une personne devenue en faillite :

(g) generally, for carrying into effect the purposes and provisions of this Part.

R.S., 1985, c. B-3, s. 240; 1992, c. 27, s. 88.

Audit of proceedings

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

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

Application of this Part

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

Automatic application

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

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

PART XI

Secured Creditors and Receivers

Court may appoint receiver

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

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

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

f) changer ou prescrire, à l'égard de toute province, les catégories de dettes auxquelles la présente partie ne s'applique pas;

f.1) régir le renvoi des procédures dans une province autre que celle où l'ordonnance de fusion a été rendue;

g) prendre toute autre mesure d'application de la présente partie.

L.R. (1985), ch. B-3, art. 240; 1992, ch. 27, art. 88.

Vérification des comptes

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

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

Application

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

Application automatique

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

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

PARTIE XI

Créanciers garantis et séquestres

Nomination d'un séquestre

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

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

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

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

Restriction on appointment of receiver

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

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

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

Definition of receiver

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

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

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

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

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

Definition of receiver — subsection 248(2)

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

Trustee to be appointed

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

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

Restriction relative à la nomination d’un séquestre

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

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

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

Définition de séquestre

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

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

b) soit est nommément habilitée à prendre — ou a pris — en sa possession ou sous sa responsabilité, aux termes d’un contrat créant une garantie sur des biens, appelé « contrat de garantie » dans la présente partie, ou aux termes d’une ordonnance rendue sous le régime de toute autre loi fédérale ou provinciale prévoyant ou autorisant la nomination d’un séquestre ou d’un séquestre-gérant, la totalité ou la quasi-totalité des biens — notamment des stocks et comptes à recevoir — qu’une personne insolvable ou un failli a acquis ou utilisés dans le cadre de ses affaires.

Définition de séquestre — paragraphe 248(2)

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

Syndic

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

Place of filing

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

Orders respecting fees and disbursements

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

Meaning of disbursements

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

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

Advance notice

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

- (a) the inventory,
- (b) the accounts receivable, or
- (c) the other property

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

Period of notice

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

Lieu du dépôt

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

Ordonnances relatives aux honoraires et débours

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

Sens de débours

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

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

Préavis

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

Délai

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

Intellectual property — disclaimer or resiliation

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

2018, c. 27, s. 268.

Good faith, etc.

247 A receiver shall

- (a)** act honestly and in good faith; and
- (b)** deal with the property of the insolvent person or the bankrupt in a commercially reasonable manner.

1992, c. 27, s. 89.

Powers of court

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

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

or both.

Idem

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

1992, c. 27, s. 89.

Propriété intellectuelle — résiliation

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

2018, ch. 27, art. 268.

Obligation de diligence

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

1992, ch. 27, art. 89.

Pouvoirs du tribunal

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

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

Idem

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

1992, ch. 27, art. 89.

Tab "3"



MANITOBA

THE BUILDERS' LIENS ACT

C.C.S.M. c. B91

LOI SUR LE PRIVILÈGE DU CONSTRUCTEUR

c. B91 de la *C.P.L.M.*

As of 20 May 2025, 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 20 mai 2025. Son contenu était à jour pendant la période indiquée en bas de page.

may be, written notice of the payments, the payments shall, as between the owner and the contractor or as between the contractor and the sub-contractor, as the case may be, be conclusively deemed to be payments to the contractor or sub-contractor, as the case may be, on the contract or sub-contract generally, but not so as to reduce the amount required to be retained by the owner under section 24.

Priority of lien

31 A lien has priority over all judgments, executions, assignments, attachments, garnishments and receiving orders, recovered, issued or made or registered in the registry office after the lien arises, and over all payments or advances made on account of any conveyance or mortgage after registration of a claim for the lien in accordance with this Act but all payments made, before registration of a claim for lien, on account of a conveyance or mortgage, have priority over the lien.

Agreements for purchase

32 Where the purchase money under an agreement for the purchase of land, or part thereof, is unpaid and no conveyance has been made to the purchaser, the purchaser shall, for the purposes of this Act, be conclusively deemed to be a mortgagor and the seller to be a mortgagee of the land to the extent of the unpaid portion of the purchase money.

Priority among lienholders

33 Subject to section 34 and subsections 35(3) and 56(1),

- (a) no person entitled to a lien on land or to a charge on moneys under this Act is entitled to any priority or preference over another person entitled to a lien on that land or to a charge on those moneys under this Act;
- (b) all lienholders rank *pari passu* for the amounts of their several liens; and
- (c) the proceeds of any sale shall be distributed as may be directed by the court.

représentant ou, selon le cas, le sous-traitant ou son représentant, le paiement est péremptoirement réputé, entre le propriétaire et l'entrepreneur ou, selon le cas, entre l'entrepreneur et le sous-traitant, être un paiement à l'entrepreneur sur le prix général du contrat ou, selon le cas, un paiement au sous-traitant sur le prix général du contrat de sous-traitance; le paiement n'a pas toutefois pour effet de réduire le montant que doit retenir le propriétaire aux termes de l'article 24.

Priorité du privilège

31 Un privilège a priorité sur tous les jugements, exécutions, cessions, saisies, saisies-arrêts et ordonnances de mise sous séquestre qui ont lieu ou qui sont enregistrés au bureau du registre foncier après sa naissance, de même que sur tous les paiements ou avances à valoir sur un acte translatif de propriété ou sur une hypothèque lorsque ces paiements ou avances sont faits après l'enregistrement d'une réclamation de privilège conformément à la présente loi; quant aux paiements effectués avant cet enregistrement, ils ont priorité sur le privilège.

Convention d'achat

32 Lorsque le prix d'achat payable en vertu d'une convention d'achat d'un bien-fonds n'a pas été payé ou n'a pas été payé en entier et que l'acte translatif de propriété n'a pas encore été fait, l'acheteur est péremptoirement réputé, pour l'application de la présente loi, être un débiteur hypothécaire et le vendeur un créancier hypothécaire à l'égard du bien-fonds, jusqu'à concurrence de la partie impayée du prix d'achat.

Priorité parmi les titulaires de privilège

33 Sous réserve de l'article 34, du paragraphe 35(3) et du paragraphe 56(1) :

- a) aucun titulaire, aux termes de la présente loi, d'un privilège sur un bien-fonds ou d'une charge sur des sommes d'argent ne jouit de priorité ou de préférence à l'égard d'un autre titulaire, sous le régime de la présente loi, d'un privilège sur le même bien-fonds ou d'une charge sur les mêmes sommes;
- b) tous les titulaires de privilège prennent rang concurremment à l'égard des montants de leurs différents privilèges;

Tab "4"

1991 CarswellOnt 205
Ontario Court of Appeal

Royal Bank v. Soundair Corp.

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

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

Goodman, McKinlay and Galligan JJ.A.

Heard: June 11, 12, 13 and 14, 1991

Judgment: July 3, 1991

Docket: Doc. CA 318/91

Counsel: *J. B. Berkow* and *S. H. Goldman* , for appellants Canadian Pension Capital Limited and Canadian Insurers' Capital Corporation.

J. T. Morin, Q.C. , for Air Canada.

L.A.J. Barnes and *L.E. Ritchie* , for plaintiff/respondent Royal Bank of Canada.

S.F. Dunphy and *G.K. Ketcheson* , for Ernst & Young Inc., receiver of respondent Soundair Corporation.

W.G. Horton , for Ontario Express Limited.

N.J. Spies , for Frontier Air Limited.

Subject: Corporate and Commercial; Insolvency

Appeal from order approving sale of assets by receiver.

Galligan J.A. :

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

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

3 In the latter part of 1989 and the early part of 1990, Soundair was in financial difficulty. Soundair has two secured creditors who have an interest in the assets of Air Toronto. The Royal Bank of Canada (the "Royal Bank") is owed at least \$65 million dollars. The appellants Canadian Pension Capital Limited and Canadian Insurers' Capital Corporation (collectively called "CCFL") are owed approximately \$9,500,000. Those creditors will have a deficiency expected to be in excess of \$50 million on the winding up of Soundair.

4 On April 26, 1990, upon the motion of the Royal Bank, O'Brien J. appointed Ernst & Young Inc. (the "receiver") as receiver of all of the assets, property and undertakings of Soundair. The order required the receiver to operate Air Toronto and sell it as

a going concern. Because of the close relationship between Air Toronto and Air Canada, it was contemplated that the receiver would obtain the assistance of Air Canada to operate Air Toronto. The order authorized the receiver:

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

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

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

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

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

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

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

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

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

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

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

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

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

13 I will deal with the two issues separately.

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

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

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

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

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

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

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

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

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

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

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

Its decision was made as a matter of business judgment *on the elements then available to it*. It is of the very essence of a receiver's function to make such judgments and in the making of them to act seriously and responsibly so as to be prepared to stand behind them.

If the court were to reject the recommendation of the Receiver in any but the most exceptional circumstances, it would materially diminish and weaken the role and function of the Receiver both in the perception of receivers and in the perception of any others who might have occasion to deal with them. It would lead to the conclusion that the decision of the Receiver was of little weight and that the real decision was always made upon the motion for approval. That would be a consequence susceptible of immensely damaging results to the disposition of assets by court-appointed receivers.

[Emphasis added.]

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

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

[Emphasis added.]

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

24. An asset purchase agreement was received by Ernst & Young on March 7, 1991 which was dated March 6, 1991. This agreement was received from CCFL in respect of their offer to purchase the assets and undertaking of Air Toronto. Apart from financial considerations, which will be considered in a subsequent affidavit, the *Receiver determined that it would not be prudent to delay acceptance of the OEL agreement to negotiate a highly uncertain arrangement with Air Canada and CCFL*. Air Canada had the benefit of an 'exclusive' in negotiations for Air Toronto and had clearly indicated its intention take itself out of the running while ensuring that no other party could seek to purchase Air Toronto and maintain the Air Canada connector arrangement vital to its survival. The CCFL offer represented a radical reversal of this position by Air Canada at the eleventh hour. However, it contained a significant number of conditions to closing which were entirely beyond the control of the Receiver. As well, the CCFL offer came less than 24 hours before signing of the agreement with OEL which had been negotiated over a period of months, at great time and expense.

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

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

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

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

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

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

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

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

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

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

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

[Emphasis added.]

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

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

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

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

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

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

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

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

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

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

2. Consideration of the Interests of all Parties

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

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

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

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

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

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

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

In that connection I adopt the principles stated by Macdonald J.A. of the Nova Scotia Supreme Court (Appeal Division) in *Cameron v. Bank of N.S.* (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303, 86 A.P.R. 303 (C.A.), where he said at p. 11:

In my opinion if the decision of the receiver to enter into an agreement of sale, subject to court approval, with respect to certain assets is reasonable and sound under the circumstances at the time existing it should not be set aside simply because a later and higher bid is made. To do so would literally create chaos in the commercial world and receivers and purchasers would never be sure they had a binding agreement. On the contrary, they would know that other bids could be received and considered up until the application for court approval is heard — this would be an intolerable situation.

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

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

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

While every proper effort must always be made to assure maximum recovery consistent with the limitations inherent in the process, no method has yet been devised to entirely eliminate those limitations or to avoid their consequences. *Certainly*

it is not to be found in loosening the entire foundation of the system. Thus to compare the results of the process in this case with what might have been recovered in some other set of circumstances is neither logical nor practical .

[Emphasis added.]

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

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

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

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

4. Was there unfairness in the process?

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

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

51 The offering memorandum had not been completed by February 11, 1991. On that date, the receiver entered into the letter of intent to negotiate with OEL. The letter of intent contained a provision that during its currency the receiver would not negotiate with any other party. The letter of intent was renewed from time to time until the OEL offer was received on March 6, 1991.

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

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

insisted upon an exclusive negotiating right while it was negotiating with the receiver demonstrates the commercial efficacy of OEL being given the same right during its negotiations with the receiver. I see no unfairness on the part of the receiver when it honoured its letter of intent with OEL by not releasing the offering memorandum during the negotiations with OEL.

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

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

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

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

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

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

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

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

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

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

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

I agree.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

McKinlay J.A. :

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

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

Goodman J.A. (dissenting):

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Appeal dismissed.

Tab "5"

2016 MBQB 77

Manitoba Court of Queen's Bench

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

2016 CarswellMan 346, 2016 MBQB 77, 270 A.C.W.S. (3d) 312, 39 C.B.R. (6th) 29

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 Queen's Bench Act, C.C.S.M. c. C280

ROYAL BANK OF CANADA (Plaintiff) and KELLER & SONS
FARMING LTD. and KELLER HOLDINGS LTD. (Defendants)

Chartier J.

Judgment: April 22, 2016*

Docket: Winnipeg Centre CI 15-01-98054

Proceedings: affirmed *Royal Bank of Canada v. Keller & Sons Farming Ltd.* (2016), 397 D.L.R. (4th) 573, 2016 MBCA 46, 2016 CarswellMan 147, Diana M. Cameron J.A., Freda M. Steel J.A., Janice L. leMaistre J.A. (Man. C.A.)

Counsel: J. Michael J. Dow, for Plaintiff, Royal Bank of Canada and also National Bank of Canada

G. Bruce Taylor, for Defendants

Arthur J. Stacey, for Receiver, Ernst & Young Inc.

Faron J. Trippier, for Marcus Keller

Richard W. Schwartz, for Shilo Farms Ltd.

David E. Swayze, for Prospective Purchasers

Subject: Corporate and Commercial; Insolvency

MOTION by receiver for sale of debtor company's land, buildings and related irrigation infrastructure equipment to buyer.

Chartier J.:

INTRODUCTION

1 Ernst & Young Inc. (the "Receiver"), the Receiver of all assets of the defendants, filed a motion on April 1, 2016 returnable for April 8, 2016 for, amongst other things, approval of the sale of the Keller land, buildings and related irrigation infrastructure equipment (the "Keller Lands") to Spud Plains Farms Ltd., A&A Farms Ltd., T.A. Farms Ltd. and A&M Potato Growers Ltd., collectively referred to as the "Adriaansen Group". The Receiver's motion was opposed by Shilo Farms Ltd. ("Shilo"), an unsecured creditor and unsuccessful bidder, as well as Marcus Keller, the sole shareholder of the defendant debtor companies and also employed as the general manager of Shilo. After adjourning the initial hearing date one week to April 15, I granted the various orders sought by the Receiver including the approval of the agreement of purchase and sale between the Receiver and the Adriaansen Group. These are my reasons for so doing.

DISCLOSURE OF CONFIDENTIAL REPORTS AND ADJOURNMENT

2 On April 7, Shilo filed written submissions seeking an adjournment of the Receiver's motion and seeking disclosure of the Second Confidential Reports. This essentially was also the position of Marcus Keller, who also filed materials on that same day.

3 At the conclusion of the proceedings on April 8, I requested that the Receiver review the Second Confidential Reports and redact any information that they believed confidential and provide it to Shilo and Marcus Keller. If disclosure remained an issue, the Receiver was to file a brief by 9:00 a.m. on Monday, April 11, and Shilo and Marcus Keller would respond by 5:00 p.m. on April 11. I would then make a decision on further disclosure of the Confidential Reports on the basis of the written submissions. The matter was also adjourned from April 8 to April 15 where I heard submissions from the Receiver and the secured creditors, Royal Bank of Canada and National Bank of Canada supporting the sale, and from Shilo and Marcus Keller opposing the sale.

4 The Receiver provided a copy of the Second Confidential Reports with redactions and written submissions were filed by the parties. On April 12, 2016, I ordered that no further disclosure of the Second Confidential Reports be made beyond the redacted copies provided by the Receiver.

5 I made that decision in light of the decision of *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522 (S.C.C.), and also considering some of the other authorities to which I was referred, including the decision in *Skyepharma PLC v. Hyal Pharmaceutical Corp.* (2000), 47 O.R. (3d) 234 (Ont. C.A.). I found that the remaining redacted portions contained sensitive commercial information which would put the Receiver at a disadvantage should the present sale not close. It followed that such disclosure could affect the interests of the creditors whose interests were central in these proceedings. I further found that the salutary effects of non-disclosure of the redacted material outweighed the deleterious effects on the rights and interest of Shilo and Marcus Keller to have access to that material.

RECEIVER'S REQUEST FOR APPROVAL OF THE SALE

6 A decision on the approval of a sale of property by a court has, by its very nature, a certain amount of urgency as the sale remains contingent and unfinalized until the court approves it. Sometimes, as in the decision of *Shape Foods Inc. (Receiver of)*, *Re*, 2009 MBQB 171, 241 Man. R. (2d) 235 (Man. Q.B.), there is a closing date for the sale. Although here there was no such closing date, we are dealing with farmlands and one way or another the farmlands will have to be dealt with in terms of preparation of soil and seeding as we are now in the middle of the month of April which is a critical time for a farm operation.

7 I heard submissions of counsel and I have considered the materials that have been filed, including the material in the reports filed by the Receiver which update the sales process and analyze the proposed sale transaction. I am satisfied that the sale to the Adriaansen Group should be approved.

FACTS

8 The Receiver was granted authority to sell property in the order granted by Justice Schulman on October 8, 2015. The Receiver's approach to sell the Keller Lands was to solicit offers by way of a modified sale and investor solicitation process. Ultimately, three parties submitted non-binding expressions of interest prior to the deadline set by the Receiver of January 12, 2016. One of these expressions of interest was accepted but the offer was subsequently withdrawn by the party on February 24, 2016. The Receiver then contacted the two remaining offerors, Shilo and the Adriaansen Group, asking them to resubmit improved offers. Offers were received and confirmed. The Adriaansen Group offer was then verbally accepted by the Receiver. Subsequent to this verbal acceptance, Shilo increased their offer, which the Receiver also considered.

9 I will also mention that appraisals of various assets were obtained by the Receiver, including on the Keller Lands. They have been sealed pursuant to a confidentiality order that I granted. I have reviewed and considered these appraisals in arriving at my decision.

10 The Receiver made a comparison of the two bids from the Adriaansen Group and Shilo that it received when each party was asked to resubmit improved offers. The Adriaansen Group made an offer totalling \$19,620,000. Shilo made an offer of \$19,450,000 being an amount of \$18,750,000 for the Keller Lands plus \$700,000 as a settlement of certain disputed claims between the Receiver and Shilo. There are two claims, one involving a claim by the Receiver for amounts allegedly owing on the lease of the Keller Lands to Shilo in the amount of \$260,495, and the other involving the Elk Haven Farm Partnership for crop inputs on which the Receiver says Shilo owes it \$839,191. This additional amount submitted by Shilo for settlement of

claims was the subject of much of Shilo's submissions opposing the sale. The Adriaansen Group advised the Receiver that if successful it would be reselling a parcel of the Keller Lands known as Parcel 4. By agreement between the Receiver and the Adriaansen Group, depending on the amount obtained on the resale, it was possible for the Receiver to obtain further proceeds from that resale.

11 As previously indicated, after verbally accepting the offer from the Adriaansen Group, the Receiver was contacted by Shilo (through Marcus Keller) to submit an increase to the aggregate amount of the offer from \$19,450,000 to \$20 million, which is an additional \$550,000. Shilo also indicated it would make arrangements to repay amounts owing to the defendants' unsecured creditors.

12 In comparing the proposals, what was noted by the Receiver is that the amount offered by the Adriaansen Group is higher than the offer of Shilo when the settlement amount is removed from the Shilo offers. The Adriaansen Group offer being \$19,620,000 while the Shilo offer was \$19,300,000 (\$20 million less the \$700,000). The other matter noted is that the Receiver could still realize on the claims against Shilo upon acceptance of the Adriaansen Group offer, the claims estimated at \$1,100,000 by the Receiver. The Receiver also noted a potential to further increase the proceeds depending on the subsequent reselling of Parcel 4 of the Keller Lands.

13 Ultimately, while the offers were relatively close, the Receiver accepted the offer that was the highest bid for the Keller Lands even with the increased bid by Shilo.

ANALYSIS

14 The duties which a court must perform when reviewing a sale by court-appointed receiver are set out in *Royal Bank v. Soundair Corp.* (1991), 83 D.L.R. (4th) 76 (Ont. C.A.). They are as follows:

(i) the court should consider whether the Receiver has made a sufficient effort to get the best price and has not acted improvidently;

(ii) the court should consider the interests of all parties;

(iii) the court should consider the efficacy and integrity of the process by which offers are obtained; and

(iv) the court should consider whether there has been unfairness in the working out of the process.

15 Regarding this latter point, the court in *Soundair* indicated that as a general rule it is not "appropriate for the court to go into the minutia of the process" but indicated that "the court has a responsibility to decide whether the process was fair." This was the main focus of the submissions of Shilo in opposing the sale.

16 The court in *Soundair* adopted two statements from the decision in *Crown Trust Co. v. Rosenberg* (1986), 60 O.R. (2d) 87 (Ont. H.C.), as follows (pp. 102-3):

... The first is at p. 109 ...

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

The second is at p. 111 O.R. ...

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

17 Finally, in *Soundair*, Galligan J. referred to the decision of *Selkirk, Re* (1986), 58 C.B.R. (N.S.) 245 (Ont. S.C.), which states (p. 99):

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

In that connection, I adopt the principles stated by Macdonald J.A. of the Nova Scotia Supreme Court (Appeal Division) in *Cameron v. Bank of N.S.* (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303, 86 A.P.R. 303 (C.A.), where he said at p. 11:

In my opinion if the decision of the receiver to enter into an agreement of sale, subject to court approval, with respect to certain assets is reasonable and sound under the circumstances at the time existing it should not be set aside simply because a later and higher bid is made. To do so would literally create chaos in the commercial world and receivers and purchasers would never be sure they had a binding agreement. On the contrary, they would know that other bids could be received and considered up until the application for court approval is heard — this would be an intolerable situation.

18 I will now apply the relevant criteria to this transaction.

(i) The court should consider whether the Receiver has made a sufficient effort to get the best price and has not acted improvidently

19 The sales process conducted by the Receiver, as outlined in the First Confidential Report at paragraphs 91 to 95 as well as the subsequent Confidential Reports, produced competitive offers. The competitiveness of the offers is a clear indication that the Receiver's process was proper and provident in effecting the best price in the circumstances.

20 The Receiver's decision that based on the numbers the Adriaansen Group offer is higher than the Shilo offer is reasonable.

21 The secured creditors support the sale. Given the outstanding amounts owing to the secured creditors, the Royal Bank of Canada and the National Bank of Canada, and the amounts that would be generated from the sale of assets, counsel for the Receiver estimated there will likely be a shortfall of approximately \$2 million. As a result, they are the only parties with a direct interest in the proceeds of sale.

(ii) The court should consider the interests of all parties

22 The Royal Bank of Canada and the National Bank of Canada are owed as secured creditors \$24,300,000 with interest accruing as of October 2, 2015. There is also a second mortgage to Karen Keller on the Keller Lands for \$1,100,000. The Royal Bank of Canada and the National Bank of Canada support the Receiver's proposal in favour of the purchaser. They will face a shortfall and not be paid in full. These secured creditors are the only parties with a material commercial interest. It is in the interests of the secured creditors that the approval of the Receiver's proposal to sell to the Adriaansen Group be given. I will address the issue of the unsecured creditors later in my reasons.

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

(iv) The court should consider whether there has been unfairness in the working out of the process

23 The principal objection of Shilo is that there was unfairness in the process, in particular in the latter stages, when it said the Receiver "muddied the waters" in the sales process by inviting Shilo to settle outstanding claims unrelated to the sale of the Keller Lands. In other words, it was a mistake on the Receiver's part to say to Shilo that its bid would be more favourably received by the Receiver if it included an amount to settle outstanding claims by the Receiver against Shilo. I do not agree that having made such an invitation to Shilo created an unfairness in the process. I find this for the following reasons:

- (a) since the Receiver was dealing with a prospective purchaser, Shilo, with which it had outstanding claims, this was an efficient way to proceed in wrapping up other aspects of the receivership and possibly obtaining an increased overall bid;
- (b) the Receiver separately allocated the amounts put forward by Shilo to either the Keller Lands or the settlement of the claims;
- (c) it was open for Shilo to offer as much or as little as it wanted to settle the claims and as much or as little as it wanted to put forward on the amount of the Keller Lands;
- (d) the amount that Shilo did offer for the Keller Lands was not as high as the offer put forward by the Adriaansen Group.

24 While Shilo alleges some confusion, I am satisfied from reviewing the Second Confidential Reports and the affidavit of Rodger Johnson that Shilo's offer was broken down by the Receiver in terms of the offer for the Keller Lands and the amount towards settlement of the outstanding claims by the Receiver against Shilo.

25 Also, it was reasonable for the Receiver, in assessing Shilo's offer, not to take into account that part of Shilo's offer as it related to paying unsecured creditors certain amounts, for the reasons it says at para. 32(d) of the Second Confidential Reports. Moreover, giving it weight would run afoul of the interests of the secured creditors and the primacy of claims in an insolvency.

26 I had some initial concerns as to whether the Receiver had considered Shilo's increased offer which came subsequent to its verbal acceptance of the Adriaansen Group offer or whether they considered it too late, but I am satisfied that the Receiver did take into account Shilo's increased offer and they discuss the increased offer in their analysis of the two proposals.

27 Marcus Keller argued that Shilo's bid was the better overall bid. The Receiver's considered view was otherwise, and is entitled to deference.

28 I am of the view that a business judgment of the Receiver in this case is entitled to deference. I find that the Receiver has fully canvassed the market for the Keller Lands in an open, fair and transparent manner to all potential interested purchasers. In my view, the Receiver in marketing the property, and its proposed sale to the Adriaansen Group, has satisfied the criteria in the decision of *Crown Trust Co.*, adopted by the Ontario Court of Appeal in *Soundair*.

STANDING

29 I am in general agreement with the analysis of Menzies J. in the *Shape Foods* decision on the issue of standing. In that regard although I heard from Marcus Keller as a shareholder of the defendant debtor companies, something more is required for him to have standing in these proceedings. Having said that, given the exigencies of time, I heard his submissions in court. The status of Shilo is a little more complicated. The passage from the decision of *Skyepharma plc*, relied on by Menzies J., also states at para. 29:

In limited circumstances, a prospective purchaser may become entitled to participate in a sale approval motion. For that to happen, it must be shown that the prospective purchaser acquired a legal right or interest from the circumstances of a particular sale process and that the nature of the right or interest is such that it could be adversely affected by the approval order. A commercial interest is not sufficient.

30 That does appear to open the door to prospective purchasers such as Shilo. The difficulty is that without hearing from prospective purchasers and in certain circumstances allowing them disclosure, it is difficult to assess whether or not they should have standing. Ultimately, I have decided here that there was no unfairness in the process to Shilo, or anyone, and it follows that there was no interest or right of Shilo that was adversely affected. But in the circumstances I heard from Shilo at the hearing of the motion. I am mindful, however, of the caution expressed by the Ontario Court of Appeal in *Skyepharma plc*, as follows (para. 30):

There is a sound policy reason for restricting, to the extent possible, the involvement of prospective purchasers in sale approval motions. There is often a measure of urgency to complete court approved sales. This case is a good example. When unsuccessful purchasers become involved, there is a potential for greater delay and additional uncertainty. This potential may, in some situations, create commercial leverage in the hands a disappointed would be purchaser which could be counterproductive to the best interests of those for whose benefit the sale is intended.

CONCLUSION

31 In conclusion, the sales process conducted by the Receiver and the agreement that has been submitted for court approval satisfies the principles set out in the *Soundair* decision. The Receiver sought prior court approval for a sales process and it followed that process. It then proceeded with the three expressions of interest and chose the superior one. When that first offer fell through the Receiver afforded the two other offerors an opportunity to submit improved bids and allowed them to improve their bids further. The Receiver accepted what it viewed as the superior bid after comparing them, and its business judgment is entitled to deference. In the end, I find the Receiver acted reasonably, prudently and fairly. I see no reason not to approve the sale.

32 I am, therefore, approving the sale agreement and granting the requested vesting order, as well as the balance of the relief sought by the Receiver in its motion.

Motion granted.

Footnotes

- * Affirmed at *Royal Bank of Canada v. Keller & Sons Farming Ltd.* (2016), 2016 CarswellMan 147, 2016 MBCA 46, 397 D.L.R. (4th) 573, 39 C.B.R. (6th) xxx (Man. C.A.).

Tab "6"

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.)

Counsel: Chantelle Cseh, Timothy Youdan, for Appellants

Iris Fischer, Skye A. Sepp, for Respondents

Peter Scrutton, for Intervener, Attorney General of Ontario

Jacqueline Hughes, for Intervener, Attorney General of British Columbia

Ryder Gilliland, for Intervener, Canadian Civil Liberties Association

Ewa Krajewska, for Intervener, Income Security Advocacy Centre

Robert S. Anderson, Q.C., for Interveners, Ad IDEM/Canadian Media Lawyers Association, Postmedia Network Inc., CTV, a Division of Bell Media Inc., Global News, a division of Corus Television Limited Partnership, The Globe and Mail Inc. and Citytv, a division of Rogers Media Inc.

Adam Goldenberg, for Intervener, British Columbia Civil Liberties Association

Khalid Janmohamed, for Interveners, HIV & AIDS Legal Clinic Ontario, the HIV Legal Network and the Mental Health Legal Committee

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

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 J.J.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. Dymont*, [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 J.J. 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 *Dymnt* that privacy is essential to the well-being of individuals (p. 427). Viewed in this way, a privacy interest, where it shields the core information associated with dignity necessary to individual well-being, begins to look much like the physical safety interest also raised in this case, the important and public nature of which is neither debated, nor, in my view, seriously debatable. The administration of justice suffers when the operation of courts threatens physical well-being because a responsible court system is attuned to the physical harm it inflicts on individuals and works to avoid such effects. Similarly, in my view, a responsible court must be attuned and responsive to the harm it causes to other core elements of individual well-being, including individual dignity. This parallel helps to understand dignity as a more limited dimension of privacy relevant as an important public interest in the open court context.

73 I am accordingly of the view that protecting individuals from the threat to their dignity that arises when information revealing core aspects of their private lives is disseminated through open court proceedings is an important public interest for the purposes of the test.

74 Focusing on the underlying value of privacy in protecting individual dignity from the exposure of private information in open court overcomes the criticisms that privacy will always be at risk in open court proceedings and is theoretically complex. Openness brings intrusions on personal privacy in virtually all cases, but dignity as a public interest in protecting an individual's core sensibility is more rarely in play. Specifically, and consistent with the cautious approach to the recognition of important public interests, this privacy interest, while determined in reference to the broader factual setting, will be at serious risk only where the sensitivity of the information strikes at the subject's more intimate self.

75 If the interest is ultimately about safeguarding a person's dignity, that interest will be undermined when the information reveals something sensitive about them as an individual, as opposed to generic information that reveals little if anything about who they are as a person. Therefore the information that will be revealed by court openness must consist of intimate or personal details about an individual — what this Court has described in its jurisprudence on *s. 8 of the Charter* as the "biographical core" — if a serious risk to an important public interest is to be recognized in this context (*R. v. Plant*, [1993] 3 S.C.R. 281, at p. 293; *R. v. Tessling* 2004 SCC 67, [2004] 3 S.C.R. 432, at para. 60; *R. v. Cole*, 2012 SCC 53, [2012] 3 S.C.R. 34, at para. 46). Dignity transcends personal inconvenience by reason of the highly sensitive nature of the information that might be revealed. This Court in *Cole* drew a similar line between the sensitivity of personal information and the public interest in protecting that information in reference to the biographical core. It held that "reasonable and informed Canadians" would be more willing to recognize the existence of a privacy interest where the relevant information cuts to the "biographical core" or, "[p]ut another way, the more personal and confidential the information" (para. 46). The presumption of openness means that mere discomfort associated with lesser intrusions of privacy will generally be tolerated. But there is a public interest in ensuring that openness does not unduly entail the dissemination of this core information that threatens dignity — even if it is "personal" to the affected person.

76 The test for discretionary limits on court openness imposes on the applicant the burden to show that the important public interest is at serious risk. Recognizing that privacy, understood in reference to dignity, is only at serious risk where the information in the court file is sufficiently sensitive erects a threshold consistent with the presumption of openness. This

threshold is fact specific. It addresses the concern, noted above, that personal information can frequently be found in court files and yet finding this sufficient to pass the serious risk threshold in every case would undermine the structure of the test. By requiring the applicant to demonstrate the sensitivity of the information as a necessary condition to the finding of a serious risk to this interest, the scope of the interest is limited to only those cases where the rationale for not revealing core aspects of a person's private life, namely protecting individual dignity, is most actively engaged.

77 There is no need here to provide an exhaustive catalogue of the range of sensitive personal information that, if exposed, could give rise to a serious risk. It is enough to say that courts have demonstrated a willingness to recognize the sensitivity of information related to stigmatized medical conditions (see, e.g., *A.B.*, at para. 9), stigmatized work (see, e.g., *Work Safe Twerk Safe v. Her Majesty the Queen in Right of Ontario* 2021 ONSC 1100, at para. 28 (CanLII)), sexual orientation (see, e.g., *Paterson*, at paras. 76, 78 and 87-88), and subjection to sexual assault or harassment (see, e.g., *Fedeli v. Brown* 2020 ONSC 994, at para. 9 (CanLII)). I would also note the submission of the intervener the Income Security Advocacy Centre, that detailed information about family structure and work history could in some circumstances constitute sensitive information. The question in every case is whether the information reveals something intimate and personal about the individual, their lifestyle or their experiences.

78 I pause here to note that I refer to cases on s. 8 of the *Charter* above for the limited purpose of providing insight into types of information that are more or less personal and therefore deserving of public protection. If the impact on dignity as a result of disclosure is to be accurately measured, it is critical that the analysis differentiate between information in this way. Helpfully, one factor in determining whether an applicant's subjective expectation of privacy is objectively reasonable in the s. 8 jurisprudence focuses on the degree to which information is private (see, e.g., *R. v. Marakah* 2017 SCC 59, [2017] 2 S.C.R. 608, at para. 31; *Cole*, at paras. 44-46). But while these decisions may assist for this limited purpose, this is not to say that the remainder of the s. 8 analysis has any relevance to the application of the test for discretionary limits on court openness. For example, asking what the Trustees' reasonable expectation of privacy was here could invite a circular analysis of whether they reasonably expected their court files to be open to the public or whether they reasonably expected to be successful in having them sealed. Therefore, it is only for the limited purpose described above that the s. 8 jurisprudence is useful.

79 In cases where the information is sufficiently sensitive to strike at an individual's biographical core, a court must then ask whether a serious risk to the interest is made out in the full factual context of the case. While this is obviously a fact-specific determination, some general observations may be made here to guide this assessment.

80 I note that the seriousness of the risk may be affected by the extent to which information would be disseminated without an exception to the open court principle. If the applicant raises a risk that the personal information will come to be known by a large segment of the public in the absence of an order, this is a plainly more serious risk than if the result will be that a handful of people become aware of the same information, all else being equal. In the past, the requirement that one be physically present to acquire information in open court or from a court record meant that information was, to some extent, protected because it was "practically obscure" (D. S. Ardia, "Privacy and Court Records: Online Access and the Loss of Practical Obscurity" (2017), 4 *U. Ill. L. Rev.* 1385, at p. 1396). However, today, courts should be sensitive to the information technology context, which has increased the ease with which information can be communicated and cross-referenced (see Bailey and Burkell, at pp. 169-70; Ardia, at pp. 1450-51). In this context, it may well be difficult for courts to be sure that information will not be broadly disseminated in the absence of an order.

81 It will be appropriate, of course, to consider the extent to which information is already in the public domain. If court openness will simply make available what is already broadly and easily accessible, it will be difficult to show that revealing the information in open court will actually result in a meaningful loss of that aspect of privacy relating to the dignity interest to which I refer here. However, just because information is already accessible to some segment of the public does not mean that making it available through the court process will not exacerbate the risk to privacy. Privacy is not a binary concept, that is, information is not simply either private or public, especially because, by reason of technology in particular, absolute confidentiality is best thought of as elusive (see generally *R. v. Quesnelle* 2014 SCC 46, [2014] 2 S.C.R. 390, at para. 37; *UFCW*, at para. 27). The fact that certain information is already available somewhere in the public sphere does not preclude further harm to the privacy interest by additional dissemination, particularly if the feared dissemination of highly sensitive information

is broader or more easily accessible (see generally Solove, at p. 1152; Ardia, at p. 1393-94; E. Paton-Simpson, "Privacy and the Reasonable Paranoid: The Protection of Privacy in Public Places" (2000), 50 *U.T.L.J.* 305, at p. 346).

82 Further, the seriousness of the risk is also affected by the probability that the dissemination the applicant suggests will occur actually occurs. I hasten to say that implicit in the notion of risk is that the applicant need not establish that the feared dissemination will certainly occur. However, the risk to the privacy interest related to the protection of dignity will be more serious the more likely it is that the information will be disseminated. While decided in a different context, this Court has held that the magnitude of risk is a product of both the gravity of the feared harm and its probability (*R. v. Mabior* 2012 SCC 47, [2012] 2 S.C.R. 584, at para. 86).

83 That said, the likelihood that an individual's highly sensitive personal information will be disseminated in the absence of privacy protection will be difficult to quantify precisely. It is best to note as well that probability in this context need not be identified in mathematical or numerical terms. Rather, courts may merely discern probability in light of the totality of the circumstances and balance this one factor alongside other relevant factors.

84 Finally, and as discussed above, individual sensitivities alone, even if they can be notionally associated with "privacy", are generally insufficient to justify a restriction on court openness where they do not rise above those inconveniences and discomforts that are inherent to court openness (*MacIntyre*, at p. 185). An applicant will only be able to establish that the risk is sufficient to justify a limit on openness in exceptional cases, where the threatened loss of control over information about oneself is so fundamental that it strikes meaningfully at individual dignity. These circumstances engage "social values of superordinate importance" beyond the more ordinary intrusions inherent to participating in the judicial process that Dickson J. acknowledged could justify curtailing public openness (pp. 186-87).

85 To summarize, the important public interest in privacy, as understood in the context of the limits on court openness, is aimed at allowing individuals to preserve control over their core identity in the public sphere to the extent necessary to preserve their dignity. The public has a stake in openness, to be sure, but it also has an interest in the preservation of dignity: the administration of justice requires that where dignity is threatened in this way, measures be taken to accommodate this privacy concern. Although measured by reference to the facts of each case, the risk to this interest will be serious only where the information that would be disseminated as a result of court openness is sufficiently sensitive such that openness can be shown to meaningfully strike at the individual's biographical core in a manner that threatens their integrity. Recognizing this interest is consistent with this Court's emphasis on the importance of privacy and the underlying value of individual dignity, but is also tailored to preserve the strong presumption of openness.

D. The Trustees Have Failed to Establish a Serious Risk to an Important Public Interest

86 As *Sierra Club* made plain, a discretionary order limiting court openness can only be made where there is a serious risk to an important public interest. The arguments on this appeal concerned whether privacy is an important public interest and whether the facts here disclose the existence of serious risks to privacy and safety. While the broad privacy interest invoked by the Trustees cannot be relied on to justify a limit on openness, the narrower concept of privacy understood in relation to dignity is an important public interest for the purposes of the test. I also recognize that a risk to physical safety is an important public interest, a point on which there is no dispute here. Accordingly, the relevant question at the first step is whether there is a serious risk to one or both of these interests. For reasons that follow, the Trustees have failed to establish a serious risk to either. This alone is sufficient to conclude that the sealing orders should not have been issued.

(1) The Risk to Privacy Alleged in this Case Is Not Serious

87 As I have said, the important public interest in privacy must be understood as one tailored to the protection of individual dignity and not the broadly defined interest the Trustees have asked this Court to recognize. In order to establish a serious risk to this interest, the information in the court files about which the Trustees are concerned must be sufficiently sensitive in that it strikes at the biographical core of the affected individuals. If it is not, there is no serious risk that would justify an exception to openness. If it is, the question becomes whether a serious risk is made out in light of the facts of this case.

88 The application judge never explicitly identified a serious risk to the privacy interest he identified but, to the extent he implicitly reached this conclusion, I respectfully do not share his view. His finding was limited to the observation that "[t]he degree of intrusion on that privacy and dignity [i.e., that of the victims and their loved ones] has already been extreme and, I am sure, excruciating" (para. 23). But the intense scrutiny faced by the Shermans up to the time of the application is only part of the equation. As the sealing orders can only protect against the disclosure of the information in these court files relating to probate, the application judge was required to consider the sensitivity of the specific information they contained. He made no such measure. His conclusion about the seriousness of the risk then focused entirely on the risk of physical harm, with no indication that he found that the Trustees met their burden as to the serious risk to the privacy interest. Said very respectfully and with the knowledge that the application judge did not have the benefit of the above framework, the failure to assess the sensitivity of the information constituted a failure to consider a required element of the legal test. This warranted intervention on appeal.

89 Applying the appropriate framework to the facts of this case, I conclude that the risk to the important public interest in the affected individuals' privacy, as I have defined it above in reference to dignity, is not serious. The information the Trustees seek to protect is not highly sensitive and this alone is sufficient to conclude that there is no serious risk to the important public interest in privacy so defined.

90 There is little controversy in this case about the likelihood and extent of dissemination of the information contained in the estate files. There is near certainty that the Toronto Star will publish at least some aspects of the estate files if it is provided access. Given the breadth of the audience of its media organization, and the high-profile nature of the events surrounding the death of the Shermans, I have no difficulty in concluding that the affected individuals would lose control over this information to a significant extent should the files be open.

91 With regard to the sensitivity of the information, however, the information contained in these files does not reveal anything particularly private about the affected individuals. What would be revealed might well cause inconvenience and perhaps embarrassment, but it has not been shown that it would strike at their biographical core in a way that would undermine their control over the expression of their identities. Their privacy would be troubled, to be sure, but the relevant privacy interest bearing on the dignity of the affected persons has not been shown to be at serious risk. At its highest, the information in these files will reveal something about the relationship between the deceased and the affected individuals, in that it may reveal to whom the deceased entrusted the administration of their estates and those who they wished or were deemed to wish to be beneficiaries of their property at death. It may also reveal some basic personal information, such as addresses. Some of the beneficiaries might well, it may fairly be presumed, bear family names other than Sherman. I am mindful that the deaths are being investigated as homicides by the Toronto Police Service. However, even in this context, none of this information provides significant insight into who they are as individuals, nor would it provoke a fundamental change in their ability to control how they are perceived by others. The fact of being linked through estate documents to victims of an unsolved murder is not in itself highly sensitive. It may be the source of discomfort but has not been shown to constitute an affront to dignity in that it does not probe deeply into the biographical core of these individuals. As a result, the Trustees have failed to establish a serious risk to an important public interest as required by *Sierra Club* .

92 The fact that some of the affected individuals may be minors is also insufficient to cross the seriousness threshold. While the law recognizes that minors are especially vulnerable to intrusions of privacy (see *Bragg*, at para. 17), the mere fact that information concerns minors does not displace the generally applicable analysis (see, e.g., *Bragg*, at para. 11). Even taking into account the increased vulnerability of minors who may be affected individuals in the probate files, there is no evidence that they would lose control of information about themselves that reveals something close to the core of their identities. Merely associating the beneficiaries or trustees with the Shermans' unexplained deaths is not enough to constitute a serious risk to the identified important public interest in privacy, defined in reference to dignity.

93 Further, while the intense media scrutiny on the family following the deaths suggests that the information would likely be widely disseminated, it is not in itself indicative of the sensitivity of the information contained in the probate files.

94 Showing that the information that would be revealed by court openness is sufficiently sensitive and private such that it goes to the biographical core of the affected individual is a necessary prerequisite to showing a serious risk to the relevant public interest aspect of privacy. The Trustees did not advance any specific reason why the contents of these files are more sensitive than they may seem at first glance. When asserting a privacy risk, it is essential to show not only that information about individuals will escape the control of the person concerned — which will be true in every case — but that this particular information concerns who the individuals are as people in a manner that undermines their dignity. This the Trustees have not done.

95 Therefore, while some of the material in the court files may well be broadly disseminated, the nature of the information has not been shown to give rise to a serious risk to the important public interest in privacy, as appropriately defined in this context in reference to dignity. For that reason alone, I conclude that the Trustees have failed to show a serious risk to this interest.

(2) The Risk to Physical Safety Alleged in this Case is Not Serious

96 Unlike the privacy interest raised in this case, there was no controversy that there is an important public interest in protecting individuals from physical harm. It is worth underscoring that the application judge correctly treated the protection from physical harm as a distinct important interest from that of the protection of privacy and found that this risk of harm was "foreseeable" and "grave" (paras. 22-24). The issue is whether the Trustees have established a serious risk to this interest for the purpose of the test for discretionary limits on court openness. The application judge observed that it would have been preferable to include objective evidence of the seriousness of the risk from the police service conducting the homicide investigation. He nevertheless concluded there was sufficient proof of risk to the physical safety of the affected individuals to meet the test. The Court of Appeal says that was a misreading of the evidence, and the Toronto Star agrees that the application judge's conclusion as to the existence of a serious risk to safety was mere speculation.

97 At the outset, I note that direct evidence is not necessarily required to establish a serious risk to an important interest. This Court has held that it is possible to identify objectively discernable harm on the basis of logical inferences (*Bragg*, at paras. 15-16). But this process of inferential reasoning is not a licence to engage in impermissible speculation. An inference must still be grounded in objective circumstantial facts that reasonably allow the finding to be made inferentially. Where the inference cannot reasonably be drawn from the circumstances, it amounts to speculation (*R. v. Chanmany* 2016 ONCA 576, 352 O.A.C. 121, at para. 45).

98 As the Trustees correctly argue, it is not just the probability of the feared harm, but also the gravity of the harm itself that is relevant to the assessment of serious risk. Where the feared harm is particularly serious, the probability that this harm materialize need not be shown to be likely, but must still be more than negligible, fanciful or speculative. The question is ultimately whether this record allowed the application judge to objectively discern a serious risk of physical harm.

99 This conclusion was not open to the application judge on this record. There is no dispute that the feared physical harm is grave. I agree with the Toronto Star, however, that the probability of this harm occurring was speculative. The application judge's conclusion as to the seriousness of the risk of physical harm was grounded on what he called "the degree of mystery that persists regarding both the perpetrator and the motives" associated with the deaths of the Shermans and his supposition that this motive might be "transported" to the trustees and beneficiaries (para. 5; see also paras. 19 and 23). The further step in reasoning that the unsealed estate files would lead to the perpetrator's next crime, to be visited upon someone mentioned in the files, is based on speculation, not the available affidavit evidence, and cannot be said to be a proper inference or some kind of objectively discerned harm or risk thereof. If that were the case, the estate files of every victim of an unsolved murder would pass the initial threshold of the test for a sealing order.

100 Further, I recall that what is at issue here is not whether the affected individuals face a safety risk in general, but rather whether they face such a risk as a result of the openness of these court files. In light of the contents of these files, the Trustees had to point to some further reason why the risk posed by this information becoming publicly available was more than negligible.

101 The speculative character of the chain of reasoning leading to the conclusion that a serious risk of physical harm exists in this case is underlined by differences between these facts and those cases relied on by the Trustees. In *X. v. Y.*, 2011 BCSC 943, 21

B.C.L.R. (5th) 410, the risk of physical harm was inferred on the basis that the plaintiff was a police officer who had investigated "cases involving gang violence and dangerous firearms" and wrote sentencing reports for such offenders which identified him by full name (para. 6). In *R. v. Esseghaier*, 2017 ONCA 970, 356 C.C.C. (3d) 455, Watt J.A. considered it "self-evident" that the disclosure of identifiers of an undercover operative working in counter-terrorism would compromise the safety of the operative (para. 41). In both cases, the danger flowed from facts establishing that the applicants were in antagonistic relationships with alleged criminal or terrorist organizations. But in this case, the Trustees asked the application judge to infer not only the fact that harm would befall the affected individuals, but also that a person or persons exist who wish to harm them. To infer all this on the basis of the Shermans' deaths and the association of the affected individuals with the deceased is not reasonably possible on this record. It is not a reasonable inference but, as the Court of Appeal noted, a conclusion resting on speculation.

102 Were the mere assertion of grave physical harm sufficient to show a serious risk to an important interest, there would be no meaningful threshold in the analysis. Instead, the test requires the serious risk asserted to be well grounded in the record or the circumstances of the particular case (*Sierra Club*, at para. 54; *Bragg*, at para. 15). This contributes to maintaining the strong presumption of openness.

103 Again, in other cases, circumstantial facts may allow a court to infer the existence of a serious risk of physical harm. Applicants do not necessarily need to retain experts who will attest to the physical or psychological risk related to the disclosure. But on this record, the bare assertion that such a risk exists fails to meet the threshold necessary to establish a serious risk of physical harm. The application judge's conclusion to the contrary was an error warranting the intervention of the Court of Appeal.

E. There Would Be Additional Barriers to a Sealing Order on the Basis of the Alleged Risk to Privacy

104 While not necessary to dispose of the appeal, it bears mention that the Trustees would have faced additional barriers in seeking the sealing orders on the basis of the privacy interest they advanced. I recall that to meet the test for discretionary limits on court openness, a person must show, in addition to a serious risk to an important interest, that the particular order sought is necessary to address the risk and that the benefits of the order outweigh its negative effects as a matter of proportionality (*Sierra Club*, at para. 53).

105 Even if the Trustees had succeeded in showing a serious risk to the privacy interest they assert, a publication ban — less constraining on openness than the sealing orders — would have likely been sufficient as a reasonable alternative to prevent this risk. The condition that the order be necessary requires the court to consider whether there are alternatives to the order sought and to restrict the order as much as reasonably possible to prevent the serious risk (*Sierra Club*, at para. 57). An order imposing a publication ban could restrict the dissemination of personal information to only those persons consulting the court record for themselves and prohibit those individuals from spreading the information any further. As I have noted, the likelihood and extent of dissemination may be relevant factors in determining the seriousness of a risk to privacy in this context. While the Toronto Star would be able to consult the files subject to a publication ban, for example, which may assist it in its investigations, it would not be able to publish and thereby broadly disseminate the contents of the files. A publication ban would seem to protect against this latter harm, which has been the focus of the Trustees' argument, while allowing some access to the file, which is not possible under the sealing orders. Therefore, even if a serious risk to the privacy interest had been made out, it would likely not have justified a sealing order, because a less onerous order would have likely been sufficient to mitigate this risk effectively. I hasten to add, however, that a publication ban is not available here since, as noted, the seriousness of the risk to the privacy interest at play has not been made out.

106 Further, the Trustees would have had to show that the benefits of any order necessary to protect from a serious risk to the important public interest outweighed the harmful effects of the order, including the negative impact on the open court principle (*Sierra Club*, at para. 53). In balancing the privacy interests against the open court principle, it is important to consider whether the information the order seeks to protect is peripheral or central to the judicial process (paras. 78 and 86; *Bragg*, at paras. 28-29). There will doubtless be cases where the information that poses a serious risk to privacy, bearing as it does on individual dignity, will be central to the case. But the interest in important and legally relevant information being aired in open court may well overcome any concern for the privacy interests in that same information. This contextual balancing, informed

by the importance of the open court principle, presents a final barrier to those seeking a discretionary limit on court openness for the purposes of privacy protection.

VI. Conclusion

107 The conclusion that the Trustees have failed to establish a serious risk to an important public interest ends the analysis. In such circumstances, the Trustees are not entitled to any discretionary order limiting the open court principle, including the sealing orders they initially obtained. The Court of Appeal rightly concluded that there was no basis for asking for redactions because the Trustees had failed at this stage of the test for discretionary limits on court openness. This is dispositive of the appeal. The decision to set aside the sealing orders rendered by the application judge should be affirmed. Given that I propose to dismiss the appeal on the existing record, I would dismiss the Toronto Star's motion for new evidence as being moot.

108 For the foregoing reasons, I would dismiss the appeal. The Toronto Star requests no costs given the important public issues in dispute. As such, there will be no order as to costs.

Appeal dismissed.

Pourvoi rejeté.

Footnotes

- 1 As noted in the title of proceedings, the appellants in this matter have been referred to consistently as the "Estate of Bernard Sherman and Trustees of the Estate and Estate of Honey Sherman and Trustees of the Estate." In these reasons the appellants are referred to throughout as the "Trustees" for convenience.
- 2 The use of "Toronto Star" as a collective term referring to both respondents should not be taken to suggest that only Toronto Star Newspapers Ltd. is participating in this appeal. Mr. Donovan is the only respondent to have been a party throughout. Toronto Star Newspapers Ltd. was a party in first instance, but was removed as a party on consent at the Court of Appeal. By order of Karakatsanis J. dated March 25, 2020, Toronto Star Newspapers Ltd. was added as a respondent in this Court.
- 3 At the time of writing the House of Commons is considering a bill that would replace part one of *PIPEDA*: Bill C-11, *An Act to enact the Consumer Privacy Protection Act and the Personal Information and Data Protection Tribunal Act and to make consequential and related amendments to other Acts*, 2nd Sess., 43rd Parl., 2020.

Tab "7"

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 CANADA ULC, HUDSON ENERGY CANADA CORP., JUST MANAGEMENT CORP., JUST ENERGY FINANCE HOLDING INC., 11929747 CANADA INC., 12175592 CANADA INC., JE SERVICES HOLDCO I INC., JE SERVICES HOLDCO II INC., 8704104 CANADA INC., JUST ENERGY ADVANCED SOLUTIONS CORP., JUST ENERGY (U.S.) CORP., JUST ENERGY ILLINOIS CORP., JUST ENERGY INDIANA CORP., JUST ENERGY MASSACHUSETTS CORP., JUST ENERGY NEW YORK CORP., JUST ENERGY TEXAS I CORP., JUST ENERGY, LLC, JUST ENERGY PENNSYLVANIA CORP., JUST ENERGY MICHIGAN CORP., JUST ENERGY SOLUTIONS INC., HUDSON ENERGY SERVICES LLC, HUDSON ENERGY CORP., INTERACTIVE ENERGY GROUP LLC, HUDSON PARENT HOLDINGS LLC, DRAG MARKETING LLC JUST ENERGY ADVANCED SOLUTIONS LLC, FULCRUM RETAIL ENERGY LLC, FULCRUM RETAIL HOLDINGS LLC, TARA ENERGY, LLC, JUST ENERGY MARKETING CORP., JUST ENERGY CONNECTICUT CORP., JUST ENERGY LIMITED, JUST SOLAR HOLDINGS CORP. and JUST ENERGY (FINANCE) HUNGARY ZRT. (Applicants) and MORGAN STANLEY CAPITAL GROUP INC. (Respondents)

McEwen J.

Heard: November 2, 2022
Judgment: November 14, 2022
Docket: CV-21-00658423-00CL

Counsel: Jeremy Dacks, Marc Wasserman, for Just Energy Group
Tim Pinos, Ryan Jacobs, Alan Merskey, for LVS III SPE XV LP, TOCU XVII LLC, HVS XVI LLC, OC II LVS XIV LP, OC III LFE I LP and CBHT Energy I LLC
David H. Botter, Sarah Link Schultz, for LVS III SPE XV LP, TOCU XVII LLC, HVS XVI LLC, OC II LVS XIV LP, OC III LFE I LP and CBHT Energy I LLC
Heather L. Meredith, James D. Gage, for Agent and the Credit Facility Lenders
Howard A. Gorman, Ryan E. Manns, for Shell Energy North American (Canada) Inc. and Shell Energy North America (U.S.)
Danielle Glatt, for U.S. Counsel for Fira Donin and Inna Golovan, in their capacity as proposed class representatives in Donin et al. v. Just Energy Group Inc. et al. and Counsel to U.S. Counsel for Trevor JorDET, in his capacity as proposed class representative in JorDET v. Just Energy Solutions Inc.
David Rosenfeld, James Harnum, for Haidar Omarali in his capacity as Representative Plaintiff in Omarali v. Just Energy
Robert Kennedy, for BP Energy Company and certain of its affiliates
Jessica MacKinnon, for Macquarie Energy LLC and Macquarie Energy Canada Ltd.
Bevan Brooksbank, for Chubb Insurance Co. of Canada
Alexandra McCawley, for Counsel to Fortis BC Energy Inc.
Robert I. Thornton, Rebecca Kennedy, Rachel B. Nicholson, Puya Fesharaki, for FTI Consulting Canada Inc., as Monitor
John F. Higgins, for FTI Consulting Canada Inc., as Monitor
Ganesh Yadav, for himself
Mohammad Jaafari, for himself

Subject: Corporate and Commercial; Insolvency

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 an Initial 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 a Claims 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 Approval Order, 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 [Quest University \(Re\)](#), 2020 BCSC 1883, at para. 157.

30 Some courts have also held that [s. 36 of 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 Energy 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 imprudently; 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) and 191(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's Order.

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 JEJJK. The stay of proceedings does not extend to JEJJK, 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 the Monitor'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 Black Rock 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.

Tab "8"

2023 ONSC 4203

Ontario Superior Court of Justice

Ontario Securities Commission v. Bridging Finance Inc.

2023 CarswellOnt 11304, 2023 ONSC 4203

ONTARIO SECURITIES COMMISSION (Applicant) and BRIDGING FINANCE INC., BRIDGING INCOME FUND LP, BRIDGING MID-MARKET DEBT FUND LP, SB FUND GP INC., BRIDGING FINANCE GP INC., BRIDGING INCOME RSP FUND, BRIDGING MID-MARKET DEBT RSP FUND, BRIDGING PRIVATE DEBT INSTITUTIONAL LP, BRIDGING REAL ESTATE LENDING FUND LP, BRIDGING SMA 1 LP, BRIDGING INFRASTRUCTURE FUND LP, BRIDGING MJ GP INC., BRIDGING INDIGENOUS IMPACT FUND, BRIDGING FERN ALTERNATIVE CREDIT FUND, BRIDGING SMA 2 LP, BRIDGING SMA 2 GP INC., and BRIDGING PRIVATE DEBT INSTITUTIONAL RSP FUND (Respondents)

Geoffrey B. Morawetz C.J. Ont. S.C.J.

Heard: July 17, 2023

Judgment: July 17, 2023

Docket: CV-21-006611458-00CL

Counsel: John L. Finnigan, Grant Moffat, Adam Driedger, for Receiver, PricewaterhouseCoopers Inc.
David Ullman, for Thomas Canning (Maidstone) Limited, William Thomas, Robert Thomas & 2190330 Ontario Ltd.
Robert Staley, Mike Shakra — Unitholder Representative Counsel

Subject: Civil Practice and Procedure; Contracts; Corporate and Commercial; Securities

MOTION by receiver to approve transaction, for sealing order and other relief.

Geoffrey B. Morawetz C.J. Ont. S.C.J.:

1 The Receiver brings this motion seeking the following orders:

(a) authorizing and directing the Receiver to enter into the AMI SPA and take such steps as are necessary to carry out the AMI Transaction and vesting all of the Receiver's right, title, and interest in the GFAC Shares held by Bridging in and to the Purchaser thereof on closing of the AMI Transaction free and clear of all encumbrances (the "Approval and Vesting Order");

(b) authorizing and directing the Receiver, on behalf of BIF, as the sole equity holder of Bottom Line, to enter into the Bottom Line APA and take such steps as are necessary to carry out the Bottom Line Transaction (the "Bottom Line Order");

(c) sealing from the public record until the closing of the AMI Transaction the unredacted copy of the AMI SPA, to be filed as Confidential Appendix "A" to the Seventeenth Report (the "AMI Sealing Order");

(d) sealing from the public record until closing of the Bottom Line Transaction the unredacted copy of the Bottom Line APA, to be filed as Confidential Appendix "B" to the Seventeenth Report; provided that Schedule 6.3(a) of the Bottom Line APA shall remain sealed until further order of the Court (the "Bottom Line Sealing Order" and together with the AMI Sealing Order, the "Sealing Orders"); and

(e) approving the Sixteenth Report of the Receiver dated April 25, 2023, the Supplement to the Sixteenth Report of the Receiver dated May 4, 2023, and the Seventeenth Report of the Receiver dated July 10, 2023, and the activities, decisions and conduct of the Receiver as set out therein.

2 The capitalized terms not expressly defined herein are defined, and have the meanings set forth, in the Seventeenth Report of the Receiver dated July 10, 2023 (the "Seventeenth Report").

3 There was no opposition to the requested relief. Unitholder Representative Counsel supported the position of the Receiver.

FACTS

4 The facts relevant to this motion are set more fully out at paragraphs 83 to 148 of the Seventeenth Report.

AMI Transaction

5 AtlantiCann Medical Inc. ("AMI") is a federally licensed cannabis producer based in Halifax, Nova Scotia. AMI is 100% owned by Growforce AC Holdings Inc. ("GFAC"), a privately held corporation. GFAC is a holding company that was incorporated for the sole purpose of holding the shares of AMI. The issued and outstanding shares of GFAC (collectively, the "GFAC Shares") are held as follows:

(a) 10.05% by Halef Group Holdings Limited;

(b) 0.5% by Tim Nolan; and

(c) 89.45% collectively by or on behalf of BIF, MMF, BIIF, and SMA 2 (collectively, the "Applicable Bridging Funds").

6 In addition to holding 89.45% of the shares of GFAC, Bridging is a secured creditor of AMI and GFAC. AMI and GFAC have each guaranteed the indebtedness of a Borrower to Bridging and Bridging continues to hold security over all of the assets of AMI and GFAC in respect of such guarantees.

7 There have been four unsuccessful separate marketing efforts conducted in respect of AMI and GFAC (and/or the interest of Bridging and MJar in AMI and GFAC).

8 In early 2023, GFAC and the Receiver received various inquiries regarding the opportunity to purchase the AMI business. 15103154 Canada Inc. (the "AMI Purchaser") submitted a LOI to AMI on March 21, 2023 to purchase 100% of the shares of AMI from GFAC. After preliminary negotiations with AMI and GFAC, the Purchaser submitted a revised LOI on April 27, 2023 and, following further negotiations, it was recommended by the special committee of the board of directors to the shareholders of GFAC and accepted following consultation with the Receiver.

9 On June 23, 2023, the Receiver (on behalf of Bridging), the Halef Group, and Tim Nolan and the Purchaser entered into a share purchase agreement (the "SPA") for the purchase of 100% of the GFAC Shares (the "AMI Transaction").

10 The SPA has been redacted to preserve the confidentiality of the Purchase Price payable by the Purchaser and other applicable monetary amounts or percentages that reveal the economic terms of the SPA. The Receiver seeks a sealing order in respect of the unredacted SPA, which is time limited to the period up to and including the Closing Date (after which it is contemplated that the unredacted SPA will no longer be sealed and will form part of the public record).

11 The SPA sets out the terms and conditions pursuant to which the Purchaser will acquire 100% of the GFAC Shares from the Vendors.

12 The Receiver is satisfied, in its business judgment, that the AMI Transaction represents the highest and best value in the circumstances for the GFAC Shares and is superior to any alternatives, including a liquidation of the assets of AMI.

The Receiver consulted with Unitholder Representative Counsel on the AMI Transaction and potential alternatives. Unitholder Representative Counsel supports the AMI Transaction.

Bottom Line Transaction

13 Pittsburg Bottom Line, LLC ("Bottom Line") is a Borrower that provides railroad infrastructure services in the Southwestern and Midwestern United States. Bottom Line is an affiliate of Allied, another Bridging Borrower. BIF is the senior secured creditor and sole equity holder of each of Allied and Bottom Line. There have been two separate marketing efforts conducted by the Receiver in respect of Bottom Line. The first effort proved to be unsuccessful.

14 The deadline for submission of LOIs was February 28, 2023. The Receiver received multiple offers by the bid deadline. The Receiver ultimately identified Martinus North America, Inc. or an affiliate thereof (the "Martinus") as the successful bidder. Bottom Line and Martinus executed a non-binding LOI on March 13, 2023 (the "Martinus LOI"), which contemplated the sale by Bottom Line of substantially all of its assets to Martinus (or an affiliate) subject to, among other things, completion of due diligence and negotiation of definitive documentation.

15 The Receiver is satisfied that the Bottom Line APA represents the highest and best offer for the Bottom Line assets and business at this time.

16 The assets being sold pursuant to the Bottom Line APA are the property of Bottom Line and not Bridging (and therefore do not constitute "Property" over which the Receiver has been appointed). In that regard, there are two key implications that impact the nature of the relief being sought by the Receiver:

- (a) first, the Court does not have jurisdiction to vest title to the Bottom Line assets in and to Martinus; and
- (b) second, the Appointment Orders do not require the Receiver to obtain Court approval prior to a wholly-owned subsidiary of Bridging selling its own assets, which do not constitute Property. Paragraph 2(k) of the Appointment Orders only requires the Receiver to obtain Court approval prior to selling Property for an amount greater than \$250,000.

17 However, given that the Bottom Line assets are directly tied to the value of the equity interest in Bottom Line held by BIF and the loans made by BIF to Bottom Line (all of which constitute Property), the Receiver is seeking the Court approval to enter into and carry out the terms of the Bottom Line APA. The Receiver consulted with Unitholder Representative Counsel on the Bottom Line Transaction. Unitholder Representative Counsel supports the Bottom Line Transaction.

ISSUES

18 The issues on this motion are whether the Court should:

- (a) approve the AMI Transaction and grant the proposed Approval and Vesting Order;
- (b) authorize and direct the Receiver, on behalf of BIF, as the sole equity holder of Bottom Line, to enter into the Bottom Line APA and carry out the Bottom Line Transaction; and
- (c) grant the proposed Sealing Orders in respect of Confidential Appendices "A" and "B" to the Seventeenth Report.

Approval and Vesting Order for AMI Transaction

19 It is well-established that where a Court is asked to approve a transaction and grant a sale approval and vesting order in the context of a receivership, the Court should consider the following principles delineated by the Court of Appeal for Ontario in *Royal Bank of Canada v. Soundair Corp.* 1991 CanLII 2727ONCA (collectively, the "Soundair Principles"):

- (a) whether the party made a sufficient effort to obtain the best price and to not act improvidently;
- (b) the interests of all parties;

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

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

20 Absent clear evidence that a proposed sale is improvident or that there was unfairness in the process, a Court is to grant deference to the recommendation of the Receiver to sell a respondent's assets. Only in "exceptional circumstances" will a Court intervene and proceed contrary to the recommendation of its officer, the Receiver.

21 Having reviewed the record and hearing submissions, I am satisfied that the Soundair Principles have been adhered to and that the Approval and Vesting Order should be granted for the following reasons:

(a) In my view, sufficient effort was made to obtain the best price. As noted above, four separate marketing processes were conducted. The consideration that will be received by Bridging under the AMI Transaction is superior to any other offers received as well as the liquidation value of AMI's assets. The Receiver is of the view that conducting a fresh marketing process for AMI would not be a productive use of Bridging's resources. Further, closing the AMI Transaction eliminates the risk that Bridging's investment in AMI, as well as its security position as a secured creditor of AMI, may deteriorate in value.

(b) Further, the interests of all parties have been served. The AMI Transaction represents the best possible outcome in the circumstances for all parties with an economic interest in AMI. The AMI Transaction also provides for the continuation of the AMI business, thus preserving jobs for a number of employees in Nova Scotia as well as value for customers, suppliers, and other parties with whom AMI transacts.

(c) In my view, the sale processes were run with integrity and there was no unfairness. The Receiver is satisfied, in its business judgment, that each sale process described above in respect of GFAC and AMI was conducted in a fair and transparent manner.

Approval Regarding Bottom Line Transaction

22 The Receiver seeks an order authorizing and directing the Receiver, on behalf of BIF, as the sole equity holder of Bottom Line, to enter into the Bottom Line APA and carry out the Bottom Line Transaction. On that basis, the Receiver has considered the application of the Soundair Principles to the Bottom Line Transaction.

23 I am satisfied that the Soundair Principles have been adhered to and therefore the Bottom Line Order should be granted for the following reasons:

(a) In my view, sufficient effort was made to obtain the best price. The Receiver is satisfied, in its business judgment, that the Bottom Line Transaction represents the highest and best value for the assets of Bottom Line in the circumstances. It will also eliminate the ongoing requirement of Bridging to fund the Bottom Line business. The consideration that will be received by Bridging under the Bottom Line Transaction is superior to the liquidation value of Bottom Line's assets. The Receiver is of the view that conducting a fresh marketing process for Bottom Line would not be a productive use of Bridging's resources.

(b) Further, the interests of all parties have been served. The Bottom Line Transaction maximizes value for all parties with an economic interest in Bottom Line.

(c) In my view, the sale processes were run with integrity and there was no unfairness. The Receiver is satisfied, in its business judgment, that each sale process described above in respect of Bottom Line was conducted in a fair and transparent manner.

(d) There are no exceptional circumstances that would lead this Court to proceed contrary to the recommendation of the Receiver. The Receiver consulted with Representative Counsel on the Bottom Line Transaction and potential alternatives. Representative Counsel supports the Bottom Line Transaction.

Sealing Orders

24 The Receiver seeks a sealing order in respect of Confidential Appendix "A" and Confidential Appendix "B" to the Seventeenth Report.

25 Confidential Appendix "A" contains the unredacted AMI SPA. The redacted version of the AMI SPA redacted the purchase price and other applicable monetary amounts or percentages that reveal the economic terms of the AMI Transaction (the "AMI Economic Terms"). The Receiver only seeks to seal the AMI Economic Terms until the closing of the AMI Transaction.

26 Confidential Appendix "B" contains the unredacted Bottom Line APA. The redacted version of the Bottom Line APA redacted the monetary components of the purchase price (the "Bottom Line Economic Terms"), the list of customer and/or supplier contracts to be assumed by Martinus contained at Schedule 1.5 thereto (the "Third Party Contracts"), and the names and salaries of the employees of Bottom Line to be assumed by Martinus contained at Schedule 6.3(a) thereto (the "Employee Information"). The Receiver only seeks to seal the Bottom Line Economic Terms and the Third Party Contracts until the closing of the Bottom Line Transaction. The Receiver seeks to seal the Employee Information until further order of the Court.

27 The applicable test for granting a sealing order, as set out by the Supreme Court in *Sherman Estate v. Donovan*, 2021 SCC 25 at para. 28, is that the person asking a court to exercise discretion in a way that limits the open court presumption must establish that:

- (a) court openness poses a serious risk to an important public interest;
- (b) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and
- (c) as a matter of proportionality, the benefits of the order outweigh its negative effects.

28 The Receiver submits that the request for a sealing order in respect of the AMI Economic Terms, the Bottom Line Economic Terms, the Third Party Contracts, and the Employee Information satisfies the *Sherman Estate* test for the reasons set out below.

29 The key economic terms of a transaction are routinely sealed until closing on the basis that there is a broader public interest in maintaining the confidentiality of such information. See, for example, *U.S. Steel Canada Inc. et al. v. The United Steel Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union et al* 2023 ONSC 2579 at para 54; and *American General Life Insurance Company et al. v. Victoria Avenue North Holdings Inc. et al.*, 2023 ONSC 3322 at para 30.

30 In the Receiver's view, disclosure of the AMI Economic Terms and the Bottom Line Economic Terms (together, the "Economic Terms") would prejudice recoveries for Bridging's stakeholders in the event that the applicable transactions do not close because the disclosure of such terms would effectively create a ceiling on the amount that a new purchaser would be prepared to pay for the applicable assets or shares.

31 The Receiver submits that there are no alternatives to sealing the Economic Terms. In terms of proportionality, given that the Sealing Orders in respect of the Economic Terms are time limited to the pre-closing period, the Receiver submits that the limitation on the open court principle is both minimal and justified. The broader public interest in maintaining the confidentiality of economic terms pre-closing and maximizing recoveries for the Bridging stakeholders outweighs the minimal limitation on the open court principle in these circumstances.

32 The Third Party Contracts are the contracts between Bottom Line and third parties that will be assumed by Martinus on closing. The redacted Schedule 1.5 in the Bottom Line APA, which contains the Third Party Contracts, sets out the name of each contract and the parties thereto. None of the parties involved in the Third Party Contracts are parties to this proceeding.

33 Disclosing the Third Party Contracts could facilitate efforts by Bottom Line's competitors to market goods or services to those customers or suppliers, to the detriment of Bottom Line. Similar to the Economic Terms, disclosure of the Third Party Contracts could therefore prejudice recoveries for Bridging's stakeholders in the event that the Bottom Line Transaction does not close.

34 Counsel to the Receiver submits that there are no alternatives to sealing the Third Party Contracts. In terms of proportionality, similar to the Economic Terms, given that the Sealing Order in respect of the Third Party Contracts is time limited to the pre-closing period, the Receiver submits that the limitation on the open court principle is minimal in these circumstances and is outweighed by the broader public interest in maximizing recoveries for the Bridging stakeholders.

35 The Employee Information contains the specific names and salaries (or hourly wages) of each employee of Bottom Line that is to be assumed by Martinus on closing. None of the applicable employees are parties to this proceeding.

36 Employee names and salaries have been sealed in similar circumstances by the Court in this proceeding *Ontario Securities Commission v. Bridging Finance Inc* 2021 ONSC 4347 [Bridging] at paras 25-27, as well as other cases that were also decided after the Supreme Court released its decision in *Sherman Estate* . (See: *Just Energy Group Inc. et al* 2021 ONSC 7630 [Just Energy] at paras 26-29; and *PricewaterhouseCoopers Inc. v. MJardin Group, Inc* 2022 ONSC 3603 [MJardin] at paras 13-21.) The overarching principle from these cases is that there is an important public interest in protecting sensitive and personal compensation information of non-party employees that justifies a sealing order in certain circumstances. See for example: *Canwest Global Communications Corp., Re*, [2009] OJ No 4286 (QL) at para 52; *Bridging*; *Just Energy* ; and *MJardin*.

37 The Receiver submits that the foregoing principles should apply equally to the Employee Information in this case. The Receiver is of the view that the named employees have a reasonable expectation that their names and salaries (or hourly wages for the non-salaried employees) will be kept private, particularly in a proceeding that is entirely unrelated to their employment. Disclosure of the Employee Information may offend applicable privacy legislation or may otherwise give rise to claims against Bottom Line or Bridging by the employees.

38 The Receiver is of the view that no party will be prejudiced in sealing the Employee Information and the benefits of granting the sealing order outweigh any limited impact on the open court principle. There are no reasonable alternatives in the circumstances.

39 In the other cases referenced herein in which similar employee information was sealed, the applicable sealing order was to remain in effect pending further order of the Court. The Receiver similarly requests that the Employee Information remain sealed in this case until further order of the Court.

40 Having reviewed the submissions of the Receiver, and having considered the test set out in *Sherman Estate* , I am satisfied that, in these circumstances, it is appropriate to grant the sealing orders requested by the Receiver.

Approval of Reports and Activities

41 Finally, the Receiver requests approval of its Sixteenth Report, the Supplement to the Sixteenth Report and the Seventeenth Report.

42 The Receiver reports that no adverse comments have been received in respect of the reports.

43 I am satisfied that these Reports should be approved.

DISPOSITION

44 The motion is granted and the Orders reflecting the foregoing have been signed.

Motion granted.

End of Document

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Tab "9"

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 Entities

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 asserts 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 is limited by the inclusion of the wording provided by counsel to Rio Can and KingSett, referenced at paragraph [7].

Application granted in part.

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Tab "10"

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 vigorous 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 vigorously 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.

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Tab "11"

2024 BCCA 249

British Columbia Court of Appeal

Skeena Resources Ltd. v. Mill

2024 CarswellIBC 1905, 2024 BCCA 249, 18 P.P.S.A.C. (4th) 221, 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, Harris, Skolrood JJ.A.

Heard: May 15-17, 2024

Judgment: July 4, 2024

Docket: Vancouver CA48751

Proceedings: reversing *Skeena Resources Ltd. v. Mill* (2022), 2022 CarswellIBC 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; Corporate and Commercial; Natural Resources; Property

APPEAL from judgment reported at *Skeena Resources Ltd. v. Mill* (2022), 2022 BCSC 2032, 2022 CarswellIBC 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),

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);

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."

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,

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.

As mentioned earlier, rights of appeal are provided by ss. 13(7) and (8).

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 Kohn Crippen, referred to as the "Knight Kohn 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-Kohn 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 m², of which the Company has only tested a small portion measuring 5,200 m². 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 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. [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 "evinced 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 19 at 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 31 at 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 62 at para. 41 ...). [At para. 46; emphasis added.]

See also *Mason v. Canada (Citizenship and Immigration)*, 2023 SCC 21 at 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 459 at 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 1251 at para. 72, *Dean v. Kotsopoulos*, 2012 ONCA 143 at 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 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 115 (Eng. 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.

Schedule A

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](#);
- (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;
- (e) a protected heritage property.

...

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*.

Tab "12"

2009 CarswellOnt 6167

Ontario Superior Court of Justice [Commercial List]

Ed Mirvish Enterprises Ltd. v. Stinson Hospitality Inc.

2009 CarswellOnt 6167, [2009] O.J. No. 4265, 181 A.C.W.S. (3d) 471

**Ed Mirvish Enterprises Limited and 1 King West Inc. v. Stinson
Hospitality Inc., Dominion Club of Canada Corporation and Harry Stinson**

Pepall J.

Judgment: September 25, 2009

Docket: 07-CL-6913

Counsel: L. Joseph Latham, Lauren Butti for Receiver
Jeff Carhart for Ed Mirvish Enterprises Limited, 1 King West Inc.
M. Michael Title for Segura Investments Ltd.
Harry Stinson for himself
Robert Verdun for himself

Subject: Insolvency; Civil Practice and Procedure

Pepall J.:

Relief Requested

1 Ira Smith Trustee & Receiver Inc. ("ISI"), the court appointed receiver and manager of Stinson Hospitality Inc., Dominion Club of Canada Corporation, The Suites at 1 King West ("the Suites") and 2076564 Ontario Inc. (the "Receiver"), requests an order: approving its 13th Report and its fees and activities that are detailed in that Report; approving a final distribution of proceeds to secured creditors in the amount of \$907,137.91 and to unsecured creditors of Suites in the amount of \$122,854; approving an assignment of the Receiver's rights under certain cost awards against Robert Verdun to Segura Investments Ltd.; and discharging the Receiver and releasing the Receiver and its counsel. The motion is supported by all those appearing except Mr. Verdun and Mr. Stinson. They are unopposed to all the relief requested except for the scope of the requested release.

Background Facts

2 The Receiver was appointed receiver and manager of the debtors on August 24, 2007. The receivership was complex and involved numerous stakeholders with differing interests including many individual condominium owners. Ultimately the subject property was sold and interim distributions were made to secured creditors. The Receiver reported regularly on its activities and proposed fees to the Court and on notice to interested parties. Twelve Receiver Reports have been approved as have the requested fees. Indeed, no one ever opposed the fees requested by the Receiver and its counsel.

3 The Receiver had particular problems with one of the condominium owners, Mr. Verdun. He was insulting and abusive of the Receiver and its counsel, distributed inflammatory correspondence and lodged complaints with the Superintendent of Bankruptcy, the Institute of Chartered Accountants of Ontario, and with the Law Society. All professional complaints have either been dismissed by the governing body or no action is being taken by the governing body with respect to the subject complaint. After having had numerous opportunities to take issue with the secured parties' security, very late in the proceedings, he chose to challenge it but then abandoned his motion. At that time the Receiver requested costs on a full indemnity basis. While I had considerable sympathy for the Receiver, for the reasons set forth in my endorsement, I awarded costs on a partial indemnity scale against Mr. Verdun. Rouleau J.A. also made a costs order against Mr. Verdun in favour of the Receiver.

4 Pursuant to a Court order, the Receiver conducted a call for creditor claims against the debtors and for claims against the Receiver and its counsel. Notices of determination dismissing the claims were sent to claimants but no appeals were initiated.

5 Administration of the estate has largely been completed. With the exception of the costs owing by Mr. Verdun, all of the undertaking, property and assets of the debtors have been collected and sold by the Receiver. The only task remaining is for the Receiver to issue the final approved distributions and respond to Mr. Verdun's leave to appeal costs motion. It therefore recommends that it be authorized to make those final distributions and assign its interest in its two cost awards to Segura Investments Ltd. and then be discharged. In view of the litigious nature of the proceedings and the claims filed as part of the claims process, the Receiver requests the following provisions in the discharge order:

10. THIS COURT ORDERS that notwithstanding its discharge, the Receiver shall continue to have the benefit of the provisions of all Orders made in this proceeding, including all approvals, protections and stays of proceedings in favour of ISI in its capacity as Receiver.

11. THIS COURT ORDERS AND DECLARES that, effective upon the filing with this Court of the Certificate of the Receiver referred to in paragraph 9 above, ISI, in its capacity as both Monitor and Receiver, and all of its directors, officers, employees and agents, and Goodmans LLP and all partners and employees thereof (collectively the "Receiver Parties"), are hereby released and discharged from any and all liability that the Receiver Parties now have or can, may or shall have hereafter by reason of, or in any way arising out of, or in connection with the Receiver Parties' conduct, involvement or duties with respect to the Debtors or in any way in connection with these proceedings. Without limiting the generality of the foregoing, the Receiver Parties are hereby forever released and discharged from any and all liability relating to matters that were raised, or which could have been raised, in these proceedings.

Positions of Parties

6 As mentioned, no one except Mr. Verdun and Mr. Stinson takes issue with the proposed order. They are unopposed to the order requested but submit that the release should exclude gross negligence and willful misconduct on the part of the Receiver Parties as they are defined in the proposed order.

Discussion

7 The issue raised by this motion often arises on a motion to discharge a receiver.

8 A Court appointed receiver is an officer and instrument of the Court. Liability it incurs is for its own account. It is for this reason that, subject to certain exceptions, a receiver typically receives a first charge over the assets under receivership. This secures its fees and disbursements and any liability it may incur with the exception of gross negligence and willful misconduct. The receiver is fully compensated by the estate once it has realized on the assets. A receiver wishes to be discharged once it has completed the substance of its mandate. Creditors typically support the requested discharge as they wish a final distribution of the remaining funds in the estate and do not wish additional receivership expenses to be incurred which would reduce the funds available for distribution. A receiver often is concerned that if it is discharged without a full release, it may be required to spend time and money defending an unmeritorious action. Once discharged, there is no ability for the receiver to recover its costs from the estate. Absent a discharge and if there are funds in the estate, a receiver may be protected and compensated by the estate.

9 Unlike a trustee in bankruptcy, a receiver is unable to look for statutory assistance. Section 41(8) of the *Bankruptcy and Insolvency Act*¹ provides that the discharge of a trustee discharges him from all liability in respect of any act done or default made by him in the administration of the property of the bankrupt and in relation to his conduct as trustee but any discharge may be revoked by the Court on proof that it was obtained by fraud or by suppression or concealment of any material fact. A receiver's discharge is not addressed by statute. For all of these reasons, requests for full releases are made of the Court.

10 The Commercial List Users' Committee had occasion to examine this issue when preparing a standard template or model discharge order. That order includes a provision comparable to paragraph 10 before me that continues the protections provided

in the initial receivership order and an optional paragraph that contains a general release comparable although not identical to that contained in paragraph 11 before me.

11 Dealing firstly with the substance of paragraph 10 of the proposed discharge order, the model order appointing a receiver provides that the receiver shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of the order, save and except for any gross negligence or willful misconduct on its part. In addition, the order states that nothing in it derogates from the protections afforded the receiver by section 14.6 of the BIA or any other applicable legislation. Furthermore, no proceeding shall be commenced or continued against the receiver except with the written consent of the receiver or with leave of the Court. Similarly, subject to certain exceptions, all rights and remedies against the receiver are stayed and suspended except with the written consent of the receiver or leave of the Court.

12 In the explanatory notes accompanying the model receivership order, the subcommittee observes that it is unaware of any case law guidance on the question of why a receiver who has been found to have committed deliberate misconduct or to have been grossly negligent ought to be protected from an award of damages that reasonably flow from its misconduct.

13 Turning to the substance of paragraph 11 of the proposed discharge order that includes a general release, the explanatory notes that accompany the model discharge order state: "The model order subcommittee was divided as to whether a general release might be appropriate. On the one hand, the receiver has presumably reported its activities to the Court, and presumably the reported activities have been approved in prior Orders. Moreover, the Order that appointed the receiver likely has protections in favour of the Receiver. These factors tend to indicate that a general release of the Receiver is not necessary. On the other hand, the Receiver has acted only in a representative capacity, as the Court's officer, so the Court may find that it is appropriate to insulate the Receiver from all liability, by way of a general release. Some members of the subcommittee felt that, absent a general release, Receivers might hold back funds and/or wish to conduct a claims bar process, which would unnecessarily add time and cost to the receivership. The general release language has been added to this form of model order as an option only, to be considered by the presiding Judge in each specific case."

14 It seems to me that as a matter of principle, on discharge, a receiver should not be granted a release that encompasses gross negligence or willful misconduct. It may be that such conduct only comes to light after a receiver has been discharged. In such circumstances, a receiver should be liable for its actions. That said, post discharge, a claimant should still be required to obtain leave of the Court to institute and continue proceedings against a former receiver. When addressing the request for such leave, the Court will consider, amongst other things, prior Court approval of the conduct of the receiver, the claims bar process, if any, and its outcome, and whether as a condition of proceeding with litigation, it is appropriate for the claimant to post full indemnity security for costs by letter of credit or otherwise. In my view, absent a strong prima facie case, the latter should be the norm, such a regime strikes me as an appropriate balance between the desirability of providing appropriate protection to the Court's former officer and the need to address instances of gross negligence and willful misconduct.

15 In this case no one took issue with the order requested by the Receiver except for Mr. Verdun and Mr. Stinson who questioned the scope of the proposed release in paragraph 11 and asked that the release be amended to exclude gross negligence and willful misconduct. For the reasons given, this is a reasonable position. I am granting the order requested but amended so that the words "save and except for gross negligence or willful misconduct" are added to the first and second sentences of paragraph 11.

Footnotes

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

Tab "13"

2020 ONSC 5161

Ontario Superior Court of Justice

West Face Capital Inc. v. Chieftain Metals Inc.

2020 CarswellOnt 14600, 2020 ONSC 5161, 324 A.C.W.S. (3d) 18, 85 C.B.R. (6th) 151

**WEST FACE CAPITAL INC., AS AGENT and CHIEFTAIN
METALS INC. AND CHIEFTAIN METALS CORP.**

Geoffrey B. Morawetz C.J. Ont. S.C.J.

Heard: August 11, 2020

Judgment: October 8, 2020

Docket: CV-16-11511-00CL

Counsel: Mark Laugesen, Danish Afroz, for Receiver, Grant Thornton Limited
Roger Jaipargas, for West Face Capital Inc., as Agent
Colby Linthwaite, Aaron Welch, for Her Majesty the Queen in right of the Province of British Columbia
Robin Dean, Robert Janes, for Taku River Tlingit First Nation
Erin Gray, for Rivers Without Borders

Subject: Civil Practice and Procedure; Insolvency

MOTION by receiver for discharge of bankrupt company without prejudice to creditor to apply for reappointment of receiver.

Geoffrey B. Morawetz C.J. Ont. S.C.J.:

1 Grant Thornton Limited ("GTL") as court-appointed receiver and manager (the "Receiver"), of the assets, undertakings and property (the "Property") of Chieftain Metals Inc. ("CMI") and Chieftain Metals Corp. ("CMC" and, together with CMI, the "Companies" or "Chieftain") brings this motion for an order (the "Discharge Order"):

- (a) approving the Third Report of the Receiver dated June 17, 2019 (the "Third Report"), including the actions and activities of the Receiver referred to therein;
- (b) approving the Receiver's final Statement of Receipts and Disbursements;
- (c) approving the fees and disbursements of the Receiver and its legal counsel, Bennett Jones;
- (d) approving the anticipated further fees and disbursements of the Receiver and Bennett Jones, estimated not to exceed \$25,000 to complete the administration of the receivership (the "Receivership") in the context of these proceedings (the "Receivership Proceedings");
- (e) approving the repayment to the ranking secured creditor West Face Capital Inc. as Agent ("West Face") of any monies remaining in the hands of the Receiver after payment of the fees and disbursements;
- (f) sealing Confidential Appendix 1 to the Third Report;
- (g) subject to the possible revival of the Receivership and re-appointment of the Receiver in the Receivership Proceedings as set forth in (i) immediately below, terminating the Receivership and discharging GTL as Receiver;
- (h) releasing GTL while acting in its capacity as Receiver, save and except for gross negligence or wilful misconduct;

(i) providing for the possible revival of the Receivership and the re-appointment of GTL as Receiver of the Companies in the Receivership Proceedings on the same terms as provided for in the Appointment Order, with any such revival and re-appointment to become effective on the date and time of the filing by GTL of a certificate with the Court (the "Re-appointment Certificate"), for the general purpose of implementing a transaction in connection with the Property; and

(j) providing that, if the Re-appointment Certificate is not filed with the Court within two years from the date of the Discharge Order, the Receivership Proceedings shall be terminated.

2 Since the date of the Third Report there have been extensive discussions among the Receiver, West Face, and various departments of the Government of British Columbia, including the Ministry of Energy and Mines and Petroleum Services, the Ministry of the Environment, the Ministry of Forests, Land and Natural Resources, the Ministry of Indigenous Relations and Reconciliation and Ministry of the Attorney General (collectively, the "Province").

3 The Receiver subsequently filed a Supplement to the Third Report (the "Supplementary Report") to support the Receiver's request for a revised form of discharge order (the "Revised Discharge Order", substantially in the form attached to the Supplementary Report.

4 Subject to certain exceptions noted below, the relief sought in the Revised Discharge Order mirrors that in the Discharge Order.

5 The requested Revised Discharge Order provides at paragraph 14:

[14] THIS COURT ORDERS that this Order, including the discharge of the Receiver as Receiver of the Property of Chieftain granted hereunder, shall be without prejudice to West Face's right to bring a motion before this Honourable Court to seek the appointment of a receiver and/or manager of the Companies and the Property pursuant to 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, in the within receivership proceedings, bearing Court File Number CV — 16 — 11511 — 00CL, and any such motion shall be served on Her Majesty the Queen in right of the Province of British Columbia.

6 The Receiver reports that by late January 2020, there were no credible and interested parties willing to submit any bid or proposal on the Tulsequah Mine Project (the "Project") on terms which would be acceptable to the Receiver and West Face.

7 The Receiver also reported that a draft Closure and Reclamation Plan for the Project was finalized on April 24, 2020.

8 During the first months of 2020, the Receiver determined that the most prudent course of action was to amend the relief sought in the Discharge Order in an effort to eliminate or reduce the issues of concern to the Province.

9 In the Supplementary Report, the Receiver reports that, with one remaining exception, all issues in the proposed form of Revised Discharge Order have been settled among the Receiver, West Face and the Province.

10 The unresolved issue concerns the proposed paragraph 14 of the Revised Discharge Order.

11 Having reviewed the record and, in particular, the Third Report and the Supplementary Report, I am satisfied that with the exception of the sole issue in dispute, the relief requested by the Receiver is appropriate in the circumstances and is granted. In arriving at this conclusion, I have taken into account that no party is opposed to the requested relief. The requested fees and disbursements appear to be reasonable in the circumstances. In addition, I am satisfied that the requested sealing order provision is appropriate as the disclosure of the information in Confidential Appendix I to the Third Report could be harmful to stakeholders. The *Sierra Club* principles have been taken into account.

Issue for Determination

12 The Receiver takes the position that it should be discharged at this time. The Receiver has concluded that incurring the cost necessary for the continuation of the receivership is no longer beneficial to the stakeholders of the Companies, including the secured creditor West Face. With no credible and interested parties willing to pursue a transaction to acquire the Project, the further costs of administering the Receivership cannot be justified at this time. West Face intends to continue in its efforts to find or develop a private-sector solution.

13 West Face wants the Receiver to be discharged at this time and accepts the terms set forth at paragraph 14 of the Revised Discharge Order.

14 The Province wants the language in paragraph 14 of the Revised Discharge Order augmented to provide that, "should West Face fail to bring the said motion to seek the appointment of a receiver and/or manager not later than two years from the date of this order, it may not do so thereafter without first obtaining the express written consent of Her Majesty the Queen in Right of the Province of British Columbia".

15 The Taku River Tlingit First Nation ("TRTFN") does not oppose the discharge of the Receiver but submits that the Receiver should be discharged without the benefit of the proposed "without prejudice" provision and that the court should not exercise its discretion so as to give the secured creditor rights that it would not normally have under the BIA, particularly given the prejudiced innocent third parties like the TRTFN. Nor does the TRTFN agree with the additional wording proposed by the Province.

16 The original version (paragraphs 12 — 14 of the Discharge Order) provided that the Receivership shall be revived and the Receiver re-appointed in the within Receivership Proceedings, in both cases effective on the filing of the Re-appointment Certificate. If the Re-appointment Certificate was not filed within two years, the Receivership Proceedings were to be terminated. No court order would be required to revive the Receivership Proceedings.

17 The proposed Revised Discharge Order provides for a different path to revive the Receivership Proceedings. It requires West Face to bring a motion for the appointment of a receiver in the Receivership Proceedings on Notice to the Province. The two-year period within which to revive the Receivership Proceedings as set out in the Discharge Order is no longer referenced.

Analysis

18 In its factum, counsel for West Face submits that the Province is requesting that the court take the extraordinary step of restricting the ability of West Face to move for the appointment of receiver over the Property to a two-year period and that it is the Province that is requesting that the court grant relief that is of an injunctive nature for which there is no authority to support such request.

19 In my view, such a submission is misguided.

20 In the vast majority of receivership proceedings, the discharge of the receiver is intended to bring finality to the receivership proceedings. There may be, in certain circumstances, ancillary work that remains to be completed and in such cases, the discharge may be granted subject to the finalization of the outstanding work to be confirmed through the filing of a certificate of completion by the receiver. That is not the situation in these Receivership Proceedings. This is not a case of ancillary work that remains to be completed. A court supervised sale transaction involving the Project is the fundamental purpose of the Receivership Proceedings.

21 West Face is the party that initiated the Receivership Proceedings in 2016. The Receiver has been attempting to find a commercial resolution, satisfactory to West Face and other stakeholders since that time but has been unable to do so. It is understandable that West Face does not wish to continue to fund the Receivership Proceedings without any commercial resolution being implemented. West Face now proposes that its exposure in continuing to fund the Receiver should come at an end while the same time, it can continue to pursue, outside of the Receivership Proceedings, potential commercial transactions

and, if a suitable transaction can be agreed upon, the Receivership Proceedings can be revived to provide a vehicle to complete the transaction.

22 In seeking to preserve a route to revive the Receivership Proceedings, it is West Face and not the Province that is requesting extraordinary relief. In my view, the onus is on West Face to justify whether such relief is appropriate in the circumstances.

23 West Face references that a re-appointment of a trustee in bankruptcy, is expressly contemplated in S. 41(11) of the BIA, which provides:

41(11) The court, on being satisfied that there are assets that have not been realized or distributed, may, on the application of any interested person, appointed a trustee to complete the administration of the estate of the bankrupt, and the trustee shall be governed by the provisions of this Act, in so far as they are applicable.

24 Counsel to West Face submits that courts have interpreted this this provision to mean that the "door is not closed on the administration of an estate by the simple fact of a trustee's discharge", as the trustee may be reappointed to deal with assets which have not been realized or distributed. As such, courts have recognized that "it cannot be said that the trustee's powers end permanently and unequivocally following discharge or that the bankrupt's assets are unavailable."

25 In considering this submission, it is necessary to take into account two points. First, bankruptcy proceedings differ from receivership proceedings. In a bankruptcy scenario, the assets of the bankrupt vest in the trustee in bankruptcy (s. 71 of the BIA). This is to be contrasted with a receivership scenario where there is no statutory vesting of assets in the receiver. Second, the re-appointment of a trustee is specifically provided for in the BIA.

26 Section 41(11) of the BIA should not be read in isolation. Section 40 and 41 address issues relating to the discharge of the trustee and the treatment of remaining assets. In particular, section 40 deals with disposal of property and s. 41(10) provides that notwithstanding the discharge, the trustee remains trustee of the estate for the performance of such duties as may be incidental to the full administration of the estate.

27 There are no corresponding provisions to sections 40 and 41 in Part XI of the BIA which deals with secured creditors and receivers, other than perhaps, s. 247(b) which requires the receiver to deal with the property of the insolvent person or the bankrupt in a commercially reasonable manner.

28 In my view, the authorities referenced by counsel to West Face which reference s. 41(11) of the BIA and the realization and distribution of assets are of limited assistance.

29 However, I am satisfied that it is open to the court to consider provisions in a discharge order that would provide for the re-appointment of a receiver in certain circumstances. I arrive at this conclusion for two reasons. First, *Grand Valley Railway, Re.* [1933] O.J. No. 151 (Ont. C.A.), at para. 19 a decision of the Court of Appeal for Ontario, provided for the re-appointment of a receiver. Second, there is no express prohibition in the BIA that would prevent the court from re-appointing a receiver.

30 In my view, the court does have the jurisdiction to reappoint a receiver in appropriate circumstances. The question is whether I should exercise my discretion to include a provision in the Revised Discharge Order that could result, at some future date, in a motion for the appointment or re-appointment of the receiver.

31 The Province submits that if West Face is granted an unlimited time within which to move for the re-appointment of a receiver for the purpose of selling the Project, the Province will be required to run an unlimited risk that any costs it incurs and resources it expends with respect to the remediation of the Project will (i) be made redundant, or (ii) be for the benefit of West Face. The Province contends that West Face is content for the Province to solve the problem, while it retains its rights forever. In such circumstances, the re-appointment of a receiver, at some future time for the purpose of completing a sale of the Project would be convenient for West Face, but it would certainly not be just.

32 Counsel to the Province references *Bank of Nova Scotia v. Freure Village on Clair Creek* (1996), 40 C.B.R. (3d) 274 (Ont. Gen. Div. [Commercial List]) for the proposition that the "just or convenient" question becomes one of the Court determining,

in the exercise of its discretion, whether it is more in the interests of all concerned to have the receiver appointed by the Court or not. This involved an examination of all the circumstances, including the potential costs, the relationship between the debtor and the creditors, the likelihood of maximizing the return on and preserving the subject property and the best way of facilitating the work and duties of the receiver-manager.

33 The Province submits that in this case, the "potential cost" to the Province is the time, effort and money expended upon work towards the development and implementation of a final remediation and closure plan that is ultimately for the benefit of West Face and its buyer.

34 The Province contends that there should be some time limit imposed on West Face's ability to bring a motion to request the re-appointment of the Receiver and that the issue to be determined is what time limit should be imposed. The Province contends that it should be no longer than two years and that the consent of the Province should be a precondition to bring such a motion.

35 Counsel to the TRTFN detailed that since the 1990s, the TTFN has taken considerable steps to protect its lands and that the protection and stewardship of the TRTFN territory is fundamental to the TRTFN way of life. The TRTFN is opposed to the project as it views the Project as a threat to their lands and waters as well as to their way of life.

36 With respect to the issue of the discharge of a Receiver, counsel to TRTFN submits that the BIA makes no provision for without prejudice discharge of a receiver and if there is any authority to make an order granting an unlimited period of time to move for the re-appointment of a receiver in this proceeding, it lies in the discretionary power of the court in managing insolvency proceedings. I agree.

37 Accordingly, in the exercise of its discretion, counsel submits that the court should take into account all interests of innocent third party such as the TRTFN. The TRTFN submits that permitting West Face to move for the re-appointment of a receiver will have a chilling effect on the remediation plan and the Province will be reluctant to engage in an expensive environmental cleanup to benefit West Face and future purchasers.

38 It is clear that West Face is not satisfied with the status quo. It does not wish to maintain the receivership and accept the costs and responsibilities associated with the Receivership Proceedings, including the ongoing supervision by the court. West Face desires an outcome which limits their ongoing financial exposure, but at the same time, preserves their ability to seek a satisfactory commercial resolution which may include the use of Receivership Proceedings to consummate a future transaction. West Face does not want a termination of the Receivership Proceedings. It is conceivable that there may be limitation period consequences to West Face if this course of action is implemented and West Face wanted to initiate a second receivership proceeding. While I acknowledge the practical concerns of West Face, the solution proposed by West Face results, in my view, in an unwarranted transference of risk and uncertainty to other parties.

39 The Province raises legitimate concerns. In my view, the Province should not be faced with an unlimited period of time of uncertainty. There are environmental concerns with the Project which will have to be addressed. It has proposed a two-year period during which West Face can explore the possibilities of a commercial transaction. However, beyond that period, the Province quite properly put forward the position that it should have some certainty in the outcome.

40 The TRTFN has also raised legitimate concerns and want these Receivership Proceedings to be dealt with in a definitive manner.

41 In my view, the Province and the TRTFN are entitled to certainty of outcome. The only question to be addressed is whether West Face should have a defined period of time to bring a motion to revive the receivership proceedings, and if so, whether that time period shall be extended only with the consent of the Province.

Disposition

42 In balancing the interests of the Receiver, the secured creditor West Face, the Province and TRTFN, I have concluded that the Receiver is to be discharged at this time, without prejudice to the right of West Face to bring a motion to seek the

appointment of a receiver in these proceedings no later than August 11, 2022, this date being two years from the date of this hearing. This gives West Face adequate time to assess its options.

43 I have also concluded that it is not appropriate, in the circumstances to include a provision that would potentially extend the timeline beyond August 11, 2022. To do so would just prolong a period of uncertainty that could be detrimental to the TRTFN and the Province. If circumstances are such that require this issue to be revisited on or before August 11, 2022, it is open to West Face to bring its motion in the Receivership Proceedings and, if reappointed, the Receiver can seek further direction from the court.

44 An order shall issue to give effect to the foregoing.

Motion granted.

Tab "14"

Schedule "1"

File No. CI 23-01-42328

~~THE QUEEN'S~~ **KING'S BENCH**
WINNIPEG CENTRE

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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.

SALE APPROVAL AND VESTING ORDER

MLT AIKINS LLP
Barristers and Solicitors
30th Floor – 360 Main Street
Winnipeg, MB R3G 4G1
J.J. BURNELL / ANJALI SANDHU
Phone: (204) 957-4663 / (204) 957-4760
Fax: (204) 957-0840
File No. 0088420.00003

THE KING'S BENCH
Winnipeg Centre

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THE HONOURABLE _____) ~~WEEKDAY,~~ WEDNESDAY, THE #11TH
MR. JUSTICE ~~_____~~ CHARTIER) DAY OF ~~MONTH, 20YR~~ JUNE, 2025

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BETWEEN:

PLAINTIFF

Plaintiff[†]

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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-~~

DEFENDANT

Defendant

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BOKHARI DEVELOPMENT INC.,

Respondent.

APPROVAL AND VESTING ORDER

THIS MOTION, made by ~~[RECEIVER'S NAME]~~ KPMG Inc. in its capacity as the Court-appointed receiver and manager (the "Receiver") of the ~~undertaking, assets, undertakings and property and assets of~~ [DEBTOR] Bokhari Development Inc. (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 including the development of the project located thereon and all

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[†]-A receivership or other proceeding that might lead to an Approval and Vesting Order may be commenced either by action or by application. This model Order is drafted on the basis that the receivership proceeding was commenced by way of an action.

proceeds thereof (collectively, the “Property”) for an order approving the sale transaction (the “Transaction”) contemplated by an ~~agreement of purchase and sale (the Asset Purchase Agreement dated February 13, 2025, as amended by an Extension Agreement dated April 14, 2025, Amendment Agreement No. 2 dated May 9, 2025 and Amendment Agreement No. 3 dated May 12, 2025 (together, the “Sale Agreement”))~~, between the Receiver and ~~[NAME OF PURCHASER]~~ in its capacity as Receiver of the Property, as vendor, and Erickson Heights Ltd. (the “Purchaser”) ~~dated [DATE] and~~ as purchaser, appended to the Confidential Supplement of the Fourth Report of the Receiver dated [DATE] (the “June 5, 2025 (the “Confidential Supplement”) at Appendix “2” and appended to the Fourth Report), of the Receiver dated June 5, 2025 (the “Fourth Report”) in a redacted form as Appendix “A”, and vesting in the Purchaser the Receiver’s and the Debtor’s right, title and interest in and to the assets described in the Sale Agreement (the “Purchased Assets”), was heard this day at _____, the Law Courts Building, 408 York Avenue, Winnipeg, Manitoba.

~~ON READING the Report~~

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ON READING the First Report of the Receiver dated November 16, 2023, the Second Report of the Receiver dated November 27, 2024, the Third Report of the Receiver dated January 23, 2025, the Supplement to the Third Report of the Receiver dated January 29, 2025, the Fourth Report and the Confidential Supplement, and on hearing the submissions of counsel for the Receiver, **[NAMES OF OTHER PARTIES APPEARING]**, no one appearing for any other person on the service list, although properly served as appears from the affidavit of **[NAME]** sworn **[DATE]** filed:²

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1. THIS COURT ORDERS that the time for service of the Notice of Motion is hereby abridged and validated so that this Motion is properly returnable today and hereby dispenses with further service thereof.

4.2. THIS COURT ORDERS AND DECLARES that the Transaction is hereby approved,³ and the execution of the Sale Agreement by the Receiver⁴ is hereby authorized and approved, with such minor amendments as the Receiver may deem necessary. The Receiver is hereby authorized and directed to take such additional steps and execute such additional documents as may be necessary or desirable for the completion of the Transaction and for the conveyance of the Purchased Assets to the Purchaser.

2.3. THIS COURT ORDERS AND DECLARES that upon the delivery of a Receiver's certificate to the Purchaser substantially in the form attached as **Schedule "A"** hereto (the "**Receiver's Certificate**"), all of the Receiver's and the Debtor's right, title and interest in and to the Purchased Assets described in the Sale Agreement ~~[and listed on Schedule B hereto]~~⁵ shall vest absolutely in the Purchaser, free and clear of and from any and all security interests (whether contractual, statutory, or otherwise), hypothecs, mortgages, trusts or deemed trusts (whether contractual, statutory, or otherwise), liens, executions, levies, charges, or other financial or monetary claims, whether or not they have attached or been perfected, registered or filed and whether secured,

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² This model order assumes that the time for service does not need to be abridged. The motion seeking a vesting order should be served on all persons having an economic interest in the Purchased Assets, unless circumstances warrant a different approach. Counsel should consider attaching the affidavit of service to this Order.

³ In some cases, notably where this Order may be relied upon for proceedings in the United States, a finding that the Transaction is commercially reasonable and in the best interests of the Debtor and its stakeholders may be necessary. Evidence should be filed to support such a finding, which finding may then be included in the Court's endorsement.

⁴ In some cases, the Debtor will be the vendor under the Sale Agreement, or otherwise actively involved in the Transaction. In those cases, care should be taken to ensure that this Order authorizes either or both of the Debtor and the Receiver to execute and deliver documents, and take other steps.

⁵ To allow this Order to be free-standing (and not require reference to the Court record and/or the Sale Agreement), it may be preferable that the Purchased Assets be specifically described in a Schedule.

unsecured or otherwise (collectively, the **“Claims”**)⁶ including, without limiting the generality of the foregoing: (i) any encumbrances or charges created by the Order of the Honourable Mr. Justice [NAME] Chartier dated [DATE]; August 29, 2023; (ii) all charges, security interests or claims evidenced by registrations pursuant to *The Personal Property Security Act* (Manitoba) or any other personal property registry system; and (iii) those Claims listed on **Schedule “C”** hereto (all of which are collectively referred to as the **“Encumbrances”**, which term shall not include the permitted encumbrances, easements and restrictive covenants listed on **Schedule “D”**) and, for greater certainty, this Court orders that all of the Encumbrances affecting or relating to the Purchased Assets are hereby expunged and discharged as against the Purchased Assets.

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3.4. THIS COURT ORDERS that upon the registration in the _____⁷Portage la Prairie Land Titles Office (“_____ LTO (“PLTO)”) of a Transmission in the form prescribed by *The Real Property Act* (Manitoba) duly executed by the Purchaser,⁸ and accompanied by a certified true copy of this Order, title to the real property identified in **Schedule “B”** hereto (the **“Real Property”**) shall vest in the Purchaser subject to all instruments registered on title at that time, other than those described in Schedule C⁷; and the District Registrar is hereby directed to issue title accordingly.

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4.5. THIS COURT ORDERS that this Order shall be accepted by the District Registrar notwithstanding that the appeal period in respect of this Order has not elapsed, which appeal period is expressly waived.⁹

5.6. THIS COURT ORDERS that for the purposes of determining the nature and priority of Claims, the net proceeds¹⁰ from the sale of the Purchased Assets shall stand in the place and stead of the Purchased Assets, and that from and after the delivery of the Receiver’s Certificate all Claims and Encumbrances shall attach to the net proceeds from the sale of the Purchased

⁶ The “Claims” being vested out may, in some cases, include ownership claims, where ownership is disputed and the dispute is brought to the attention of the Court. Such ownership claims would, in that case, still continue as against the net proceeds from the sale of the claimed asset. Similarly, other rights, titles or interests could also be vested out, if the Court is advised what rights are being affected, and the appropriate persons are served. It is the Subcommittee’s view that a non-specific vesting out of “rights, titles and interests” is vague and therefore undesirable.

⁷ Insert applicable Land Titles Office.

⁸ Elect the language appropriate to the land registry system.

⁹ On October 20, 2004 the Registrar General of the Property Registry of Manitoba issued a Directive which changed its previous practice and indicated that it would no longer accept a Vesting Order for registration until the applicable appeal period had expired subject to a number of exceptions including the Court ordering the Vesting Order to be immediately filed. Counsel should consider whether it is appropriate in the circumstances to seek inclusion of a paragraph along these lines.

¹⁰ The Report should identify the disposition costs and any other costs which should be paid from the gross sale proceeds, to arrive at “net proceeds”.

Assets with the same priority as they had with respect to the Purchased Assets immediately prior to the sale,⁴⁴ as if the Purchased Assets had not been sold and remained in the possession or control of the person having that possession or control immediately prior to the sale.

~~6.7.~~ THIS COURT ORDERS AND DIRECTS the Receiver to file with the Court a copy of the Receiver's Certificate, forthwith after delivery thereof.

~~7. THIS COURT ORDERS that, pursuant to clause 7(3)(c) of the Canada Personal Information Protection and Electronic Documents Act, the Receiver is authorized and permitted to disclose and transfer to the Purchaser all human resources and payroll information in the Company's records pertaining to the Debtor's past and current employees, including personal information of those employees listed on Schedule "A" to the Sale Agreement. The Purchaser shall maintain and protect the privacy of such information and shall be entitled to use the personal information provided to it in a manner which is in all material respects identical to the prior use of such information by the Debtor.~~

8. THIS COURT ORDERS that, notwithstanding:

- (a) the pendency of these proceedings;
- (b) any applications for a bankruptcy order now or hereafter issued pursuant to the *Bankruptcy and Insolvency Act* (Canada) in respect of the Debtor and any bankruptcy order issued pursuant to any such applications; and
- (c) any assignment in bankruptcy made in respect of the Debtor;

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the vesting of the Purchased Assets in the Purchaser pursuant to this Order shall be binding on any trustee in bankruptcy that may be appointed in respect of the Debtor and shall not be void or voidable by creditors of the Debtor, nor shall it constitute nor be deemed to be a fraudulent preference, assignment, fraudulent conveyance, transfer at undervalue, or other reviewable transaction under the *Bankruptcy and Insolvency Act* (Canada) or any other applicable federal or provincial legislation, nor shall it constitute oppressive or unfairly prejudicial conduct or action other than in good faith pursuant to any applicable federal or provincial legislation.

9. THIS COURT HEREBY REQUESTS the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States to give

⁴⁴This provision crystallizes the date as of which the Claims will be determined. If a sale occurs early in the insolvency process, or potentially secured claimants may not have had the time or the ability to register or perfect proper claims prior to the sale, this provision may not be appropriate, and should be amended to remove this crystallization concept.

effect to this Order and to assist the Receiver and its agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Receiver, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Receiver and its agents in carrying out the terms of this Order.

Date: June , 2025

Chartier, J.

I, ANJALI SANDHU, OF THE FIRM OF MLT AIKINS LLP HEREBY CERTIFY THAT I HAVE RECEIVED THE CONSENTS AS TO FORM OF THE FOLLOWING PARTIES:

AS DIRECTED BY THE HONOURABLE MR. JUSTICE CHARTIER

Schedule A – Form of Receiver’s Certificate

~~Court~~ File No. CI 23-01-42328

~~THE QUEEN’S~~KING’S BENCH
~~WINNIPEG~~ CENTRE

~~BETWEEN:~~

~~PLAINTIFF~~

~~Plaintiff~~

~~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~~

~~DEFENDANT~~

~~Defendant~~

BOKHARI DEVELOPMENT INC.,

~~Respondent.~~

RECEIVER’S CERTIFICATE

RECITALS

A. Pursuant to an Order of the Honourable ~~[NAME OF JUDGE]~~Mr. Justice Chartier of the Manitoba Court of ~~Queen’s~~King’s Bench (the “**Court**”) dated ~~[DATE OF ORDER]~~, ~~[NAME OF RECEIVER]~~August 29, 2023, KPMG Inc. was appointed as the receiver and manager (the “**Receiver**”) of the ~~undertaking, assets, undertakings and property and assets of~~ ~~[DEBTOR]~~Bokhari Development Inc. (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 including the development of the project located thereon and all proceeds thereof (collectively, the “**Property**”).

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- B. Pursuant to an Order of the Court ~~dated [DATE]~~, pronounced June 11, 2025, the Court approved the ~~agreement of purchase and sale made as of [DATE OF AGREEMENT]~~ (the “Asset Purchase Agreement dated February 13, 2025, as amended by an Extension Agreement dated April 14, 2025, Amendment Agreement No. 2 dated May 9, 2025 and Amendment Agreement No. 3 dated May 12, 2025 (together, the “Sale Agreement”)”), between the Receiver ~~[Debtor] and [NAME OF PURCHASER]~~ in its capacity as Receiver of the Property, as vendor, and Erickson Heights Ltd. (the “Purchaser”), as purchaser, appended to the Confidential Supplement of the Fourth Report of the Receiver dated June 5, 2025 (the “Confidential Supplement”) at Appendix “2” and appended to the Fourth Report of the Receiver dated June 5, 2025 (the “Fourth Report”) in a redacted form as Appendix “A”, and provided for the vesting in the Purchaser of the Receiver’s and the Debtor’s right, title and interest in and to the purchased assets (the “Purchased Assets”), which vesting is to be effective with respect to the Purchased Assets upon the delivery by the Receiver to the Purchaser of a certificate confirming (i) the payment by the Purchaser of the Purchase Price for the Purchased Assets; (ii) that the conditions to Closing have been satisfied or waived by the Receiver and the Purchaser; and (iii) the Transaction has been completed to the satisfaction of the Receiver.
- C. Unless otherwise indicated herein, terms with initial capitals have the meanings set out in the Sale Agreement.

THE RECEIVER CERTIFIES the following:

1. The Purchaser has paid and the Receiver has received the Purchase Price for the Purchased Assets payable on the Closing Date pursuant to the Sale Agreement;⁴²
2. The conditions to Closing the Sale Agreement have been satisfied or waived by the Receiver and the Purchaser; and
3. The Transaction has been completed to the satisfaction of the Receiver.
4. This Certificate was delivered by the Receiver at _____ [TIME] on _____ [DATE].

⁴² While ordinarily the Receiver will expect payment in full on closing this language may need to be varied to accommodate certain transactions. For example, where the Purchaser’s lender cannot advance until the mortgage has been registered in which case it can be revised to read:

~~The Purchaser has made arrangements to pay the purchase price for the purchased assets pursuant to the Sale Agreement satisfactory to Receiver’s counsel.~~

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~~[NAME OF RECEIVER],~~ KPMG INC., in its capacity as Receiver of the ~~undertaking, assets, undertakings and property and assets~~ of ~~[DEBTOR],~~ Bokhari Development Inc. 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 including the development of the project located thereon and ~~not in its personal capacity~~ all proceeds thereof

Per: _____

Name:
Title:

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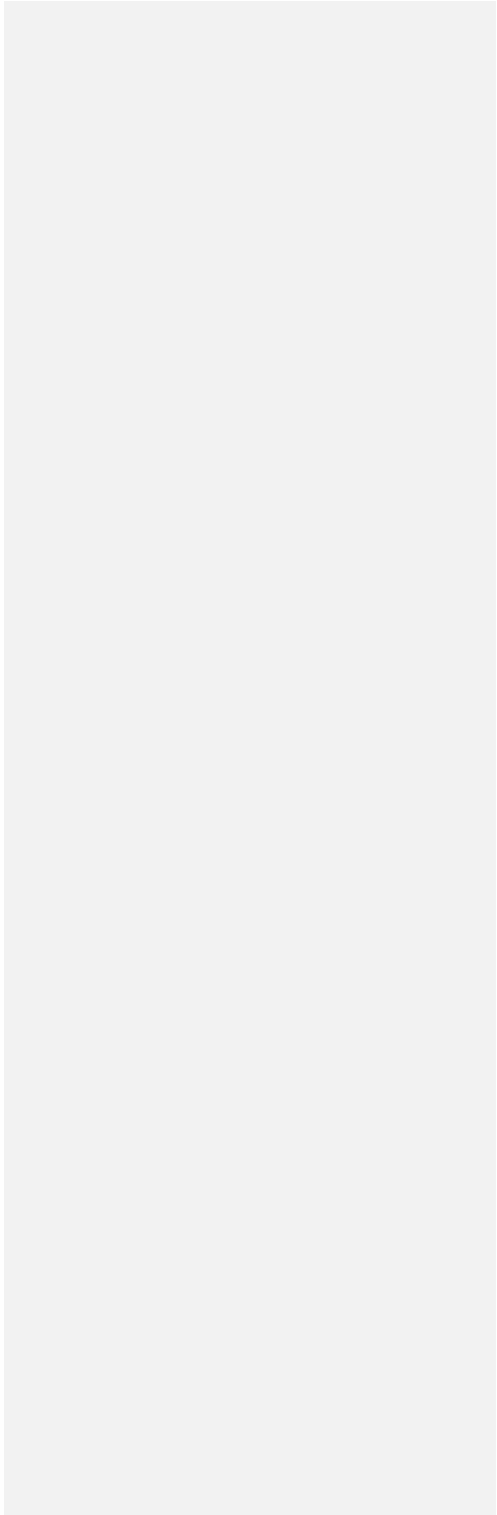
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Schedule B – ~~Purchased Assets~~ Real Property



Real Property:

Title No. 3015541/3

LOTS 1 AND 2 BLOCK 1 PLAN 1810 PLTO
EXC ALL MINES AND MINERALS VESTED IN THE
CROWN (MANITOBA) BY THE REAL PROPERTY ACT
IN RL 56 AND 57 PARISH OF PORTAGE LA PRAIRIE

(the "**Lands**")

DOCSTOR: 1201927144

Schedule C – Claims to be deleted and expunged from title to Real Property

- [Mortgage No. 1217450/3 to Peoples Trust Company in the amount of \\$32,815,800.00](#)
- [Caveat No. 1217451/3 \(Assignment of Rents and Leases\)](#)
- [Personal Property Security Notice No. 1217452/3 \(Fixtures and Payments under a Lease\)](#)
- [Builders Lien No. 1229156/3 by 6332189 Manitoba Ltd. in the amount of \\$2,573,550.00](#)
 - [Request to Issue Notice No. 1230350/3 by Bokhari Development Inc.](#)
- [Builders Lien No. 1229581/3 by Golden Heating and Cooling Ltd. in the amount of \\$223,898.00](#)
- [Builders Lien No. 1229706/3 by Raycan Exteriors Inc. in the amount of \\$116,340.00](#)
- [Builders Lien No. 1230321/3 by Meridian Hauling Ltd. in the amount of \\$9,496.01](#)
- [Builders Lien No. 1230399/3 by Sirius Protection and Security Services Inc. in the amount of \\$106,435.22](#)
- [Notice of Appt. Of A Receiver/Mgr No. 1230463/3 by KPMG Inc.](#)
- [Caveat No. 1230464/3 by KPMG Inc. \(Equitable Mortgage\)](#)
- [Builders Lien No. 1230609/3 by Burke William Rosentreter in the amount of \\$24,287.76](#)
- [Builders Lien No. 1230610/3 by Neeraj Kumar in the amount of 18,375.84](#)

**Schedule D – Permitted Encumbrances, Easements and Restrictive Covenants
related to the Real Property**

~~(unaffected by the Vesting Order)~~

- [Caveat No. 33684/3 by The Manitoba Telephone System](#)
- [Caveat No. 38556/3 by Manitoba Hydro Etal](#)
- [Caveat No. 39479/3 by Manitoba Telephone System](#)
- [Easement No. 1164848/3 by MTS Inc.](#)
- [Caveat No. 1202806/3 by The City of Portage la Prairie \(Dev. Agreement pursuant to sec. 150 of The Planning Act\)](#)
- [Easement No. 1229968/3 to The Manitoba Hydro-Electric Board, Bell Canada & Shaw](#)

Tab "15"

THE KING'S BENCH
Winnipeg Centre

THE HONOURABLE _____) ~~WEEKDAY, WEDNESDAY,~~ THE #11TH
MR. JUSTICE CHARTIER) DAY OF ~~MONTH, 20~~YR JUNE, 2025

~~B E T W E E N:~~

~~PLAINTIFF~~

Plaintiff,

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,

~~-and-~~

~~DEFENDANT~~

Applicant,

Defendant.

BOKHARI DEVELOPMENT INC.,

Respondent.

DISTRIBUTION, ANCILLARY MATTERS AND DISCHARGE ORDER

THIS MOTION, made by ~~{RECEIVER'S NAME}~~ KPMG Inc., in its capacity as the Court-appointed receiver and manager (the "Receiver") of the ~~undertaking, assets, undertakings and property and assets of~~ {DEBTOR} Bokhari Development Inc. (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 including the development of the project located thereon and all proceeds thereof (collectively, the "Property") for an ~~Order~~ order, inter alia, authorizing the

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holdback of certain funds, approving certain proposed distributions, sealing the confidential supplement (“**Confidential Supplement**”) to the Fourth Report (“**Fourth Report**”) of the Receiver each dated June 5, 2025, approving the actions of the Receiver, approving the fees and disbursements and estimated fees and disbursements of the Receiver and its counsel, and discharging the Receiver and other relief, was heard this day at _____, the Law Courts Building, 408 York Avenue, Winnipeg, Manitoba,

_____ ON READING, the Report of the Receiver dated _____ [add any other supporting materials]; First Report of the Receiver dated November 16, 2023, the Second Report of the Receiver dated November 27, 2024, the Third Report of the Receiver dated January 23, 2025, the Supplement to the Third Report of the Receiver dated January 29, 2025, the Fourth Report and the Confidential Supplement, and on hearing the submissions of counsel for the

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Receiver, NAMES OF OTHER PARTIES APPEARING, no one ~~else~~ appearing for any other person on the service list, although properly served as appears from the affidavit of NAME sworn DATE filed.

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Approval of Distributions and Payments

1. THIS COURT ORDERS that the Receiver is authorized and directed to make the following payments and/or distributions:

- a. A commission to Colliers International Group Inc. in the amount set out in the Broker Engagement Letter attached to the Second Report of the Receiver dated November 27, 2024;
- b. The sum of \$10,723,000 in aggregate to the Applicant, in repayment and full satisfaction of the Receiver's borrowings certificates issued pursuant to the terms of the Receivership Order pronounced by the Honourable Mr. Justice Chartier in these proceedings on August 29, 2023 (the "Receivership Order");
- c. An interim distribution to the Applicant in the amount of \$600,000;
- d. The accrued and unpaid expenses in the amount of approximately \$175,000 consisting of approximately (i) \$100,000 of accrued operating costs in respect of the Project Premises, and (ii) \$75,000 of accrued fees of the Receiver and the Receiver's Counsel (the "Accrued Obligations"); and
- e. the remaining costs, which includes the remaining operating and administrative expenses, and the Estimated Receiver Fees (as hereinafter defined).

2. THIS COURT ORDERS that upon completion of the remaining activities and prior to the filing of the Discharge Certificate (as hereinafter defined) the Receiver is authorized and directed to make a final distribution to the Applicant from the available cash on hand.

Sealing

3. THIS COURT ORDERS AND DECLARES that the Confidential Supplement be filed under seal, kept confidential and is not to form part of the public record, and shall remain stored electronically with this Court on an encrypted basis limiting access to only the Registrar of this Court and the presiding Judge, until:

a. further order of the Court; or

b. the sale transaction contemplated by the asset purchase agreement dated February 13, 2025, as amended by an Extension Agreement dated April 14, 2025, Amendment Agreement No. 2 dated May 9, 2025 and Amendment Agreement No. 3 dated May 12, 2025, between the Receiver in its capacity as Receiver of the Property, as vendor, and Erickson Heights Ltd., as purchaser, appended to the Confidential Supplement at Appendix "2" and appended to the Fourth Report in a redacted form as Appendix "A", has closed as evidenced by the Affidavit of [NAME] sworn [DATE], filed¹: Receiver's Certificate filed with this Court;

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1. whichever shall first occur, at which time the Confidential Supplement shall be unsealed and thereafter form part of the public record.

Approval of Activities

4. THIS COURT ORDERS that the activities Third Report of the Receiver, dated January 23, 2025, the Supplement to the Third Report dated January 29, 2025, the Fourth Report and the Confidential Supplement and the activities and actions of the Receiver as set out in the Report, are hereby described therein, including the Receiver's Statement of Receipts and Disbursements be approved.

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2. _____

Approval of Fees

¹This model order assumes that the time for service does not need to be abridged.

5. THIS COURT ORDERS that the fees and disbursements of the Receiver and from October 1, 2024 to April 30, 2025, the fees and disbursements of its legal counsel, as set out in the Report, from October 16, 2024 to May 31, 2025, and the fees and disbursements incurred by the Receiver and its counsel thereafter (the “Estimated Receiver Fees”), are hereby approved, without the need of a formal passing of accounts.

~~3. THIS COURT ORDERS that, after payment of the fees and disbursements herein approved, the Receiver shall pay the monies remaining in its hands to [NAME OF PARTY]².~~

4. —

Unclaimed Container

6. THIS COURT ORDERS AND DECLARES that the shipping container left on the Premises by 6332189 Manitoba Ltd. (the “Unclaimed Container”) is deemed abandoned by 6332189 Manitoba Ltd., and that the Unclaimed Container is Property under the Receivership Order, and the Receiver may deal with it in accordance with the powers granted to it by the Orders of this Court.

Discharge and Release of Receiver

7. THIS COURT ORDERS that upon payment distributions and payments of the amounts set out in paragraph paragraphs 2 and 3 hereof and upon the Receiver filing a certificate (the “Discharge Certificate”), substantially in the form attached hereto as Schedule A to this Order certifying that it has completed the other activities described in the Fourth Report, the Receiver shall be discharged as Receiver of the undertaking, property and assets of the Debtor, including the filing of income tax and GST returns, provided however that notwithstanding its discharge herein (a) the Receiver shall remain Receiver for the performance of such incidental duties as may be required to complete the administration of the receivership herein, and (b) the Receiver

²This model order assumes that the material filed supports a distribution to a specific secured creditor or other party.

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shall continue to have the benefit of the provisions of all Orders made in this proceeding, including all approvals, protections and stays of proceedings in favour of [RECEIVER'S NAME]KPMG Inc. in its capacity as Receiver.

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8. ~~5.~~ THIS COURT ORDERS AND DECLARES that [RECEIVER'S NAME]KPMG Inc. is hereby released and discharged from any and all liability that [RECEIVER'S NAME]KPMG Inc. now has or may hereafter have by reason of, or in any way arising out of, the acts or omissions of [RECEIVER'S NAME]KPMG Inc. while acting in its capacity as Receiver herein and to the date hereof, save and except for any gross negligence or wilful misconduct on the Receiver's part.

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Without limiting the generality of the foregoing, [RECEIVER'S NAME]KPMG Inc. is hereby forever released and discharged from any and all liability relating to matters that were raised, or which could have been raised, in the within receivership proceedings to date, save and except for any gross negligence or wilful misconduct on the Receiver's part³.

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9. ~~6.~~ THIS COURT ORDERS AND DECLARES that the Receiver shall, at least seven calendar days prior to the filing of the Discharge Certificate, provide notice to the Service List in these proceedings of the Receiver's intention to file the Discharge Certificate, and that upon the filing of the Discharge Certificate, absent any party filing a motion seeking the leave of this Court to commence a proceeding or enforcement process against the Receiver and serving it on the Receiver in respect of the acts or omissions of KPMG Inc. while acting in its capacity as Receiver following the date of this Order, KPMG Inc. is hereby released and discharged from any and all liability that KPMG Inc. may have by reason of, or in any way arising out of, the acts or omissions of KPMG Inc. while acting in its capacity as Receiver based in whole or in part on any act or omission, transaction, dealing or other occurrence existing or taking place on or following the pronouncement date of this Order, save and except for any gross negligence or wilful misconduct on the Receiver's part. Without limiting the generality of the foregoing, KPMG Inc. is hereby

³If this relief is being sought, stakeholders should be specifically advised, and given ample notice.

forever released and discharged from any and all liability relating to matters that were raised, or which could have been raised, in the within receivership proceedings as at the date of its discharge, save and except for any gross negligence or wilful misconduct on the Receiver's part.

10. THIS COURT ORDERS AND DECLARES that no action or other proceeding shall be commenced against the Receiver, including its officers, directors, employees, solicitors and agents and assigns in any way arising from or related to its capacity or conduct as Receiver, except with prior leave of this Court on notice to the Receiver, and upon such terms as this Court may direct.

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~~I, [NAME], of the firm of [NAME] hereby certify that I have received the consents as to form of the following parties:~~

~~[INSERT]~~

~~As directed by the Honourable [INSERT]~~

~~SCHEDULE A~~

~~THE QUEEN'S~~ DATE: _____

Chartier, J.

I, ANJALI SANDHU, OF THE FIRM OF MLT AIKINS LLP HEREBY CERTIFY THAT I HAVE
RECEIVED THE CONSENTS AS TO FORM OF THE FOLLOWING PARTIES:

AS DIRECTED BY THE HONOURABLE MR. JUSTICE CHARTIER

THE KING'S BENCH

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WINNIPEG CENTRE

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~~ETWEEN:~~

~~PLAINTIFF~~

~~Plaintiff,~~

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-~~

~~DEFENDANT~~

~~Defendant,~~

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BOKHARI DEVELOPMENT INC.,

Respondent.

RECEIVER'S DISCHARGE CERTIFICATE

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A. KPMG Inc. was appointed receiver and manager (the "Receiver" ("Receiver") of all") of the assets, undertakings and property and undertaking of Bokhari Development Inc. 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 including the development of the Defendant [INSERT NAME OF DEBTOR] ("Debtor") project located thereon and

~~all proceeds thereof~~, pursuant to an Order of the Court of ~~Queen's~~King's Bench dated ~~_____~~
~~("Receivership Order");~~August 29, 2023;

B. Pursuant to the Discharge Order of this Court pronounced ~~_____~~June 11, 2025
~~("Discharge Order")~~ the Receiver has paid out any net realizations as directed by the Discharge
Order ~~and~~ has completed the outstanding activities described in the Fourth Report, and has
completed the administration of the Debtor's estate;

C. Unless otherwise indicated the Receiver's Certificate shall have the same meaning as
given to them in the Discharge Order.

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THE RECEIVER CERTIFIES the following:

- 1. The Receiver has paid the net proceeds in accordance with the Discharge Order and in particular:

[INSERT PARTICULARS OF PAY OUT]

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- 2. The Receiver has completed the outstanding activities described in the Fourth Report and completed its administration of the Debtor's estate.

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DATED at _____, Manitoba, city, province, this ____ day of _____,

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~~2020~~, 202 .

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_____ in its capacity as Receiver of

Per: _____

KPMG INC., in its capacity as Receiver of the assets, undertakings and property of Bokhari Development Inc. 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 including the development of the project located thereon and all proceeds thereof

Per: _____
Name: _____
Title: _____

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