BOYNECLARKE
LAWYERS | LLP

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179571

Joshua J. Santimaw
Direct Dial: (902) 460-3451
Facsimile: (902) 463-7500
E-mail: jsantimaw@boyneclarke.ca

Halifax Regional
Municipality

99 Wyse Road, Suite 600
Dartmouth
NS Canada B3A 4S5

Correspondence:
P.O. Box 876
Dartmouth Main
NS Canada B2Y 3Z5

T 902.469.9500
F 902.463.7500
www.boyneclarke.ca

June 26, 2025

The Honourable Justice John A. Keith
Supreme Court of Nova Scotia
The Law Courts
1815 Upper Water Street
Halifax, NS B3J 1S7

Dear Justice Keith:

Re: In the matter of the Notice of Intention to Make a Proposal under the under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended, of Annapolis Management, Inc., Ruby, LLP, BSL Holdings Limited, 3337151 Nova Scotia Limited and 4551650 Nova Scotia Limited
Hfx No. 539955

This is the submission of the Annapolis Management, Inc. ("**Annapolis**"), Ruby, LLP ("**Ruby**"), BSL Holdings Limited ("**BSL**"), 3337151 Nova Scotia Limited ("**333 NSL**") and 4551650 Nova Scotia Limited ("**455 NSL**"), which are collectively referred to herein as the "**Caryi Group of Companies**" for, *inter alia*,

(a) an order abridging time pursuant to Rule 6 of the *Bankruptcy and Insolvency Act General Rules*;

(b) an order for confidentiality pursuant to *Nova Scotia Civil Procedure Rule* 85.04 as regards the confidential appendix ("**Confidential Appendix**") to the fifth report ("**Fifth Report**") of Deloitte Restructuring Inc., in its capacity as the Proposal Trustee ("**Deloitte**");

(c) an order pursuant to §65.13 of the BIA approving the sale by the respective property owner within the Caryi Group of Companies of the following:

(i) real property located at 1665 Granville Street, more particularly described as PID No. 40042087 and 1669 Granville Street, more particularly described as PID No.

00003251, which are both commonly referred to as Granville Hall;

(ii) real property located at 1598 Barrington Street, Halifax, Nova Scotia, more particularly described as PID No. 00076455, which is commonly referred to as the Tramway Building; and

(iii) real property located at 1674 Hollis Street, Halifax, Nova Scotia, more particularly described as PID No. 00003236, which is commonly referred to as the Sonic Building;

(collectively the "**Purchased Assets**")

on the terms and conditions set out in Deloitte's Fifth Report and its Confidential Appendix, and also providing that:

(i) the real property shall vest in the purchasers thereof free from any claims, liens, or encumbrances other than permitted encumbrances; and

(ii) the monies paid to Deloitte pursuant to the sale of the real property shall stand in the place and stead of it for the purpose of determining the nature of the properties and claims thereto.

(d) an order extending the time for BSL, 333 NSL, and 455 NSL to file a proposal under the *Bankruptcy and Insolvency Act* ("**BIA**"), commencing from and including July 5, 2025, up to and including July 18, 2025, pursuant to section 50.4(9) of the BIA;

(e) approving the fees and activities of the Deloitte and its independent counsel, Stewart McKelvey.

A. Concise Statement of Facts

Steven Caryi had a vision to revitalize heritage properties by combining both the modern and historic elements of each, resulting in a new purpose and life for the older buildings Mr. Caryi purchased over the years and specific to this proceeding.

The Caryi Group of Companies are incorporated pursuant to the laws of Nova Scotia save and except Annapolis and Ruby, which are extra provincially companies incorporated pursuant the laws of the State of Florida, in the United States of America.

The Caryi Group of Companies own various buildings in downtown Halifax and one in Charlottetown, Prince Edward Island, which contain rental and commercial tenants. Additionally, most of the buildings are in mid-construction.

Given their heritage status, many of the buildings are generally known by their historic names rather than their municipal address. The buildings owned by the Caryi Group of Companies have various credit facilities secured against them, and in particular:

(a) the National Film Board building is secured by a mortgage extended by League Savings and Mortgage Company and Graysbrook Capital Ltd.;

(b) the Halifax Club is secured by a mortgage extended by Assumption Mutual Life Insurance Company and Graysbrook Capital Ltd.;

(c) the Freemason's Building is secured by a mortgage extended by Atlantic Central and Graysbrook;

(d) the Young Property is secured by a mortgage extended by CIBC and Graysbrook Capital Ltd.;

(e) Granville Hall is secured by a mortgage extended by Atlantic Central and Graysbrook Capital Ltd.;

(f) the property in Prince Edward Island is secured by a mortgage extended by Saltwire Network Inc. and Assumption Mutual Life Insurance Company;

(g) the Tramway Building is secured by a mortgage extended by League Savings and Mortgage Company and;

(h) the Sonic Building is secured by a mortgage extended by 4518276 Nova Scotia Limited and 3046475 Nova Scotia Limited.

(the properties are defined in the affidavit of Joanne Caryi sworn on January 23, 2025, at paragraphs 13, 18, 23, 27, 30, 35 38 and 41)

On January 20, 2025, each of the companies forming the Caryi Group of Companies filed a Notice of Intention to Make a Proposal. Prior to the expiry of the initial stay of proceedings, the Caryi Group of Companies filed a motion for, *inter alia*, a further stay of proceedings and to proceed with a sale investment and solicitation process ("**SISP**").

This Court granted that Order on February 18, 2025.

On April 4, 2025, this Court granted a further order extending the stay of proceedings until May 19, 2025. During that time, the SISP was underway. Bids have been received and were reviewed with all stakeholders, including the mortgage holders for each property.

On May 9, 2025, this Court granted a further order extending the stay of proceedings until July 5, 2025. This was granted, in part, to allow further review of the bids with all stakeholders.

The Caryi Group of Companies is seeking a further stay of proceedings to close the sale of the Purchased Assets.

B. Service, Notice and Abridgement of Time

The relief sought in this motion is pursuant to the BIA and therefore the *Bankruptcy and Insolvency General Rules* supersede the *Nova Scotia Civil Procedure Rules* in the event of any inconsistency. BIA Rule 3 states:

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

As this is a matter where the BIA does not specify a minimum notice requirement, BIA Rule 6 applies, which states:

> 6 (1) Unless otherwise provided in the Act or these Rules, every notice or other document given or sent pursuant to the Act or these Rules must be served, delivered personally, or sent by mail, courier, facsimile or electronic transmission.
>
> (2) Unless otherwise provided in these Rules, every notice or other document given or sent pursuant to the Act or these Rules
>
> (a) must be received by the addressee at least four days before the event to which it relates, if it is served, delivered personally, or sent by facsimile or electronic transmission; or
>
> (b) must be sent to the addressee at least 10 days before the event to which it relates, if it is sent by mail or by courier.

> (3) A trustee, receiver or administrator who gives or sends a notice or other document shall prepare an affidavit, or obtain proof, that it was given or sent, and shall retain the affidavit or proof in their files.
>
> (4) The court may, on an ex parte application, exempt any person from the application of subsection (2) or order any terms and conditions that the court considers appropriate, including a change in the time limits.

In terms of measuring the four days provided under BIA Rule 6, the period of time is governed by BIA Rule 4, which stipulates clear business days:

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

In accordance with BIA Rule 6(1), the motion materials will be served electronically by email. No opposition is anticipated, and the affected creditors are supportive of the requested relief. Proof of service by affidavit will be filed in advance of the hearing of the pending motion.

Given the nature of the relief sought and the surrounding circumstances, the Caryi Group of Companies submit that this is an appropriate circumstance for the Court to abridge the time for the hearing of this matter.

C. Order of Confidentiality – Confidential Supplement

Nova Scotia Civil Procedure Rule 85 addresses access to Court records. Specifically,

> **Order of confidentiality and interim order**
>
> **85.04** (1) A judge may order that a court record be kept confidential only if the judge is satisfied that it is in accordance with law to do so, including the freedom of the press and other media under section 2 of the Canadian Charter of Rights and Freedoms and the open courts principle.
>
> (2) An order that provides for any of the following is an example of an order for confidentiality:
>
> (a) sealing a court document or an exhibit in a proceeding;

Sealing Orders may be granted when (a) court openness poses a serious risk to an important public interest; (b) the order sought is necessary to prevent the serious risk to the identified interest because reasonably alternative measures will not prevent the risk; and (c) as a matter of proportionality the benefits of the order outweigh its negative effects. See, *Sherman Estate v. Donovan*, 2021 SCC 25 at para 38.

Courts have previously identified the public interest of Sealing Orders following a bidding or sales process in a receivership. In *Yukon (Government of) v. Yukon Zinc Corporation*, 2022 YKSC 2, said the following in response to a request for a Sealing Order:

> [39] In the insolvency context, especially where there is a sale process, it is a standard practice to keep all aspects of the bidding or sales process confidential. Courts have found this appropriately meets the *Sierra Club* test as modified by *Sherman Estate*, as sealing this information ensures the integrity of the sales and marketing process and avoids misuse of information by bidders in a subsequent process to obtain an unfair advantage. The important public interest at stake is described as the commercial interests of the Receiver, bidders, creditors and stakeholders in ensuring a fair sales and marketing process is carried out, with all bidders on a level playing field.

And they have found that a Temporary Sealing Order to seal commercially sensitive information relating to a sales process that has not closed, is necessary to protect such information as stated in *Rose-Isli Corp v. Frame-Tech Structures Ltd.*, 2023 ONSC 832:

> [138] The requested partial sealing order is limited in its scope (only specifically identified confidential exhibits) and in time (until the Transaction is completed). It is necessary to protect commercially sensitive information that could negatively impact the Company and its stakeholders if this transaction is not completed and further efforts to sell the property must be undertaken.
>
> [139] The proposed partial sealing order appropriately balances the open court principle and legitimate commercial requirements for confidentiality. It is necessary to avoid any interference with subsequent attempts to market and sell the property, and to avoid any prejudice that might be caused by publicly disclosing confidential and commercially-sensitive information prior to the completion of the now approved Ora Transaction.

> [140] These salutary effects outweigh any deleterious effects, including the effects on the public interest in open and accessible court proceedings. I am satisfied that the limited nature and scope of the proposed sealing order is appropriate and satisfies the *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522 requirements, as modified by the reformulation of the test in Sherman Estate v. Donovan, 2021 SCC 25, 458 D.L.R. (4th) 361, at para. 38.
>
> [141] Granting this order is consistent with the court's practice of granting limited partial sealing orders in conjunction with approval and vesting orders.

The Caryi Group of Companies respectfully submits that this is an appropriate case for this Court to exercise its discretion to "seal" the Confidential Appendix because the Confidential Appendix contains sensitive commercial information regarding the realization analysis it performed to arrive at its opinion to allow the purchase of the real property.

The Caryi Group of Companies is concerned that if the Confidential Appendix is made publicly available, the disclosure of this sensitive information would negatively impact any future sale efforts, in the event that the proposed sale transactions do not close.

The draft Order for Confidentiality, as drafted, will expire when Deloitte files its certificate following the last closing. The Confidential Appendix will be available to any interested party at that time.

Accordingly, the Caryi Group of Companies respectfully requests that this Court issue an Order for Confidentiality as regards the Confidential Appendix.

D. BIA section 65.13

This Court possesses the jurisdiction to issue a Sale Approval and Vesting Order in the context of NOI proceedings pursuant to BIA §65.13, which states:

> (1) An insolvent person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

(2) In the case of an individual who is carrying on a business, the court may authorize the sale or disposition only if the assets were acquired for or used in relation to the business.

(3) An insolvent person who applies to the court for an authorization shall give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

(4) In deciding whether to grant the authorization, the court is to consider, among other things,

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

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

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

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

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

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

(5) If the proposed sale or disposition is to a person who is related to the insolvent person, the court may, after considering the factors referred to in subsection (4), grant the authorization only if it is satisfied that

(a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the insolvent person; and

(b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

(6) For the purpose of subsection (5), a person who is related to the insolvent person includes

(a) a director or officer of the insolvent person;

(b) a person who has or has had, directly or indirectly, control in fact of the insolvent person; and

(c) a person who is related to a person described in paragraph (a) or (b).

(7) The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the insolvent person or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

(8) The court may grant the authorization only if the court is satisfied that the insolvent person can and will make the payments that would have been required under paragraphs 60(1.3)(a) and (1.5)(a) if the court had approved the proposal.

(9) If, on the day on which a notice of intention is filed under section 50.4 or a copy of the proposal is filed under subsection 62(1), the insolvent person is a party to an agreement that grants to another party a right to use intellectual property that is included in a sale or disposition authorized under subsection (7), that sale or disposition does not affect the 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."

As regards the specific requirements of BIA s. 65.13(4), the Proposal Trustee submits:

(a) The Sale Process was reasonable in the circumstances, as it was conducted in accordance with the SISP Order previously issued by this Court;

(b) The Sale Process was conducted by Deloitte in accordance with the SISP Order and the approval of the Court;

(c) The Fifth Report states that the proposed sales of the Purchased Assets, in the opinion of Deloitte, would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) Consultations with creditors during the Sale Process were robust; and

(e) The Purchased Assets were exposed to the market in accordance with the approved Sale Process. All interested parties had the opportunity to submit Qualified Bids if they chose to do so. As it transpired, Deloitte submits that the purchase prices as set out therein is reasonable and fair in the circumstances.

E. Draft Sale Approval and Vesting Order

The draft Order authorizes and approves the completion of the sale of the Purchased Assets by the Caryi Group of Companies in accordance with agreements and authorizes the Caryi Group of Companies to take such additional steps and execute such additional documents as may be necessary or desirable for that purpose.

The draft Order also vests title in the Purchasers free and clear of all liens, charges or encumbrances – with creditors' claims attaching to the net sale proceeds with the same priority as they had as regards the Purchased Assets immediately prior to the closing of the sale transactions.

The Caryi Group of Companies submit that the granting of the Sale Approval Vesting Orders will assist it in completing the sale transactions, and that it will not cause any prejudice to any stakeholder.

F. Extension to File a Proposal

Pursuant to section 69 of the BIA, a debtor that files an NOI is automatically given the benefit of an initial 30-day stay of proceedings, which may be extended in increments of 45 days on sufficient cause for a total of five months. Meaning, the Caryi Group of Companies will be deemed bankrupt on July 21, 2025.

The current stay of proceedings is set to expire at the end of the day July 5, 2025. BSL, 333 NSL and 455 NSL have agreed to sell the Purchased Assets and requires the time to complete those transactions.

The Court has discretion to extend the time for a debtor to file a proposal pursuant to section 50.4(9) of the BIA:

> **Extension of time for filing proposal**
> (9) The insolvent person may, before the expiry of the 30-day period referred to in subsection (8) or of any extension granted under this subsection, apply to the court for an extension, or further extension, as the case may be, of that period, and the court, on notice to any interested persons that the court may direct, may grant the extensions, not exceeding 45 days for any individual extension and not exceeding in the aggregate five months after the expiry of the 30-day period referred to in subsection (8), if satisfied on each application that
>
> (a) the insolvent person has acted, and is acting, in good faith and with due diligence;
>
> (b) the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and
>
> (c) no creditor would be materially prejudiced if the extension being applied for were granted. See BIA at s. 50.4(9).

In considering whether to exercise its discretion, the court assesses whether the debtor has discharged its burden of proving on a balance of probabilities that the factors enumerated in s. 50.4(9) of the BIA are objectively satisfied. See, *Scotian Distribution Services Limited (Re)*, 2020 NSSC 131 at para. 19.

As will be described below, BSL 333 NSL and 455 NSL submit that each of the factors of 50.4(9) of the BIA are satisfied and that it is appropriate for this Court to extend the stay period.

(a) The Company has acted in good faith and with due diligence

In *Re Convergix*, 2006 NBQB 288, Glennie, J., provided guiding principles regarding the consideration of applications by the Court and evidence of good faith and due diligence when His Lordship held:

> [38] In considering applications under section 50.4(9) of the BIA, an objective standard must be applied and matters considered under this provision should be judged on a rehabilitation basis rather than on a liquidation basis: See *Cantrail Coach Lines Ltd., Re* (2005), 10 C.B.R. (5th) 164 (B.C. Master).

> [39] I am satisfied that the Insolvent Corporations' actions demonstrate good faith and diligence. These actions include the following:
>
> (a) The Insolvent Corporations have retained the professional services of Grant Thornton Limited to assist them in their restructuring;
>
> (b) The Insolvent Corporations have completed a business plan;
>
> (c) The Insolvent Corporations are diligently working on the Restructuring;
>
> (d) Since the filing of the five Notices of Intention to Make a Proposal, representatives of the Insolvent Corporations and Grant Thornton Limited have met with representatives of ACOA, the principle outside creditor of the Insolvent Corporations, to advise them of these proceedings, and
>
> (e) Representatives of the Insolvent Corporations have met with outside investors.

Good faith has been defined as a state of mind consisting of (1) honesty in belief of purpose, (2) faithfulness to one's duty and obligation, (3) observance of reasonable commercial standards or fair dealing in a given trade or business, or (4) absence of intent to defraud or to use unconscionable advantage. See, *Lundrigan (Re)*, 2012 NSSC 231 at para. 18.

Likewise, the "good faith and "due diligence" requirement relates to the development of a viable proposal and not to other insolvency options. In other words, moving the viable proposal forward. It is a question of fact determined on the evidence. See, *Atlantic Sea Cucumber (Re)*, 2023 NSSC 238 at para. 22.

Deloitte with the assistance of the Caryi Group of Companies conducted the SISP and agreed with the creditors to the sale of the Purchased Assets. Further, the Caryi Group of Companies are, as further detailed in Deloitte's Fifth Report:

> a. continuing to manage the assets of the Caryi Group of Companies in the normal course, including but not limited to:
>
> i. dealing with tenant matters, which include leasing matters;
>
> ii. maintaining insurance coverage;

iii.communicating with stakeholders; and

iv.ensuring repairs and maintenance are completed.

b. corresponding with Halifax Regional Municipality and all stakeholders regarding the scaffolding erected at 5212 Sackville Street, Halifax, Nova Scotia, which is commonly known as the Tramway Building.

c. engaging, with the support of the affected Lenders, and erect scaffolding in compliance with the Halifax Regional Municipality.to support the exterior and structural stability of the Tramway Building;

d. responding to information requests from Deloitte in a timely fashion;

e. submitting disbursement requests (including supporting documentation) to Deloitte for review prior to any payments being made;

f.corresponding with Canada Revenue Agency to open a post-filing excise tax accounts for Ruby, BSL, 333 NSL and 455 NSL;

g. corresponding with Cox & Palmer regarding the collection of a corporate receivable; and

h. assisting Deloitte and its counsel with reviewing, analyzing and approving the sale of the Purchased assets pursuant to the SISP.

Based on the foregoing, the Caryi Group of Companies are acting in good faith and with due diligence.

(b) The Company will be likely to make a viable proposal

The test for whether an insolvent person would likely be able to make a viable proposal if granted an extension is whether the insolvent person might (not certainly will) be able to present a proposal that seems reasonable on its face to a reasonable creditor. See, *Re Convergix Inc.*, 2006 NBQB 288 at para. 40.

The Caryi Group of Companies submits that the evidence before the Court satisfies this requirement.

(c) No creditor is materially prejudiced

In considering the third element of the test, Glennie, J., held in *Convergix, supra*, described material prejudice when his Lordship stated:

> [42] I am satisfied that the proposed extension would not materially prejudice creditors of the Insolvent Corporations. My conclusion in this regard is based on the following facts: the Insolvent Corporations continue to pay equipment leases and the equipment continues to be insured and properly maintained and preserved by the Insolvent Corporations; the principle debt of the Insolvent Corporations is inter-company debt; the collateral of the secured creditors is substantially comprised of equipment and software and its value is unlikely to be eroded as a result of an extension; based on the Projected Monthly Cash-Flow Summary the Insolvent Corporations have sufficient cash to meet their ongoing current liabilities to the end of September, 2006 and in a bankruptcy scenario it is likely that there will be little if any recovery for the unsecured creditors of the Insolvent Corporations.
>
> [43] Accordingly, I conclude that each of the requirements of section 50.4(9) of the BIA are satisfied on the facts of this case and that an extension of time for filing a proposal should be granted.

Further, Registrar Balmanoukian has taken judicial notice that "proposals, if performed, generally result in a greater net recovery to creditors overall". See, *Scotian Distribution Services Limited (Re),* 2020 NSSC 131 at para. 22.

BSL, 333 NSL and 455 NSL respectfully submits that there is no material prejudice if the requested extension is granted. The real property is located primarily in downtown Halifax. It is not being dissipated or eroded and time is required to complete the transactions.

(d) Relief sought under section 50.4(9)

BSL, 333 NSL and 455 NSL respectfully submit that it has satisfied the three-part test and that an extension of the NOI should be granted in its entirety.

G. Approval of fees, Disbursements and Activities

Rule 3 and 6 of the *Bankruptcy and Insolvency General Rules* state as follows:

> 3. In cases not provided for in the Act or these Rules, the courts shall apply, within their respective jurisdictions, their ordinary procedure to the extent that that procedure is not inconsistent with the Act or these Rules.
>
> ...
>
> 6. (1) Unless otherwise provided in the Act or these Rules, every notice or other document given or sent pursuant to the Act or these Rules must be served, delivered personally, or sent by mail, courier, facsimile or electronic transmission.
>
> (2) Unless otherwise provided in these Rules, every notice or other document given or sent pursuant to the Act or these Rules
>
> (a) must be received by the addressee at least four days before the event to which it relates, if it is served, delivered personally, or sent by facsimile or electronic transmission; or
>
> (b) must be sent to the addressee at least 10 days before the event to which it relates, if it is sent by mail or by courier.
>
> (3) A trustee, receiver or administrator who gives or sends a notice or other document shall prepare an affidavit, or obtain proof, that it was given or sent, and shall retain the affidavit or proof in their files.
>
> (4) The court may, on an ex parte application, exempt any person from the application of subsection (2) or order any terms and conditions that the court considers appropriate, including a change in the time limits.

Nova Scotia Civil Procedure Rule 73.11 addresses a Receiver. Specifically:

> **Passing accounts and discharge**
> 73.11 (1) A receiver who completes the tasks for which the receivership order was granted must make a motion for an order passing the receiver's accounts, approving fees and expenses not yet approved, and discharging the receiver.

> (2) A judge who hears a motion for a discharge may do any of the following:
>
> (a) pass the accounts or order repayment of an expense not approved;
>
> (b) approve the receiver's fees and disbursements and allow payment of them or, if advances exceed the amount approved, order repayment;
>
> (c) discharge the receiver wholly, or on conditions.

In *Arnold v. Rockwood*, (1989), 93 N.S.R. (2d) 14, [1989] N.S.J. No. 307 at paragraph 2, Davison J. stated the following with respect to the remuneration of a receiver:

> The remuneration of the receiver should not be fixed totally on the amount of time spent on the affairs of the debtor. The factors to be considered in fixing the remuneration should also include the result obtained, the responsibility assumed, the quality of service rendered, the nature, extent and value of the assets handled, the complications and difficulties encountered, the receiver's knowledge, experience and skill, the diligence and thoroughness displayed, and the responsibilities assumed. The purpose of passing accounts of a receiver is to afford judicial protection to the receiver with respect to the performance of his duties and to permit interested parties to question the activities of the receiver. The court will protect the receiver in pursuit of his remuneration and should pass accounts which are fair and reasonable . . .

In *Toronto-Dominion Bank v. Karlsen Shipping Co.*, 2015 NSSC 204, McDougall J. adopted the comments of Goodman J. of the Ontario Supreme Court of Justice in *Bank of Nova Scotia v. Diemer*, 2014 ONSC 365, concerning the remuneration of a receiver:

> [29] Counsel for No. Co. referred the Court to a relatively recent case of the Ontario Superior Court of Justice in *Bank of Nova Scotia v. Diemer*, 2014 ONSC 365 (Ont. S.C.J.). The Honourable Andrew J. Goodman, at para. 3 of his decision, said this:
>
> 3 One of the leading authorities dealing with approval of the fees of a receiver is found in the case of *Re Bakemates International Inc.*, [2002] O.J. No. 3569. In Re Bakemates, the Ontario Court of Appeal held that when a receiver asks the court to approve its compensation, there is an onus on the

receiver to prove that the compensation for which it seeks the court's approval is fair and reasonable and a court could adjust the fees and charges of the receiver.

...

[32] Before getting into an analysis of the case that was before him, Justice Goodman also cited from a case penned by Justice Farley of the Ontario General Division [Commercial List] at para. 6 of *Belyea, supra*:

> 6 In *BT-PR Reality Holdings Inc. v. Coopers & Lybrand*, [1997] O.J. No. 1097 (Sup. Ct.) Farley J. held at paras. 22 & 23:
>
> > The issue on a s. 248(2) hearing is whether the fees charged by the receiver are fair and reasonable in the circumstances as they existed - that with the benefit of the receivership going on, not with the benefit of hindsight. I would also note that it would be an unusual receivership and an unusual receiver where a receiver was able to be up to full speed instantaneously upon its appointment. There is a learning curve for the particular case and probably a suspicion equation to solve. The receiver must demonstrate that it acted in good faith and in the best interests of the creditor as opposed to its own interest or some third party's interests. The receiver must also demonstrate that it exercised the reasonable care, supervision and control that an ordinary man would give to the business if it were his own: see *Re Ursel Investments Ltd.* (1992), 10 C.B.R. (3d) 61 (Sask. C.A.). The receiver is not required to act with perfection, but it must demonstrate that it acted with a reasonable degree of confidence: see *Ontario Development Corp. v. I.C. Suatac Construction Ltd.* (1978), 26 C.B.R. (N.S.) 55 (Ont. S.C.). While sufficient fees should be paid to induce competent persons to serve as receivers, receiverships should be administered as economically as reasonably possible. Reasonably is emphasized. It should not be based on any cut rate procedures or cutting corners and it must relate to the circumstances. It should not be the expensive foreign sports model; but neither should it be the battered used car which keeps its driver worried about whether he will make his destination without a breakdown.

[33] In his analysis, Justice Goodman, at para. 18 and 19, commented as follows:

> 18 As a general principle, the assessment of fees are in the discretion of the court. There is no fixed rate or tariff for determining the amount of compensation to pay a receiver or receiver's counsel. Similar to the approach in assessing costs, in approving a receiver's accounts, a determination should be made as to whether the remuneration and disbursements incurred in carrying out the receivership were fair and reasonable, rather than an amount fixed by the actual costs charged by receiver's counsel. The court must, first and foremost, be fair when exercising its discretion on awarding fees.
>
> 19 In my view, in an assessment of fees, there must be practical and reasonable limits to the amounts awarded and those amounts should bear some reasonable connection to the amount that should reasonably have been contemplated. It is not necessary for me to have to go through the dockets, hours, the explanations or disbursements, line by line, in order to determine what the appropriate fees are. Nor is the court to second-guess the amount of time claimed unless it is clearly excessive or overreaching. The appellate courts have directed that judges should consider all the relevant factors, and should award costs (or fees) in a more holistic manner. However, when appropriate and necessary, a court ought to analyze the Bill of Costs or dockets in order to satisfy itself as to the reasonableness of the fees submitted for consideration.

[34] I accept what Justice Goodman had to say and adopt what he borrowed from the various other cases cited

Accordingly, it is respectfully submitted that Deloitte's fees and disbursements and that of its counsel should be approved, unless there is evidence that the activities of Deloitte as the proposal trustee and the associated fees and disbursements were unfair or unreasonable in the circumstances. It is respectfully submitted that there is no evidence that Deloitte acted unfairly or in a commercially unreasonable manner in administering the receivership of the Companies.

It is further respectfully submitted that the time and disbursements incurred by Deloitte and its counsel in the course of its duties are fair and reasonable in a proposal of the nature described herein, and that the hourly rates charged by Deloitte are consistent with the average hourly rates billed by Deloitte on its other engagements, and

consistent with other insolvency firms of comparable size engaged on similar receivership matters.

It is respectfully submitted that the fees and expenses submitted by Deloitte in its capacity as proposal trustee and those of its counsel are fair and reasonable and reflect the work that was done and the quality of the service provided up to and including May 31, 2025.

The activities of Deloitte set out in its Fifth Report should also be approved. Should this Honourable Court approve the proposed order sought by Deloitte in this motion, Deloitte intends to complete its statutory duties.

H. Conclusion

The Caryi Group of Companies respectfully submit that the orders should be granted in their entirety.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

BOYNECLARKE LLP

Joshua J. Santimaw

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SUPREME COURT OF CANADA

CITATION: Sherman Estate *v.* Donovan, 2021 SCC 25, [2021] 2 S.C.R. 75

APPEAL HEARD: October 6, 2020
JUDGMENT RENDERED: June 11, 2021
DOCKET: 38695

BETWEEN:

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

and

Kevin Donovan and Toronto Star Newspapers Ltd.
Respondents

- and -

Attorney General of Ontario, Attorney General of British Columbia, Canadian Civil Liberties Association, Income Security Advocacy Centre, Ad IDEM/Canadian Media Lawyers Association, Postmedia Network Inc., CTV, a Division of Bell Media Inc., Global News, a division of Corus Television Limited Partnership, The Globe and Mail Inc., Citytv, a division of Rogers Media Inc., British Columbia Civil Liberties Association, HIV & AIDS Legal Clinic Ontario, HIV Legal Network and Mental Health Legal Committee
Interveners

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

REASONS FOR JUDGMENT: (paras. 1 to 108)

Kasirer J. (Wagner C.J. and Moldaver, Karakatsanis, Brown, Rowe and Martin JJ. concurring)

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

v.

Kevin Donovan and Toronto Star Newspapers Ltd. *Respondents*

and

Attorney General of Ontario, Attorney General of British Columbia, Canadian Civil Liberties Association, Income Security Advocacy Centre, Ad IDEM/Canadian Media Lawyers Association, Postmedia Network Inc., CTV, a Division of Bell Media Inc., Global News, a division of Corus Television Limited Partnership, The Globe and Mail Inc., Citytv, a division of Rogers Media Inc., British Columbia Civil Liberties Association, HIV & AIDS Legal Clinic Ontario, HIV Legal Network and Mental Health Legal Committee *Interveners*

Indexed as: Sherman Estate *v.* Donovan

2021 SCC 25

File No.: 38695.

2020: October 6; 2021: June 11.

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

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Courts — Open court principle — Sealing orders — Discretionary limits on court openness — Important public interest — Privacy — Dignity — Physical safety — Unexplained deaths of prominent couple generating intense public scrutiny and prompting trustees of estates to apply for sealing of probate files — Whether privacy and physical safety concerns advanced by estate trustees amount to important public interests at such serious risk to justify issuance of sealing orders.

A prominent couple was found dead in their home. Their deaths had no apparent explanation and generated intense public interest. To this day, the identity and motive of those responsible remain unknown, and the deaths are being investigated as homicides. The estate trustees sought to stem the intense press scrutiny prompted by the events by seeking sealing orders of the probate files. Initially granted, the sealing orders were challenged by a journalist who had reported on the couple's deaths, and by the newspaper for which he wrote. The application judge sealed the probate files,

concluding that the harmful effects of the sealing orders were substantially outweighed by the salutary effects on privacy and physical safety interests. The Court of Appeal unanimously allowed the appeal and lifted the sealing orders. It concluded that the privacy interest advanced lacked a public interest quality, and that there was no evidence of a real risk to anyone's physical safety.

Held: The appeal should be dismissed.

The estate trustees have failed to establish a serious risk to an important public interest under the test for discretionary limits on court openness. As such, the sealing orders should not have been issued. Open courts can be a source of inconvenience and embarrassment, but this discomfort is not, as a general matter, enough to overturn the strong presumption of openness. That said, personal information disseminated in open court can be more than a source of discomfort and may result in an affront to a person's dignity. Insofar as privacy serves to protect individuals from this affront, it is an important public interest and a court can make an exception to the open court principle if it is at serious risk. In this case, the risks to privacy and physical safety cannot be said to be sufficiently serious.

Court proceedings are presumptively open to the public. Court openness is protected by the constitutional guarantee of freedom of expression and is essential to the proper functioning of Canadian democracy. Reporting on court proceedings by a free press is often said to be inseparable from the principle of open justice. The open court principle is engaged by all judicial proceedings, whatever their nature. Matters in

a probate file are not quintessentially private or fundamentally administrative. Obtaining a certificate of appointment of estate trustee in Ontario is a court proceeding engaging the fundamental rationale for openness — discouraging mischief and ensuring confidence in the administration of justice through transparency — such that the strong presumption of openness applies.

The test for discretionary limits on court openness is directed at maintaining the presumption while offering sufficient flexibility for courts to protect other public interests where they arise. In order to succeed, the person asking a court to exercise discretion in a way that limits the open court presumption must establish that (1) court openness poses a serious risk to an important public interest; (2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and (3) as a matter of proportionality, the benefits of the order outweigh its negative effects.

The recognized scope of what interests might justify a discretionary exception to open courts has broadened over time and now extends generally to important public interests. The breadth of this category transcends the interests of the parties to the dispute and provides significant flexibility to address harm to fundamental values in our society that unqualified openness could cause. While there is no closed list of important public interests, courts must be cautious and alive to the fundamental importance of the open court rule when they are identifying them. Determining what is an important public interest can be done in the abstract at the level of general principles

that extend beyond the parties to the particular dispute. By contrast, whether that interest is at serious risk is a fact-based finding that is necessarily made in context. The identification of an important interest and the seriousness of the risk to that interest are thus theoretically separate and qualitatively distinct operations.

Privacy has been championed as a fundamental consideration in a free society, and its public importance has been recognized in various settings. Though an individual's privacy will be pre-eminently important to that individual, the protection of privacy is also in the interest of society as a whole. Privacy therefore cannot be rejected as a mere personal concern: some personal concerns relating to privacy overlap with public interests.

However, cast too broadly, the recognition of a public interest in privacy could threaten the strong presumption of openness. The privacy of individuals will be at risk in many court proceedings. Furthermore, privacy is a complex and contextual concept, making it difficult for courts to measure. Recognizing an important interest in privacy generally would accordingly be unworkable.

Instead, the public character of the privacy interest involves protecting individuals from the threat to their dignity. Dignity in this sense involves the right to present core aspects of oneself to others in a considered and controlled manner; it is an expression of an individual's unique personality or personhood. This interest is consistent with the Court's emphasis on the importance of privacy, but is tailored to preserve the strong presumption of openness.

Privacy as predicated on dignity will be at serious risk in limited circumstances. Neither the sensibilities of individuals nor the fact that openness is disadvantageous, embarrassing or distressing to certain individuals will generally on their own warrant interference with court openness. Dignity will be at serious risk only where the information that would be disseminated as a result of court openness is sufficiently sensitive or private such that openness can be shown to meaningfully strike at the individual's biographical core in a manner that threatens their integrity. The question is whether the information reveals something intimate and personal about the individual, their lifestyle or their experiences.

In cases where the information is sufficiently sensitive to strike at an individual's biographical core, a court must then ask whether a serious risk to the interest is made out in the full factual context of the case. The seriousness of the risk may be affected by the extent to which information is disseminated and already in the public domain, and the probability of the dissemination actually occurring. The burden is on the applicant to show that privacy, understood in reference to dignity, is at serious risk; this erects a fact-specific threshold consistent with the presumption of openness.

There is also an important public interest in protecting individuals from physical harm, but a discretionary order limiting court openness can only be made where there is a serious risk to this important public interest. Direct evidence is not necessarily required to establish a serious risk to an important public interest, as objectively discernable harm may be identified on the basis of logical inferences. But

this process of inferential reasoning is not a licence to engage in impermissible speculation. It is not just the probability of the feared harm, but also the gravity of the harm itself that is relevant to the assessment of serious risk. Where the feared harm is particularly serious, the probability that this harm materialize need not be shown to be likely, but must still be more than negligible, fanciful or speculative. Mere assertions of grave physical harm are therefore insufficient.

In addition to a serious risk to an important interest, it must be shown that the particular order sought is necessary to address the risk and that the benefits of the order outweigh its negative effects as a matter of proportionality. This contextual balancing, informed by the importance of the open court principle, presents a final barrier to those seeking a discretionary limit on court openness for the purposes of privacy protection.

In the present case, the risk to the important public interest in privacy, defined in reference to dignity, is not serious. The information contained in the probate files does not reveal anything particularly private or highly sensitive. It has not been shown that it would strike at the biographical core of the affected individuals in a way that would undermine their control over the expression of their identities. Furthermore, the record does not show a serious risk of physical harm. The estate trustees asked the application judge to infer not only the fact that harm would befall the affected individuals, but also that a person or persons exist who wish to harm them. To infer all

this on the basis of the deaths and the association of the affected individuals with the deceased is not a reasonable inference but is speculation.

Even if the estate trustees had succeeded in showing a serious risk to privacy, a publication ban — less constraining on openness than the sealing orders — would have likely been sufficient as a reasonable alternative to prevent this risk. As a final barrier, the estate trustees would have had to show that the benefits of any order necessary to protect from a serious risk to the important public interest outweighed the harmful effects of the order.

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Queen (No.1) (1983), 41 O.R. (2d) 11; *R. v. Oakes*, [1986] 1 S.C.R. 103; *Otis v. Otis* (2004), 7 E.T.R. (3d) 221; *H. (M.E.) v. Williams*, 2012 ONCA 35, 108 O.R. (3d) 321; *F.N. (Re)*, 2000 SCC 35, [2000] 1 S.C.R. 880; *R. v. Dyment*, [1988] 2 S.C.R. 417; *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401*, 2013 SCC 62, [2013] 3 S.C.R. 733; *Toronto Star Newspaper Ltd. v. R.*, 2012 ONCJ 27, 289 C.C.C. (3d) 549; *Douez v. Facebook, Inc.*, 2017 SCC 33, [2017] 1 S.C.R. 751; *R. v. Paterson* (1998), 102 B.C.A.C. 200; *S. v. Lamontagne*, 2020 QCCA 663; *Himel v. Greenberg*, 2010 ONSC 2325, 93 R.F.L. (6th) 357; *A.B. v. Canada (Citizenship and Immigration)*, 2017 FC 629; *R. v. Pickton*, 2010 BCSC 1198; *Lac d'Amiante du Québec Ltée v. 2858-0702 Québec Inc.*, 2001 SCC 51, [2001] 2 S.C.R. 743; *3834310 Canada inc. v. Chamberland*, 2004 CanLII 4122; *R. v. Spencer*, 2014 SCC 43, [2014] 2 S.C.R. 212; *Coltsfoot Publishing Ltd. v. Foster-Jacques*, 2012 NSCA 83, 320 N.S.R. (2d) 166; *Goulet v. Transamerica Life Insurance Co. of Canada*, 2002 SCC 21, [2002] 1 S.C.R. 719; *Godbout v. Longueuil (Ville de)*, [1995] R.J.Q. 2561, aff'd [1997] 3 S.C.R. 844; *A. v. B.*, 1990 CanLII 3132; *R. v. Plant*, [1993] 3 S.C.R. 281; *R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432; *R. v. Cole*, 2012 SCC 53, [2012] 3 S.C.R. 34; *Work Safe Twerk Safe v. Her Majesty the Queen in Right of Ontario*, 2021 ONSC 1100; *Fedeli v. Brown*, 2020 ONSC 994; *R. v. Marakah*, 2017 SCC 59, [2017] 2 S.C.R. 608; *R. v. Quesnelle*, 2014 SCC 46, [2014] 2 S.C.R. 390; *R. v. Mabior*, 2012 SCC 47, [2012] 2 S.C.R. 584; *R. v. Channany*, 2016 ONCA 576, 352 O.A.C. 121; *X. v. Y.*, 2011 BCSC 943, 21 B.C.L.R. (5th) 410; *R. v. Esseghaier*, 2017 ONCA 970, 356 C.C.C. (3d) 455.

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APPEAL from a judgment of the Ontario Court of Appeal (Doherty, Rouleau and Hourigan JJ.A.), 2019 ONCA 376, 47 E.T.R. (4th) 1, [2019] O.J. No. 2373 (QL), 2019 CarswellOnt 6867 (WL Can.), setting aside a decision of Dunphy J., 2018 ONSC 4706, 417 C.R.R. (2d) 321, 41 E.T.R. (4th) 126, 28 C.P.C. (8th) 102, [2018] O.J. No. 4121 (QL), 2018 CarswellOnt 13017 (WL Can.). Appeal dismissed.

Chantelle Cseh and *Timothy Youdan*, for the appellants.

Iris Fischer and *Skye A. Sepp*, for the respondents.

Peter Scrutton, for the intervener the Attorney General of Ontario.

Jaqueline Hughes, for the intervener the Attorney General of British Columbia.

Ryder Gilliland, for the intervener the Canadian Civil Liberties Association.

Ewa Krajewska, for the intervener the Income Security Advocacy Centre.

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

Adam Goldenberg, for the intervener the British Columbia Civil Liberties Association.

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

The judgment of the Court was delivered by

KASIRER J. —

I. Overview

[1] This Court has been resolute in recognizing that the open court principle is protected by the constitutionally-entrenched right of freedom of expression and, as such, it represents a central feature of a liberal democracy. As a general rule, the public can attend hearings and consult court files and the press — the eyes and ears of the public — is left free to inquire and comment on the workings of the courts, all of which helps make the justice system fair and accountable.

[2] Accordingly, there is a strong presumption in favour of open courts. It is understood that this allows for public scrutiny which can be the source of inconvenience and even embarrassment to those who feel that their engagement in the justice system brings intrusion into their private lives. But this discomfort is not, as a general matter, enough to overturn the strong presumption that the public can attend hearings and that court files can be consulted and reported upon by the free press.

[3] Notwithstanding this presumption, exceptional circumstances do arise where competing interests justify a restriction on the open court principle. Where a discretionary court order limiting constitutionally-protected openness is sought — for example, a sealing order, a publication ban, an order excluding the public from a

hearing, or a redaction order — the applicant must demonstrate, as a threshold requirement, that openness presents a serious risk to a competing interest of public importance. That this requirement is considered a high bar serves to maintain the strong presumption of open courts. Moreover, the protection of open courts does not stop there. The applicant must still show that the order is necessary to prevent the risk and that, as a matter of proportionality, the benefits of that order restricting openness outweigh its negative effects.

[4] This appeal turns on whether concerns advanced by persons seeking an exception to the ordinarily open court file in probate proceedings — the concerns for privacy of the affected individuals and their physical safety — amount to important public interests that are at such serious risk that the files should be sealed. The parties to this appeal agree that physical safety is an important public interest that could justify a sealing order but disagree as to whether that interest would be at serious risk, in the circumstances of this case, should the files be unsealed. They further disagree whether privacy is in itself an important interest that could justify a sealing order. The appellants say that privacy is a public interest of sufficient import that can justify limits on openness, especially in light of the threats individuals face as technology facilitates widespread dissemination of personally sensitive information. They argue that the Court of Appeal was mistaken to say that personal concerns for privacy, without more, lack the public interest component that is properly the subject-matter of a sealing order.

[5] This Court has, in different settings, consistently championed privacy as a fundamental consideration in a free society. Pointing to cases decided in other contexts, the appellants contend that privacy should be recognized here as a public interest that, on the facts of this case, substantiates their plea for orders sealing the probate files. The respondents resist, recalling that privacy has generally been seen as a poor justification for an exception to openness. After all, they say, virtually every court proceeding entails some disquiet for the lives of those concerned and these intrusions on privacy must be tolerated because open courts are essential to a healthy democracy.

[6] This appeal offers, then, an occasion to decide whether privacy can amount to a public interest in the open court jurisprudence and, if so, whether openness puts privacy at serious risk here so as to justify the kind of orders sought by the appellants.

[7] For the reasons that follow, I propose to recognize an aspect of privacy as an important public interest for the purposes of the relevant test from *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522. Proceedings in open court can lead to the dissemination of highly sensitive personal information that would result not just in discomfort or embarrassment, but in an affront to the affected person's dignity. Where this narrower dimension of privacy, rooted in what I see as the public interest in protecting human dignity, is shown to be at serious risk, an exception to the open court principle may be justified.

[8] In this case, and with this interest in mind, it cannot be said that the risk to privacy is sufficiently serious to overcome the strong presumption of openness. The

same is true of the risk to physical safety here. The Court of Appeal was right in the circumstances to set aside the sealing orders and I would therefore dismiss the appeal.

II. Background

[9] Prominent in business and philanthropic circles, Bernard Sherman and Honey Sherman were found dead in their Toronto home in December of 2017. Their deaths had no apparent explanation and generated intense public interest and press scrutiny. In January of the following year, the Toronto Police Service announced that the deaths were being investigated as homicides. As the present matter came before the courts, the identity and motive of those responsible remained unknown.

[10] The couple's estates and estate trustees (collectively the "Trustees")[1] sought to stem the intense press scrutiny prompted by the events. The Trustees hoped to see to the orderly transfer of the couple's property, at arm's length from what they saw as the public's morbid interest in the unexplained deaths and the curiosity around apparently great sums of money involved.

[11] When the time came to obtain certificates of appointment of estate trustee from the Superior Court of Justice, the Trustees sought a sealing order so that the estate trustees and beneficiaries ("affected individuals") might be spared any further

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[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.

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.)*

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[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.

[13] In addressing whether the circumstances warranted interference with the open court principle, the application judge relied on this Court's judgment in *Sierra Club*. He noted that a confidentiality order should only be granted when: "(1) such an order is necessary . . . to prevent a serious risk to an important interest because reasonable alternative measures will not prevent the risk; and (2) the salutary effects of the confidentiality order outweigh its deleterious effects, including the effects on the right to free expression and the public interest in open and accessible court proceedings" (para. 13(d)).

[14] The application judge considered whether the Trustees' interests would be served by granting the sealing orders. In his view, the Trustees had correctly identified two legitimate interests in support of making an exception to the open court principle: "protecting the privacy and dignity of victims of crime and their loved ones" and "a reasonable apprehension of risk on behalf of those known to have an interest in receiving or administering the assets of the deceased" (paras. 22-25). With respect to the first interest, the application judge found that "[t]he degree of intrusion on that privacy and dignity has already been extreme and . . . excruciating" (para. 23). For the second interest, although he noted that "it would have been preferable to include objective evidence of the gravity of that risk from, for example, the police responsible for the investigation", he concluded that "the lack of such evidence is not fatal" (para. 24). Rather, the necessary inferences could be drawn from the circumstances notably the "willingness of the perpetrator(s) of the crimes to resort to extreme violence to pursue whatever motive existed" (*ibid.*). He concluded that the "current uncertainty"

was the source of a reasonable apprehension of the risk of harm and, further, that the foreseeable harm was "grave" (*ibid.*).

[15] The application judge ultimately accepted the Trustees' submission that these interests "very strongly outweigh" what he called the proportionately narrow public interest in the "essentially administrative files" at issue (paras. 31 and 33). He therefore concluded that the harmful effects of the sealing orders were substantially outweighed by the salutary effects on the rights and interests of the affected individuals.

[16] Finally, the application judge considered what order would protect the affected individuals while infringing upon the open court principle to the minimum extent possible. He decided no meaningful part of either file could be disclosed if one were to make the redactions necessary to protect the interests he had identified. Open-ended sealing orders did not, however, sit well with him. The application judge therefore sealed the files for an initial period of two years, with the possibility of renewal.

B. *Court of Appeal for Ontario, 2019 ONCA 376, 47 E.T.R. (4th) 1 (Doherty, Rouleau and Hourigan JJ.A.)*

[17] The Toronto Star's appeal was allowed, unanimously, and the sealing orders were lifted.

[18] The Court of Appeal considered the two interests advanced before the application judge in support of the orders to seal the probate files. As to the need to protect the privacy and dignity of the victims of violent crime and their loved ones, it recalled that the kind of interest that is properly protected by a sealing order must have a public interest component. Citing *Sierra Club*, the Court of Appeal wrote that "[p]ersonal concerns cannot, without more, justify an order sealing material that would normally be available to the public under the open court principle" (para. 10). It concluded that the privacy interest for which the Trustees sought protection lacked this quality of public interest.

[19] While it recognized the personal safety of individuals as an important public interest generally, the Court of Appeal wrote that there was no evidence in this case that could warrant a finding that disclosure of the contents of the estate files posed a real risk to anyone's physical safety. The application judge had erred on this point: "the suggestion that the beneficiaries and trustees are somehow at risk because the Shermans were murdered is not an inference, but is speculation. It provides no basis for a sealing order" (para. 16).

[20] The Court of Appeal concluded that the Trustees had failed the first stage of the test for obtaining orders sealing the probate files. It therefore allowed the appeal and set aside the orders.

C. *Subsequent Proceedings*

[21] The Court of Appeal's order setting aside the sealing orders has been stayed pending the disposition of this appeal. The Toronto Star brought a motion to adduce new evidence on this appeal, comprised of land titles documents, transcripts of the cross-examination of a detective on the murder investigation, and various news articles. This evidence, it says, supports the conclusion that the sealing orders should be lifted. The motion was referred to this panel.

IV. Submissions

[22] The Trustees have appealed to this Court seeking to restore the sealing orders made by the application judge. In addition to contesting the motion for new evidence, they maintain that the orders are necessary to prevent a serious risk to the privacy and physical safety of the affected individuals and that the salutary effects of sealing the court probate files outweigh the harmful effects of limiting court openness. The Trustees argue that two legal errors led the Court of Appeal to conclude otherwise.

[23] First, they submit the Court of Appeal erred in holding that privacy is a personal concern that cannot, without more, constitute an important interest under *Sierra Club*. The Trustees say the application judge was right to characterize privacy and dignity as an important public interest which, as it was subject to a serious risk, justified the orders. They ask this Court to recognize that privacy in itself is an important public interest for the purposes of the analysis.

[24] Second, the Trustees submit that the Court of Appeal erred in overturning the application judge's conclusion that there was a serious risk of physical harm. They argue that the Court of Appeal failed to recognize that courts have the ability to draw reasonable inferences by applying reason and logic even in the absence of specific evidence of the alleged risk.

[25] The Trustees say that these errors led the Court of Appeal to mistakenly set aside the sealing orders. In answer to questions at the hearing, the Trustees acknowledged that an order redacting certain documents in the file or a publication ban could assist in addressing some of their concerns, but maintained neither is a reasonable alternative to the sealing orders in the circumstances.

[26] The Trustees submit further that the protection of these interests outweighs the deleterious effects of the orders. They argue that the importance of the open court principle is attenuated by the nature of these probate proceedings. Given that it is non-contentious and not strictly speaking necessary for the transfer of property at death, probate is a court proceeding of an "administrative" character, which diminishes the imperative of applying the open court principle here (paras. 113-14).

[27] The Toronto Star takes the position that the Court of Appeal made no mistake in setting aside the sealing orders and that the appeal should be dismissed. In the Toronto Star's view, while privacy can be an important interest where it evinces a public component, the Trustees have only identified a subjective desire for the affected individuals in this case to avoid further publicity, which is not inherently harmful.

According to the Toronto Star and some of the interveners, the Trustees' position would allow that measure of inconvenience and embarrassment that arises in every court proceeding to take precedence over the interest in court openness protected by the *Canadian Charter of Rights and Freedoms* in which all of society has a stake. The Toronto Star argues further that the information in the court files is not highly sensitive. On the issue of whether the sealing orders were necessary to protect the affected individuals from physical harm, the Toronto Star submits that the Court of Appeal was right to conclude that the Trustees had failed to establish a serious risk to this interest.

[28] In the alternative, even if there were a serious risk to one or another important interest, the Toronto Star says the sealing orders are not necessary because the risk could be addressed by an alternative, less onerous order. Furthermore, it says the orders are not proportionate. In seeking to minimize the importance of openness in probate proceedings, the Trustees invite an inflexible approach to balancing the effects of the order that is incompatible with the principle that openness applies to all court proceedings. In any event, there is a public interest in openness specifically here, given that the certificates sought can affect the rights of third parties and that openness ensures the fairness of the proceedings, whether they are contested or not.

V. Analysis

[29] The outcome of the appeal turns on whether the application judge should have made the sealing orders pursuant to the test for discretionary limits on court openness from this Court's decision in *Sierra Club*.

[30] Court openness is protected by the constitutional guarantee of freedom of expression and is essential to the proper functioning of our democracy (*Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480, at para. 23; *Vancouver Sun (Re)*, 2004 SCC 43, [2004] 2 S.C.R. 332, at paras. 23-26). Reporting on court proceedings by a free press is often said to be inseparable from the principle of open justice. "In reporting what has been said and done at a public trial, the media serve as the eyes and ears of a wider public which would be absolutely entitled to attend but for purely practical reasons cannot do so" (*Khuja v. Times Newspapers Ltd.*, [2017] UKSC 49, [2019] A.C. 161, at para. 16, citing *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, at pp. 1339-40, per Cory J.). Limits on openness in service of other public interests have been recognized, but sparingly and always with an eye to preserving a strong presumption that justice should proceed in public view (*Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, at p. 878; *R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442, at paras. 32-39; *Sierra Club*, at para. 56). The test for discretionary limits on court openness is directed at maintaining this presumption while offering sufficient flexibility for courts to protect these other public interests where they arise (*Mentuck*, at para. 33). The parties agree that this is the appropriate framework of analysis for resolving this appeal.

[31] The parties and the courts below disagree, however, about how this test applies to the facts of this case and this calls for clarification of certain points of the *Sierra Club* analysis. Most centrally, there is disagreement about how an important

interest in the protection of privacy could be recognized such that it would justify limits on openness, and in particular when privacy can be a matter of public concern. The parties bring two settled principles of this Court's jurisprudence to bear in support of their respective positions. First, this Court has often observed that privacy is a fundamental value necessary to the preservation of a free and democratic society (*Lavigne v. Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53, [2002] 2 S.C.R. 773, at para. 25; *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403, at paras. 65-66, per La Forest J. (dissenting but not on this point); *New Brunswick*, at para. 40). Courts have invoked privacy, in some instances, as the basis for an exception to openness under the *Sierra Club* test (see, e.g., *R. v. Henry*, 2009 BCCA 86, 270 B.C.A.C. 5, at paras. 11 and 17). At the same time, the jurisprudence acknowledges that some degree of privacy loss — resulting in inconvenience, even in upset or embarrassment — is inherent in any court proceeding open to the public (*New Brunswick*, at para. 40). Accordingly, upholding the presumption of openness has meant recognizing that neither individual sensibilities nor mere personal discomfort associated with participating in judicial proceedings are likely to justify the exclusion of the public from court (*Attorney General of Nova Scotia v. MacIntyre*, [1982] 1 S.C.R. 175, at p. 185; *New Brunswick*, at para. 41). Determining the role of privacy in the *Sierra Club* analysis requires reconciling these two ideas, which is the nub of the disagreement between the parties. The right of privacy is not absolute; the open court principle is not without exceptions.

[32] For the reasons that follow, I disagree with the Trustees that the ostensibly unbounded privacy interest they invoke qualifies as an important public interest within the meaning of *Sierra Club*. Their broad claim fails to focus on the elements of privacy that are deserving of public protection in the open court context. That is not to say, however, that privacy can never ground an exceptional measure such as the sealing orders sought in this case. While the mere embarrassment caused by the dissemination of personal information through the open court process does not rise to the level justifying a limit on court openness, circumstances do exist where an aspect of a person's private life has a plain public interest dimension.

[33] Personal information disseminated in open court can be more than a source of discomfort and may result in an affront to a person's dignity. Insofar as privacy serves to protect individuals from this affront, it is an important public interest relevant under *Sierra Club*. Dignity in this sense is a related but narrower concern than privacy generally; it transcends the interests of the individual and, like other important public interests, is a matter that concerns the society at large. A court can make an exception to the open court principle, notwithstanding the strong presumption in its favour, if the interest in protecting core aspects of individuals' personal lives that bear on their dignity is at serious risk by reason of the dissemination of sufficiently sensitive information. The question is not whether the information is "personal" to the individual concerned, but whether, because of its highly sensitive character, its dissemination would occasion an affront to their dignity that society as a whole has a stake in protecting.

[34] This public interest in privacy appropriately focuses the analysis on the impact of the dissemination of sensitive personal information, rather than the mere fact of this dissemination, which is frequently risked in court proceedings and is necessary in a system that privileges court openness. It is a high bar — higher and more precise than the sweeping privacy interest relied upon here by the Trustees. This public interest will only be seriously at risk where the information in question strikes at what is sometimes said to be the core identity of the individual concerned: information so sensitive that its dissemination could be an affront to dignity that the public would not tolerate, even in service of open proceedings.

[35] I hasten to say that applicants for an order making exception to the open court principle cannot content themselves with an unsubstantiated claim that this public interest in dignity is compromised any more than they could by an unsubstantiated claim that their physical integrity is endangered. Under *Sierra Club*, the applicant must show on the facts of the case that, as an important interest, this dignity dimension of their privacy is at "serious risk". For the purposes of the test for discretionary limits on court openness, this requires the applicant to show that the information in the court file is sufficiently sensitive such that it can be said to strike at the biographical core of the individual and, in the broader circumstances, that there is a serious risk that, without an exceptional order, the affected individual will suffer an affront to their dignity.

[36] In the present case, the information in the court files was not of this highly sensitive character that it could be said to strike at the core identity of the affected

persons; the Trustees have failed to show how the lifting of the sealing orders engages the dignity of the affected individuals. I am therefore not convinced that the intrusion on their privacy raises a serious risk to an important public interest as required by *Sierra Club*. Moreover, as I shall endeavour to explain, there was no serious risk of physical harm to the affected individuals by lifting the sealing orders. Accordingly, this is not an appropriate case in which to make sealing orders, or any order limiting access to these court files. In the circumstances, the admissibility of the Toronto Star's new evidence is moot. I propose to dismiss the appeal.

A. *The Test for Discretionary Limits on Court Openness*

[37] Court proceedings are presumptively open to the public (*MacIntyre*, at p. 189; *A.B. v. Bragg Communications Inc.*, 2012 SCC 46, [2012] 2 S.C.R. 567, at para. 11).

[38] The test for discretionary limits on presumptive court openness has been expressed as a two-step inquiry involving the necessity and proportionality of the proposed order (*Sierra Club*, at para. 53). Upon examination, however, this test rests upon three core prerequisites that a person seeking such a limit must show. Recasting the test around these three prerequisites, without altering its essence, helps to clarify the burden on an applicant seeking an exception to the open court principle. In order to succeed, the person asking a court to exercise discretion in a way that limits the open court presumption must establish that:

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

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

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

Only where all three of these prerequisites have been met can a discretionary limit on openness — for example, a sealing order, a publication ban, an order excluding the public from a hearing, or a redaction order — properly be ordered. This test applies to all discretionary limits on court openness, subject only to valid legislative enactments (*Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41, [2005] 2 S.C.R. 188, at paras. 7 and 22).

[39] The discretion is structured and controlled in this way to protect the open court principle, which is understood to be constitutionalized under the right to freedom of expression at s. 2(b) of the Charter (*New Brunswick*, at para. 23). Sustained by freedom of expression, the open court principle is one of the foundations of a free press given that access to courts is fundamental to newsgathering. This Court has often highlighted the importance of open judicial proceedings to maintaining the independence and impartiality of the courts, public confidence and understanding of their work and ultimately the legitimacy of the process (see, e.g., *Vancouver Sun*, at paras. 23-26). In *New Brunswick*, La Forest J. explained the presumption in favour of

court openness had become "'one of the hallmarks of a democratic society'" (citing *Re Southam Inc. and The Queen (No. 1)* (1983), 41 O.R. (2d) 113 (C.A.), at p. 119), that "acts as a guarantee that justice is administered in a non-arbitrary manner, according to the rule of law . . . thereby fostering public confidence in the integrity of the court system and understanding of the administration of justice" (para. 22). The centrality of this principle to the court system underlies the strong presumption — albeit one that is rebuttable — in favour of court openness (para. 40; *Mentuck*, at para. 39).

[40] The test ensures that discretionary orders are subject to no lower standard than a legislative enactment limiting court openness would be (*Mentuck*, at para. 27; *Sierra Club*, at para. 45). To that end, this Court developed a scheme of analysis by analogy to the *Oakes* test, which courts use to understand whether a legislative limit on a right guaranteed under the *Charter* is reasonable and demonstrably justified in a free and democratic society (*Sierra Club*, at para. 40, citing *R. v. Oakes*, [1986] 1 S.C.R. 103; see also *Dagenais*, at p. 878; *Vancouver Sun*, at para. 30).

[41] The recognized scope of what interests might justify a discretionary exception to open courts has broadened over time. In *Dagenais*, Lamer C.J. spoke of a requisite risk to the "fairness of the trial" (p. 878). In *Mentuck*, Iacobucci J. extended this to a risk affecting the "proper administration of justice" (para. 32). Finally, in *Sierra Club*, Iacobucci J., again writing for a unanimous Court, restated the test to capture any serious risk to an "important interest, including a commercial interest, in the context of litigation" (para. 53). He simultaneously clarified that the important

interest must be expressed as a public interest. For example, on the facts of that case, a harm to a particular business interest would not have been sufficient, but the "general commercial interest of preserving confidential information" was an important interest because of its public character (para. 55). This is consistent with the fact that this test was developed in reference to the *Oakes* jurisprudence that focuses on the "pressing and substantial" objective of legislation of general application (*Oakes*, at pp. 138-39; see also *Mentuck*, at para. 31). The term "important interest" therefore captures a broad array of public objectives.

[42] While there is no closed list of important public interests for the purposes of this test, I share Iacobucci J.'s sense, explained in *Sierra Club*, that courts must be "cautious" and "alive to the fundamental importance of the open court rule" even at the earliest stage when they are identifying important public interests (para. 56). Determining what is an important public interest can be done in the abstract at the level of general principles that extend beyond the parties to the particular dispute (para. 55). By contrast, whether that interest is at "serious risk" is a fact-based finding that, for the judge considering the appropriateness of an order, is necessarily made in context. In this sense, the identification of, on the one hand, an important interest and, on the other, the seriousness of the risk to that interest are, theoretically at least, separate and qualitatively distinct operations. An order may therefore be refused simply because a valid important public interest is not at serious risk on the facts of a given case or, conversely, that the identified interests, regardless of whether they are at serious risk, do not have the requisite important public character as a matter of general principle.

[43] The test laid out in *Sierra Club* continues to be an appropriate guide for judicial discretion in cases like this one. The breadth of the category of "important interest" transcends the interests of the parties to the dispute and provides significant flexibility to address harm to fundamental values in our society that unqualified openness could cause (see, e.g., P. M. Perell and J. W. Morden, *The Law of Civil Procedure in Ontario* (4th ed. 2020), at para. 3.185; J. Bailey and J. Burkell, "Revisiting the Open Court Principle in an Era of Online Publication: Questioning Presumptive Public Access to Parties' and Witnesses' Personal Information" (2016), 48 *Ottawa L. Rev.* 143, at pp. 154-55). At the same time, however, the requirement that a serious risk to an important interest be demonstrated imposes a meaningful threshold necessary to maintain the presumption of openness. Were it merely a matter of weighing the benefits of the limit on court openness against its negative effects, decision-makers confronted with concrete impacts on the individuals appearing before them may struggle to put adequate weight on the less immediate negative effects on the open court principle. Such balancing could be evasive of effective appellate review. To my mind, the structure provided by *Dagenais*, *Mentuck*, and *Sierra Club* remains appropriate and should be affirmed.

[44] Finally, I recall that the open court principle is engaged by all judicial proceedings, whatever their nature (*MacIntyre* at pp. 185-86; *Vancouver Sun*, at para. 31). To the extent the Trustees suggested, in their arguments about the negative effects of the sealing orders, that probate in Ontario does not engage the open court principle or that the openness of these proceedings has no public value, I disagree. The

certificates the Trustees sought from the court are issued under the seal of that court, thereby bearing the imprimatur of the court's authority. The court's decision, even if rendered in a non-contentious setting, will have an impact on third parties, for example by establishing the testamentary paper that constitutes a valid will (see *Otis v. Otis* (2004), 7 E.T.R. (3d) 221 (Ont. S.C.), at paras. 23-24). Contrary to what the Trustees argue, the matters in a probate file are not quintessentially private or fundamentally administrative. Obtaining a certificate of appointment of estate trustee in Ontario is a court proceeding and the fundamental rationale for openness — discouraging mischief and ensuring confidence in the administration of justice through transparency — applies to probate proceedings and thus to the transfer of property under court authority and other matters affected by that court action.

[45] It is true that other non-probate estate planning mechanisms may allow for the transfer of wealth outside the ordinary avenues of testate or intestate succession — that is the case, for instance, for certain insurance and pension benefits, and for certain property held in co-ownership. But this does not change the necessarily open court character of probate proceedings. That non-probate transfers keep certain information related to the administration of an estate out of public view does not mean that the Trustees here, by seeking certificates from the court, somehow do not engage this principle. The Trustees seek the benefits that flow from the public judicial probate process: transparency ensures that the probate court's authority is administered fairly and efficiently (*Vancouver Sun*, at para. 25; *New Brunswick*, at para. 22). The strong

presumption in favour of openness plainly applies to probate proceedings and the Trustees must satisfy the test for discretionary limits on court openness.

B. *The Public Importance of Privacy*

[46] As mentioned, I disagree with the Trustees that an unbounded interest in privacy qualifies as an important public interest under the test for discretionary limits on court openness. Yet in some of its manifestations, privacy does have social importance beyond the person most immediately concerned. On that basis, it cannot be excluded as an interest that could justify, in the right circumstances, a limit to court openness. Indeed, the public importance of privacy has been recognized by this Court in various settings, and this sheds light on why the narrower aspect of privacy related to the protection of dignity is an important public interest.

[47] I respectfully disagree with the manner in which the Court of Appeal disposed of the claim by the Trustees that there is a serious risk to the interest in protecting personal privacy in this case. For the appellate judges, the privacy concerns raised by the Trustees amounted to "[p]ersonal concerns" which cannot, "without more", satisfy the requirement from *Sierra Club* that an important interest be framed as a public interest (para. 10). The Court of Appeal in our case relied, at para. 10, on *H. (M.E.) v. Williams*, 2012 ONCA 35, 108 O.R. (3d) 321, in which it was held that "[p]urely personal interests cannot justify non-publication or sealing orders" (para. 25). Citing as authority judgments of this Court in *MacIntyre* and *Sierra Club*, the court continued by observing that "personal concerns of a litigant, including concerns about

the very real emotional distress and embarrassment that can be occasioned to litigants when justice is done in public, will not, standing alone, satisfy the necessity branch of the test" (para. 25). Respectfully stated, the emphasis that the Court of Appeal placed on personal concerns as a means of deciding that the sealing orders failed to meet the necessity requirement in this case and in *Williams* is, I think, mistaken. Personal concerns that relate to aspects of the privacy of an individual who is before the courts can coincide with a public interest in confidentiality.

[48] Like the Court of Appeal, I do agree with the view expressed particularly in the pre-*Charter* case of *MacIntyre*, that where court openness results in an intrusion on privacy which disturbs the "sensibilities of the individuals involved" (p. 185), that concern is generally insufficient to justify a sealing or like order and does not amount to an important public interest under *Sierra Club*. But I disagree with the Court of Appeal in this case and in *Williams* that this is because the intrusion only occasions "personal concerns". Certain personal concerns — even "without more" — can coincide with important public interests within the meaning of *Sierra Club*. To invoke the expression of Binnie J. in *F.N. (Re)*, 2000 SCC 35, [2000] 1 S.C.R. 880, at para. 10, there is a "public interest in confidentiality" that is felt, first and foremost, by the person involved and is most certainly a personal concern. Even in *Williams*, the Court of Appeal was careful to note that where, without privacy protection, an individual would face "a substantial risk of serious debilitating emotional . . . harm", an exception to openness should be available (paras. 29-30). The means of discerning whether a privacy interest reflects a "public interest in confidentiality" is therefore not whether

the interest reflects or is rooted in "personal concerns" for the privacy of the individuals involved. Some personal concerns relating to privacy overlap with public interests in confidentiality. These interests in privacy can be, in my view, important public interests within the meaning of *Sierra Club*. It is true that an individual's privacy is pre-eminently important to that individual. But this Court has also long recognized that the protection of privacy is, in a variety of settings, in the interest of society as a whole.

[49] The proposition that privacy is important, not only to the affected individual but to our society, has deep roots in the jurisprudence of this Court outside the context of the test for discretionary limits on court openness. This background helps explain why privacy cannot be rejected as a mere personal concern. However, the key differences in these contexts are such that the public importance of privacy cannot be transposed to open courts without adaptation. Only specific aspects of privacy interests can qualify as important public interests under *Sierra Club*.

[50] In the context of s. 8 of the *Charter* and public sector privacy legislation, La Forest J. cited American privacy scholar Alan F. Westin for the proposition that privacy is a fundamental value of the modern state, first in *R. v. Dyment*, [1988] 2 S.C.R. 417, at pp. 427-28 (concurring), and then in *Dagg*, at para. 65 (dissenting but not on this point). In the latter case, La Forest J. wrote: "The protection of privacy is a fundamental value in modern, democratic states. An expression of an individual's unique personality or personhood, privacy is grounded on physical and moral autonomy — the freedom to engage in one's own thoughts, actions and decisions"

(para. 65 (citations omitted)). That statement was endorsed unanimously by this Court in *Lavigne*, at para. 25.

[51] Further, in *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401*, 2013 SCC 62, [2013] 3 S.C.R. 733 ("*UFCW*"), decided in the context of a statute regulating the use of information by organizations, the objective of providing an individual with some control over their information was recognized as "intimately connected to individual autonomy, dignity and privacy, self-evidently significant social values" (para. 24). The importance of privacy, its "quasi-constitutional status" and its role in protecting moral autonomy continues to find expression in our recent jurisprudence (see, e.g., *Lavigne*, at para. 24; *Bragg*, at para. 18, per Abella J., citing *Toronto Star Newspaper Ltd. v. R.*, 2012 ONCJ 27, 289 C.C.C. (3d) 549, at paras. 40-41 and 44; *Douez v. Facebook, Inc.*, 2017 SCC 33, [2017] 1 S.C.R. 751, at para. 59). In *Douez*, Karakatsanis, Wagner (as he then was) and Gascon JJ. underscored this same point, adding that "the growth of the Internet, virtually timeless with pervasive reach, has exacerbated the potential harm that may flow from incursions to a person's privacy interests" (para. 59).

[52] Privacy as a public interest is underlined by specific aspects of privacy protection present in legislation at the federal and provincial levels (see, e.g., *Privacy Act*, R.S.C. 1985, c. P-21; *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5 ("PIPEDA"); *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31; *Charter of Human Rights and Freedoms*, CQLR, c. C-12,

s. 5; *Civil Code of Québec*, arts. 35 to 41).[3] Further, in assessing the constitutionality of a legislative exception to the open court principle, this Court has recognized that the protection of individual privacy can be a pressing and substantial objective (*Edmonton Journal*, at p. 1345, per Cory J.; see also the concurring reasons of Wilson J., at p. 1354, in which "the public interest in protecting the privacy of litigants generally in matrimonial cases against the public interest in an open court process" was explicitly noted). There is also continued support for the social and public importance of individual privacy in the academic literature (see, e.g., A. J. Cockfield, "Protecting the Social Value of Privacy in the Context of State Investigations Using New Technologies" (2007), 40 *U.B.C. L. Rev.* 41, at p. 41; K. Hughes, "A Behavioural Understanding of Privacy and its Implications for Privacy Law" (2012), 75 *Mod. L. Rev.* 806, at p. 823; P. Gewirtz, "Privacy and Speech" (2001), *Sup. Ct. Rev.* 139, at p. 139). It is therefore inappropriate, in my respectful view, to dismiss the public interest in protecting privacy as merely a personal concern. This does not mean, however, that privacy generally is an important public interest in the context of limits on court openness.

[53] The fact that the case before the application judge concerned individuals who were advancing their own privacy interests, which were undeniably important to them as individuals, does not mean that there is no public interest at stake. In *F.N. (Re)*, this was the personal interest that young offenders had in remaining anonymous in court

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[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.

proceedings as a means of encouraging their personal rehabilitation (para. 11). All of society had a stake, according to Binnie J., in the young person's personal prospect for rehabilitation. This same idea from *F.N. (Re)* was cited in support of finding the interest in *Sierra Club* to be a public interest. That interest, rooted first in an agreement of personal concern to the contracting parties involved, was a private matter that evinced, alongside its personal interest to the parties, a "public interest in confidentiality" (*Sierra Club*, at para. 55). Similarly, while the Trustees have a personal interest in preserving their privacy, this does not mean that the public has no stake in this same interest because — as this Court has made clear — it is related to moral autonomy and dignity which are pressing and substantial concerns.

[54] In this appeal, the Toronto Star suggests that legitimate privacy concerns would be effectively protected by a discretionary order where there is "something more" to elevate them beyond personal concerns and sensibilities (R.F., at para. 73). The Income Security Advocacy Centre, by way of example, submits that privacy serves the public interests of preventing harm and of ensuring individuals are not dissuaded from accessing the courts. I agree that these concepts are related, but in my view care must be taken not to conflate the public importance of privacy with that of other interests; aspects of privacy, such as dignity, may constitute important public interests in and of themselves. A risk to personal privacy may be tied to a risk to psychological harm, as it was in *Bragg* (para. 14; see also J. Rossiter, *Law of Publication Bans, Private Hearings, and Sealing Orders* (loose-leaf), s. 2.4.1). But concerns for privacy may not always coincide with a desire to avoid psychological harm, and may focus

instead, for example, on protecting one's professional standing (see, e.g., *R. v. Paterson* (1998), 102 B.C.A.C. 200, at paras. 76, 78 and 87-88). Similarly, there may be circumstances where the prospect of surrendering the personal information necessary to pursue a legal claim may deter an individual from bringing that claim (see *S. v. Lamontagne*, 2020 QCCA 663, at paras. 34-35 (CanLII)). In the same way, the prospect of surrendering sensitive commercial information would have impaired the conduct of the party's defence in *Sierra Club* (at para. 71), or could pressure an individual into settling a dispute prematurely (K. Eltis, *Courts, Litigants and the Digital Age* (2nd ed. 2016), at p. 86). But this does not necessarily mean that a public interest in privacy is wholly subsumed by such concerns. I note, for example, that access to justice concerns do not apply where the privacy interest to be protected is that of a third party to the litigation, such as a witness, whose access to the courts is not at stake and who has no choice available to terminate the litigation and avoid any privacy impacts (see, e.g., *Himel v. Greenberg*, 2010 ONSC 2325, 93 R.F.L. (6th) 357, at para. 58; see also Rossiter, s. 2.4.2(2)). In any event, the recognition of these related and valid important public interests does not answer the question as to whether aspects of privacy in and of themselves are important public interests and does not diminish the distinctive public character of privacy, considered above.

[55] Indeed, the specific harms to privacy occasioned by open courts have not gone unnoticed nor been discounted as merely personal concerns. Courts have exercised their discretion to limit court openness in order to protect personal information from publicity, including to prevent the disclosure of sexual orientation

(see, e.g., *Paterson*, at paras. 76, 78 and 87-88), HIV status (see, e.g., *A.B. v. Canada (Citizenship and Immigration)*, 2017 FC 629, at para. 9 (CanLII)), and a history of substance abuse and criminality (see, e.g., *R. v. Pickton*, 2010 BCSC 1198, at paras. 11 and 20 (CanLII)). This need to reconcile the public interest in privacy with the open court principle has been highlighted by this Court (see, e.g., *Edmonton Journal*, at p. 1353, per Wilson J.). Writing extra-judicially, McLachlin C.J. explained that "[i]f we are serious about peoples' private lives, we must preserve a modicum of privacy. Equally, if we are serious about our justice system, we must have open courts. The question is how to reconcile these dual imperatives in a fair and principled way" ("Courts, Transparency and Public Confidence – To the Better Administration of Justice" (2003), 8 *Deakin L. Rev.* 1, at p. 4). In seeking that reconciliation, the question becomes whether the relevant dimension of privacy amounts to an important public interest that, when seriously at risk, would justify rebutting the strong presumption favouring open courts.

C. *The Important Public Interest in Privacy Bears on the Protection of Individual Dignity*

[56] While the public importance of privacy has clearly been recognized by this Court in various settings, caution is required in deploying this concept in the test for discretionary limits on court openness. It is a matter of settled law that open court proceedings by their nature can be a source of discomfort and embarrassment and these intrusions on privacy are generally seen as of insufficient importance to overcome the presumption of openness. The Toronto Star has raised the concern that recognizing

privacy as an important public interest will lower the burden for applicants because the privacy of litigants will, in some respects, always be at risk in court proceedings. I agree that the requirement to show a serious risk to an important interest is a key threshold component of the analysis that must be preserved in order to protect the open court principle. The recognition of a public interest in privacy could threaten the strong presumption of openness if privacy is cast too broadly without a view to its public character.

[57] Privacy poses challenges in the test for discretionary limits on court openness because of the necessary dissemination of information that openness implies. It bears recalling that when Dickson J., as he then was, wrote in *MacIntyre* that "covertness is the exception and openness the rule", he was explicitly treating a privacy argument, returning to and dismissing the view, urged many times before, "that the 'privacy' of litigants requires that the public be excluded from court proceedings" (p. 185 (emphasis added)). Dickson J. rejected the view that personal privacy concerns require closed courtroom doors, explaining that "[a]s a general rule the sensibilities of the individuals involved are no basis for exclusion of the public from judicial proceedings" (*ibid.*).

[58] Though writing before *Dagenais*, and therefore not commenting on the specific steps of the analysis as we now understand them, to my mind, Dickson J. was right to recognize that the open court principle brings necessary limits to the right to privacy. While individuals may have an expectation that information about them will

not be revealed in judicial proceedings, the open court principle stands presumptively in opposition to that expectation. For example, in *Lac d'Amiante du Québec Ltée v. 2858-0702 Québec Inc.*, 2001 SCC 51, [2001] 2 S.C.R. 743, LeBel J. held that "a party who institutes a legal proceeding waives his or her right to privacy, at least in part" (para. 42). *MacIntyre* and cases like it recognize — in stating that openness is the rule and covertness the exception — that the right to privacy, however defined, in some measure gives way to the open court ideal. I share the view that the open court principle presumes that this limit on the right to privacy is justified.

[59] The Toronto Star is therefore right to say that the privacy of individuals will very often be at some risk in court proceedings. Disputes between and concerning individuals that play out in open court necessarily reveal information that may have otherwise remained out of public view. Indeed, much like the Court of Appeal in this case, courts have explicitly adverted to this concern when concluding that mere inconvenience is insufficient to cross the initial threshold of the test (see, e.g., *3834310 Canada inc. v. Chamberland*, 2004 CanLII 4122 (Que. C.A.), at para. 30). Saying that any impact on individual privacy is sufficient to establish a serious risk to an important public interest for the purposes of the test for discretionary limits on court openness could render this initial requirement moot. Many cases would turn on the balancing at the proportionality stage. Such a development would amount to a departure from *Sierra Club*, which is the appropriate framework and one which must be preserved.

[60] Further, recognizing an important interest in privacy generally could prove to be too open-ended and difficult to apply. Privacy is a complex and contextual concept (*Dagg*, at para. 67; see also B. McIsaac, K. Klein and S. Brown, *The Law of Privacy in Canada* (loose-leaf), vol. 1, at pp. 1-4; D. J. Solove, "Conceptualizing Privacy" (2002), 90 *Cal. L. Rev.* 1087, at p. 1090). Indeed, this Court has described the nature of limits of privacy as being in a state of "theoretical disarray" (*R. v. Spencer*, 2014 SCC 43, [2014] 2 S.C.R. 212, at para. 35). Much turns on the context in which privacy is invoked. I agree with the Toronto Star that a bald recognition of privacy as an important interest in the context of the test for discretionary limits on court openness, as the Trustees advance here, would invite considerable confusion. It would be difficult for courts to measure a serious risk to such an interest because of its multi-faceted nature.

[61] While I acknowledge these concerns have merit, I disagree that they require that privacy never be considered in determining whether there is a serious risk to an important public interest. I reach this conclusion for two reasons. First, the problem of privacy's complexity can be attenuated by focusing on the purpose underlying the public protection of privacy as it is relevant to the judicial process, in order to fix precisely on that aspect which transcends the interests of the parties in this context. That narrower dimension of privacy is the protection of dignity, an important public interest that can be threatened by open courts. Indeed, rather than attempting to apply a single unwieldy concept of privacy in all contexts, this Court has generally fixed on more specific privacy interests tailored to the particular situation (*Spencer*, at para. 35;

Edmonton Journal, at p. 1362, per Wilson J.). That is what must be done here, with a view to identifying the public aspect of privacy that openness might inappropriately undermine.

[62] Second, I recall that in order to pass the first stage of the analysis one must not simply invoke an important interest, but must also overcome the presumption of openness by showing a serious risk to this interest. The burden of showing a risk to such an interest on the facts of a given case constitutes the true initial threshold on the person seeking to restrict openness. It is never sufficient to plead a recognized important public interest on its own. The demonstration of a serious risk to this interest is still required. What is important is that the interest be accurately defined to capture only those aspects of privacy that engage legitimate public objectives such that showing a serious risk to that interest remains a high bar. In this way, courts can effectively maintain the guarantee of presumptive openness.

[63] Specifically, in order to preserve the integrity of the open court principle, an important public interest concerned with the protection of dignity should be understood to be seriously at risk only in limited cases. Nothing here displaces the principle that covertness in court proceedings must be exceptional. Neither the sensibilities of individuals nor the fact that openness is disadvantageous, embarrassing or distressing to certain individuals will generally on their own warrant interference with court openness (*MacIntyre*, at p. 185; *New Brunswick*, at para. 40; *Williams*, at para. 30; *Coltsfoot Publishing Ltd. v. Foster-Jacques*, 2012 NSCA 83, 320 N.S.R. (2d)

166, at para. 97). These principles do not preclude recognizing the public character of a privacy interest as important when it is related to the protection of dignity. They merely require that a serious risk be shown to exist in respect of this interest in order to justify, exceptionally, a limit on openness, as is the case with any important public interest under *Sierra Club*. As Professors Sylvette Guillemard and Séverine Menétrey explain, [TRANSLATION] "[t]he confidentiality of the proceedings may be justified, in particular, in order to protect the parties' privacy . . . . However, the jurisprudence indicates that embarrassment or shame is not a sufficient reason to order that proceedings be held *in camera* or to impose a publication ban" (*Comprendre la procédure civile québécoise* (2nd ed. 2017), at p. 57).

[64] How should the privacy interest at issue be understood as raising an important public interest relevant to the test for discretionary limits on court openness in this context? It is helpful to recall that the orders below were sought to limit access to documents and information in the court files. The Trustees' argument on this point focused squarely on the risk of immediate and widespread dissemination of the personally identifying and other sensitive information contained in the sealed materials by the Toronto Star. The Trustees submit that this dissemination would constitute an unwarranted intrusion into the privacy of the affected individuals beyond the upset they have already suffered as a result of the publicity associated with the death of the Shermans.

[65] In my view, there is value in leaving individuals free to restrict when, how and to what extent highly sensitive information about them is communicated to others in the public sphere, because choosing how we present ourselves in public preserves our moral autonomy and dignity as individuals. This Court has had occasion to underscore the connection between the privacy interest engaged by open courts and the protection of dignity specifically. For example, in *Edmonton Journal*, Wilson J. noted that the impugned provision which would limit publication about matrimonial proceedings addressed "a somewhat different aspect of privacy, one more closely related to the protection of one's dignity . . . namely the personal anguish and loss of dignity that may result from having embarrassing details of one's private life printed in the newspapers" (pp. 1363-64). In *Bragg*, as a further example, the protection of a young person's ability to control sensitive information was said to foster respect for "dignity, personal integrity and autonomy" (para. 18, citing *Toronto Star Newspaper Ltd.*, at para. 44).

[66] Consistent with this jurisprudence, I note by way of example that the Quebec legislature expressly highlighted the preservation of dignity when the *Sierra Club* test was codified in the *Code of Civil Procedure*, CQLR, c. C-25.01 ("*C.C.P.*"), art. 12 (see also Ministère de la Justice, *Commentaires de la ministre de la Justice: Code de procédure civile, chapitre C-25.01* (2015), art. 12). Under art. 12 *C.C.P.*, a discretionary exception to the open court principle can be made by the court if "public order, in particular the preservation of the dignity of the persons involved or the protection of substantial and legitimate interests", requires it.

[67] The concept of public order evidences flexibility analogous to the concept of an important public interest under *Sierra Club* yet it recalls that the interest invoked transcends, in importance and consequence, the purely subjective sensibilities of the persons affected. Like the "important public interest" that must be at serious risk to justify the sealing orders in the present appeal, public order encompasses a wide array of general principles and imperative norms identified by a legislature and the courts as fundamental to a given society (see *Goulet v. Transamerica Life Insurance Co. of Canada*, 2002 SCC 21, [2002] 1 S.C.R. 719, at paras. 42-44, citing *Godbout v. Longueuil (Ville de)*, [1995] R.J.Q. 2561 (C.A.), at p. 2570, aff'd [1997] 3 S.C.R. 844). As one Quebec judge wrote, referring to *Sierra Club* prior to the enactment of art. 12 *C.C.P.*, the interest must be understood as defined [TRANSLATION] "in terms of a public interest in confidentiality" (see *3834310 Canada inc.*, at para. 24, per Gendreau J.A. for the Court of appeal). From among the various considerations that make up the concept of public order and other legitimate interests to which art. 12 *C.C.P.* alludes, it is significant that dignity, and not an untailored reference to either privacy, harm or access to justice, was given pride of place. Indeed, it is that narrow aspect of privacy considered to be a fundamental right that courts had fixed upon before the enactment of art. 12 *C.C.P.* — [TRANSLATION] "what is part of one's personal life, in short, what constitutes a minimum personal sphere" (*Godbout*, at p. 2569, per Baudouin J.A.; see also *A. v. B.*, 1990 CanLII 3132 (Que. C.A.), at para. 20, per Rothman J.A.).

[68] The "preservation of the dignity of the persons involved" is now consecrated as the archetypal public order interest in art. 12 *C.C.P.* It is the exemplar

of the *Sierra Club* important public interest in confidentiality that stands as justification for an exception to openness (S. Rochette and J.-F. Côté, "Article 12", in L. Chamberland, ed., *Le grand collectif: Code de procédure civile — Commentaires et annotations* (5th ed. 2020), vol. 1, at p. 102; D. Ferland and B. Emery, *Précis de procédure civile du Québec* (6th ed. 2020), vol. 1, at para. 1-111). Dignity gives concrete expression to this public order interest because all of society has a stake in its preservation, notwithstanding its personal connections to the individuals concerned. This codification of *Sierra Club*'s notion of important public interest highlights the superordinate importance of human dignity and the appropriateness of limiting court openness on this basis as against an overbroad understanding of privacy that might be otherwise unsuitable to the open court context.

[69] Consistent with this idea, understanding privacy as predicated on dignity has been advanced as useful in connection with challenges brought by digital communications (K. Eltis, "The Judicial System in the Digital Age: Revisiting the Relationship between Privacy and Accessibility in the Cyber Context" (2011), 56 *McGill L.J.* 289, at p. 314).

[70] It is also significant, in my view, that the application judge in this case explicitly recognized, in response to the relevant arguments from the Trustees, an interest in "protecting the privacy and dignity of victims of crime and their loved ones" (para. 23 (emphasis added)). This elucidates that the central concern for the affected individuals on this point is not merely protecting their privacy for its own sake but

privacy where it coincides with the public character of the dignity interests of these individuals.

[71] Violations of privacy that cause a loss of control over fundamental personal information about oneself are damaging to dignity because they erode one's ability to present aspects of oneself to others in a selective manner (D. Matheson, "Dignity and Selective Self-Presentation", in I. Kerr, V. Steeves and C. Lucock, eds., *Lessons from the Identity Trail: Anonymity, Privacy and Identity in a Networked Society* (2009), 319, at pp. 327-28; L. M. Austin, "Re-reading Westin" (2019), 20 *Theor. Inq. L.* 53, at pp. 66-68; Eltis (2016), at p. 13). Dignity, used in this context, is a social concept that involves presenting core aspects of oneself to others in a considered and controlled manner (see generally Matheson, at pp. 327-28; Austin, at pp. 66-68). Dignity is eroded where individuals lose control over this core identity-giving information about themselves, because a highly sensitive aspect of who they are that they did not consciously decide to share is now available to others and may shape how they are seen in public. This was even alluded to by La Forest J., dissenting but not on this point, in *Dagg*, where he referred to privacy as "[a]n expression of an individual's unique personality or personhood" (para. 65).

[72] Where dignity is impaired, the impact on the individual is not theoretical but could engender real human consequences, including psychological distress (see generally *Bragg*, at para. 23). La Forest J., concurring, observed in *Dyment* that privacy is essential to the well-being of individuals (p. 427). Viewed in this way, a privacy

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

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

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

broader factual setting, will be at serious risk only where the sensitivity of the information strikes at the subject's more intimate self.

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

[76] The test for discretionary limits on court openness imposes on the applicant the burden to show that the important public interest is at serious risk. Recognizing that privacy, understood in reference to dignity, is only at serious risk where the information in the court file is sufficiently sensitive erects a threshold consistent with the presumption of openness. This threshold is fact specific. It addresses the concern, noted above, that personal information can frequently be found in court files and yet finding this sufficient to pass the serious risk threshold in every case would undermine the structure of the test. By requiring the applicant to demonstrate the sensitivity of the information as a necessary condition to the finding of a serious risk to this interest, the scope of the interest is limited to only those cases where the rationale for not revealing core aspects of a person's private life, namely protecting individual dignity, is most actively engaged.

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

constitute sensitive information. The question in every case is whether the information reveals something intimate and personal about the individual, their lifestyle or their experiences.

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

[79] In cases where the information is sufficiently sensitive to strike at an individual's biographical core, a court must then ask whether a serious risk to the interest is made out in the full factual context of the case. While this is obviously a

fact-specific determination, some general observations may be made here to guide this assessment.

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

[81] It will be appropriate, of course, to consider the extent to which information is already in the public domain. If court openness will simply make available what is already broadly and easily accessible, it will be difficult to show that revealing the information in open court will actually result in a meaningful loss of that aspect of privacy relating to the dignity interest to which I refer here. However, just because

information is already accessible to some segment of the public does not mean that making it available through the court process will not exacerbate the risk to privacy. Privacy is not a binary concept, that is, information is not simply either private or public, especially because, by reason of technology in particular, absolute confidentiality is best thought of as elusive (see generally *R. v. Quesnelle*, 2014 SCC 46, [2014] 2 S.C.R. 390, at para. 37; *UFCW*, at para. 27). The fact that certain information is already available somewhere in the public sphere does not preclude further harm to the privacy interest by additional dissemination, particularly if the feared dissemination of highly sensitive information is broader or more easily accessible (see generally Solove, at p. 1152; Ardia, at p. 1393-94; E. Paton-Simpson, "Privacy and the Reasonable Paranoid: The Protection of Privacy in Public Places" (2000), 50 *U.T.L.J.* 305, at p. 346).

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

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

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

[85] To summarize, the important public interest in privacy, as understood in the context of the limits on court openness, is aimed at allowing individuals to preserve control over their core identity in the public sphere to the extent necessary to preserve their dignity. The public has a stake in openness, to be sure, but it also has an interest in the preservation of dignity: the administration of justice requires that where dignity

is threatened in this way, measures be taken to accommodate this privacy concern. Although measured by reference to the facts of each case, the risk to this interest will be serious only where the information that would be disseminated as a result of court openness is sufficiently sensitive such that openness can be shown to meaningfully strike at the individual's biographical core in a manner that threatens their integrity. Recognizing this interest is consistent with this Court's emphasis on the importance of privacy and the underlying value of individual dignity, but is also tailored to preserve the strong presumption of openness.

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

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

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

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

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

knowledge that the application judge did not have the benefit of the above framework, the failure to assess the sensitivity of the information constituted a failure to consider a required element of the legal test. This warranted intervention on appeal.

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

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

[91] With regard to the sensitivity of the information, however, the information contained in these files does not reveal anything particularly private about the affected individuals. What would be revealed might well cause inconvenience and perhaps embarrassment, but it has not been shown that it would strike at their biographical core in a way that would undermine their control over the expression of their identities. Their privacy would be troubled, to be sure, but the relevant privacy interest bearing

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

[92] The fact that some of the affected individuals may be minors is also insufficient to cross the seriousness threshold. While the law recognizes that minors are especially vulnerable to intrusions of privacy (see *Bragg*, at para. 17), the mere fact that information concerns minors does not displace the generally applicable analysis (see, e.g., *Bragg*, at para. 11). Even taking into account the increased vulnerability of minors who may be affected individuals in the probate files, there is no evidence that

they would lose control of information about themselves that reveals something close to the core of their identities. Merely associating the beneficiaries or trustees with the Shermans' unexplained deaths is not enough to constitute a serious risk to the identified important public interest in privacy, defined in reference to dignity.

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

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

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

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

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

[97] At the outset, I note that direct evidence is not necessarily required to establish a serious risk to an important interest. This Court has held that it is possible to identify objectively discernable harm on the basis of logical inferences (*Bragg*, at paras. 15-16). But this process of inferential reasoning is not a licence to engage in impermissible speculation. An inference must still be grounded in objective circumstantial facts that reasonably allow the finding to be made inferentially. Where

the inference cannot reasonably be drawn from the circumstances, it amounts to speculation (*R. v. Chanmany*, 2016 ONCA 576, 352 O.A.C. 121, at para. 45).

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

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

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

[101] The speculative character of the chain of reasoning leading to the conclusion that a serious risk of physical harm exists in this case is underlined by differences between these facts and those cases relied on by the Trustees. In *X. v. Y.*, 2011 BCSC 943, 21 B.C.L.R. (5th) 410, the risk of physical harm was inferred on the basis that the plaintiff was a police officer who had investigated "cases involving gang violence and dangerous firearms" and wrote sentencing reports for such offenders which identified him by full name (para. 6). In *R. v. Esseghaier*, 2017 ONCA 970, 356 C.C.C. (3d) 455, Watt J.A. considered it "self-evident" that the disclosure of identifiers of an undercover operative working in counter-terrorism would compromise the safety of the operative (para. 41). In both cases, the danger flowed from facts establishing that the applicants were in antagonistic relationships with alleged criminal or terrorist organizations. But in this case, the Trustees asked the application judge to infer not only the fact that harm would befall the affected individuals, but also that a person or persons exist who wish to harm them. To infer all this on the basis of the Shermans' deaths and the association of the affected individuals with the deceased is not reasonably possible on this record. It is not a reasonable inference but, as the Court of Appeal noted, a conclusion resting on speculation.

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

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

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

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

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

[106] Further, the Trustees would have had to show that the benefits of any order necessary to protect from a serious risk to the important public interest outweighed the

harmful effects of the order, including the negative impact on the open court principle (*Sierra Club*, at para. 53). In balancing the privacy interests against the open court principle, it is important to consider whether the information the order seeks to protect is peripheral or central to the judicial process (paras. 78 and 86; *Bragg*, at paras. 28-29). There will doubtless be cases where the information that poses a serious risk to privacy, bearing as it does on individual dignity, will be central to the case. But the interest in important and legally relevant information being aired in open court may well overcome any concern for the privacy interests in that same information. This contextual balancing, informed by the importance of the open court principle, presents a final barrier to those seeking a discretionary limit on court openness for the purposes of privacy protection.

VI. Conclusion

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

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

Appeal dismissed.

Solicitors for the appellants: Davies Ward Phillips & Vineberg, Toronto.

Solicitors for the respondents: Blake, Cassels & Graydon, Toronto.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitor for the intervener the Attorney General of British Columbia: Attorney General of British Columbia, Vancouver.

Solicitors for the intervener the Canadian Civil Liberties Association: DMG Advocates, Toronto.

Solicitors for the intervener the Income Security Advocacy Centre: Borden Ladner Gervais, Toronto.

Solicitors for the interveners Ad IDEM/Canadian Media Lawyers Association, Postmedia Network Inc., CTV, a Division of Bell Media Inc., Global News,

a division of Corus Television Limited Partnership, The Globe and Mail Inc. and Citytv, a division of Rogers Media Inc.: Farris, Vancouver.

Solicitors for the intervener the British Columbia Civil Liberties Association: McCarthy Tétrault, Toronto.

Solicitors for the interveners the HIV & AIDS Legal Clinic Ontario, the HIV Legal Network and the Mental Health Legal Committee: HIV & AIDS Legal Clinic Ontario, Toronto.

2

SUPREME COURT OF YUKON

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

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

BETWEEN:

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

PETITIONER

AND

YUKON ZINC CORPORATION

RESPONDENT

Before Chief Justice S.M. Duncan

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

REASONS FOR DECISION

Introduction

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

assets of Yukon Zinc Corporation ("Yukon Zinc") to Almaden Minerals Ltd. ("Almaden") and for the termination of the sale and investment solicitation plan (the "SISP"), and the second for an Order sealing the Receiver's Confidential Supplemental Eighth Report to the Court, with appendices, currently unfiled.

[2] The Government of Yukon supports these applications. The applications are unopposed or subject to no position taken by Welichem Research General Partnership ("Welichem") a secured creditor of Yukon Zinc and lessor of items comprising substantially all of the infrastructure, tools, vehicles and equipment at the Wolverine Mine (the "Mine"). No other interested party appeared on the application or made submissions.

[3] For the following reasons, I will grant the Orders requested, subject to certain conditions as set out below.

Background

[4] These applications arise in the context of the ongoing receivership of all the assets, undertakings and property of Yukon Zinc. Its principal asset is the Mine, a zinc-silver-lead mine located 282 km northeast of Whitehorse, Yukon. It holds 2,945 quartz mineral claims, a quartz mining license issued under the *Quartz Mining Act*, SY 2003, c.14, and a water licence issued under the *Waters Act*, SY 2003, c.19. Yukon Zinc carried out exploration and development activities between 2008 and 2011. The Mine began production in March 2012. In January 2015, the Mine ceased operating because of financial difficulties and was put into care and maintenance. Despite a successful restructuring in October 2015, Yukon Zinc was unable to obtain additional funds to operate the Mine and it continued in care and maintenance. In 2017, the underground

portion of the Mine flooded and contaminated water was diverted to the tailings storage facility, creating an increased risk of the release of untreated water into the environment. In May 2018, the Yukon government requested from Yukon Zinc an increase in reclamation security from $10,588,966 to $35,548,650 to enable it to address the deteriorating condition of the Mine. Yukon Zinc never provided this increased amount. In September 2019, the Yukon government's petition for the appointment of the Receiver of Yukon Zinc's property and assets was granted by this Court. By October 2019, Yukon Zinc had not filed a proposal in the bankruptcy matter, commenced in British Columbia, and Yukon Zinc was deemed to have made an assignment into bankruptcy. PricewaterhouseCoopers Inc. was appointed the trustee in bankruptcy.

[5] Pursuant to s. 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 as amended (the "*BIA*"), the Receiver became responsible for the care and maintenance of the Mine. It developed the SISP that proposed the evaluation of bids for the assets and property of Yukon Zinc on various factors. The SISP was approved by the Court on May 26, 2020 but was stayed pending the outcome of an appeal by Welichem. The Court's approval was confirmed on appeal.

[6] The sale process began in April 2021. The Receiver contacted 559 potential bidders, advertised the SISP on-line and through media in British Columbia and Yukon and encouraged other stakeholders such as Yukon government and the Kaska Nation to provide additional contacts. Eighteen potential bidders signed non-disclosure agreements and were given access to the data room. By June 2021 several entities submitted non-binding expressions of interest. Throughout the summer of 2021, the

Receiver held multiple calls with each of these potential bidders to discuss their plans and ensure the Receiver understood them, to explain and clarify the SISP evaluation criteria, and to support the bidders' due diligence work, including providing explanations of the regulatory requirements. The Receiver also discussed the progress of the SISP regularly with Yukon government and the Kaska Nation. The binding bid deadline was extended and by July the Receiver had received several binding bids. The Receiver began to evaluate these bids. By September 2021, however, some bidders withdrew from the process for various reasons. These withdrawals were confirmed in writing by the Receiver (the "Removal Letters").

[7] On completion of the evaluation of the remaining bids, the Receiver concluded that no bid could result in a viable sale of substantially all of Yukon Zinc's assets. The Receiver advised the relevant stakeholders by letter, after consultation with Yukon government, that the sale process would be terminated (the "Termination Letters"). The Receiver also determined at that time that the preferred approach was to transfer the care and maintenance to the Yukon government.

[8] In June 2021, the Receiver received a non-binding expression of interest and subsequently a binding bid from Almaden for a small portion of the assets of Yukon Zinc, the Logan interests. Almaden had entered into a joint venture agreement with Yukon Zinc (then called Expatriate Resources Ltd.) in 2005. This agreement led to the forming of a contractual joint venture to explore and develop the Logan interests. No such activity was ever commenced. The Logan interests consist of 156 mineral claims located approximately 100 km south of the Mine. Under the joint venture, Yukon Zinc

had an interest of 60% and Almaden 40%. Almaden offered to purchase the Yukon Zinc 60% interest.

[9] The Receiver believes the Almaden bid could be a viable sale of the Logan interests and has entered into a purchase and sale agreement with Almaden for this purpose, subject to court approval.

[10] The Receiver has submitted copies of the non-binding expressions of interest, binding bids, Removal letters, Termination letters, the Almaden bid, and the Almaden purchase agreement as attachments to the Receiver's Confidential Supplemental Eighth Report. All of these documents along with the report are considered to contain sensitive commercial information and the Receiver seeks a sealing order over them.

Approval of Sale to Almaden

[11] Subsections 3(k) and (l) of the Receiver's powers set out in the Order dated September 13, 2019 provide the Receiver with express power and authority to market any or all of the Yukon Zinc assets, undertakings or property, including advertising and soliciting offers for all or part of the property, negotiating appropriate terms and conditions, as well as authority to sell, convey, transfer, lease or assign the property with approval of this Court if the transaction exceeds $150,000.

[12] The SISP sets out at s. 22 the evaluation criteria for qualified purchase bids. They are:

(a) Price;

(b) Structural complexity of the proposed transaction;

(c) Nature and sufficiency of funding for the proposed transaction;

(d) Probability of closing the proposed transaction and any relevant risks thereto, including nature of any remaining conditions and due diligence requirements;

(e) Whether the proposed transaction leaves any of the YZC [Yukon Zinc Corporation] Assets within the receivership;

(f) Impact on former employees of YZC;

(g) Bidder's financial strength, technical and environmental expertise and relevant experience to carry out work required to maintain regulatory compliance at the Wolverine Mine after closing of the proposed transaction;

(h) Bidder's historical environmental safety record, operational experience with undertakings of similar nature and/or scale and record of successful restart of mines out of care and maintenance;

(i) Strength of a bidder's proposal for posted required Reclamation Security as required by the DEMR [Department of Energy, Mines and Resources] and any other security required by any other applicable regulator;

(j) Qualified Bidder's willingness and demonstrated ability to obtain and maintain any necessary regulatory approval in connection with ownership and operation or case and maintenance of the Wolverine Mine, including from but not limited to the Water Board and the DEMR;

(k) Benefits that may accrue to Yukon residents and businesses and the affected Kaska Nations of Ross River Dena Council, Liard First Nation, Kwadacha Nation and Dease River First Nation.

[13] The SISP also requires the Receiver to report to the Court on the outcome of the solicitation process, including whether it intends to proceed with any one or more of the qualified purchase bids. The applicable statutory obligations on the Receiver are set

out in s. 247(a) and (b) of the *BIA*: to act honestly and in good faith, and to deal with the property of the debtor in a commercially reasonable manner.

[14] The principles to be applied by a court in determining whether to approve a proposed sale by a receiver are set out in the leading case of *Royal Bank v Soundair Corp* (1991), 4 OR (3d) 1 (CA) at para. 16:

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

[15] Here, the Receiver made extensive efforts through direct and indirect contacts of potential bidders and advertising to obtain the best price for the assets. There is no evidence of any improvident actions by the Receiver. The Receiver spent time with each interested potential bidder to assist with their due diligence activities and other aspects of the bidding process.

[16] As the Receiver reported, a review of the submitted bids shows that Almaden was the only bidder specifically for the Logan interests. While other bidders referred to the Logan interests, and included them in their bids, their overall bids were withdrawn or unacceptable to the Receiver. Almaden provided the best price for the Logan interests. Almaden is an experienced mining exploration company based in Vancouver.

[17] The Receiver noted that although the Logan interests represent a small fraction of the Yukon Zinc assets and property, their sale will generate some funds for the estate

which is in the interests of all parties. Yukon government supports this sale and Welichem does not oppose it.

[18] The Almaden offer was obtained through the SISP process. This process was approved by the Court as fair, transparent and commercially efficacious.

[19] Finally, the evidence shows the SISP process was conducted by the Receiver honestly and in good faith. There is no suggestion or evidence of unfairness in the way the process was carried out.

[20] The finalizing of this sale process will be simple: the 60% interest in the Logan assets under the joint venture agreement will be transferred to Almaden. The other 40% are already in the name of Almaden. The commercial joint venture agreement will become defunct on closing. The Receiver advised the splitting off of these interests from the remainder of the assets and property would not be detrimental to any future sale process as they represent a small portion and there was no other bidder interested in solely the Logan interests. The cost to the Receiver of this transaction is reasonable given Almaden's existing agreement and interests.

[21] The Almaden Purchase Agreement, a redacted copy of which is included in the filed materials, is approved.

Termination of the SISP

[22] As noted above, the Receiver concluded that the SISP process did not lead to a viable sale. None of the bids was acceptable, either because the bidder withdrew from the process, or the bids contained conditions for closing or available consideration that were unacceptably uncertain. The specifics of each bid were not disclosed in the

publicly filed eighth report of the Receiver, for reasons of confidentiality. This issue is addressed below.

[23] In general, the reasons why certain bidders withdrew from the process included:

(a) the realization during the SISP process of the need for the purchaser to obtain a new water licence instead of assuming the current water licence, a process which could take two years or more;

(b) the possibility of ongoing litigation over the Welichem assets which remain at the site (the Court has been advised that the matter is in the process of settling, although the settlement agreement is not yet finalized);

(c) the unknown extent and costs of reconstruction to make the Mine operational, given the flooded state of the underground part of the Mine and its questionable structural integrity;

(d) the inability to determine potential value of the mineral claims because of an absence of updated exploration results; and

(e) the uncertainty of reclamation or remediation costs and how they will be shared with the Yukon government.

[24] The Receiver explained that there was not one issue that presented a bar to the bidders who withdrew or were rejected; the concerns were different for each bidder.

[25] The Order approving the SISP or the SISP do not contain a provision for termination of the SISP process. However, s. 30(a) of the SISP states that the Receiver, in consultation with Yukon government, may reject at any time any bid that is:

(i) inadequate or insufficient;

> (ii) not in conformity with the requirements of the BIA, this SISP or any orders of the Court applicable to YZC or the Receiver; or
>
> (iii) contrary to the interests of YZC's estate and stakeholders as determined by the Receiver;

[26] Further, s. 23(f) of the SISP contemplates the possibility that the Receiver may report to the Court that it will not proceed with any one or more of the bids.

[27] The jurisprudence offers little guidance on the role of the court in a situation of termination of a sales process in the event of no acceptable bidders. The Receiver noted one decision in which the Supreme Court of British Columbia observed it saw no reason why the Receiver could not recommend against completion of a sale, and that it had a duty to advise the court of any reason why the court might conclude the sale should not be approved (*Bank of Montreal v On-Stream Natural Gas Ltd Partnership* (1992), 29 CBR (3) 203 (BC SC) at para. 24).

[28] The case law is clear that in reviewing a sales process the court is to defer to the business expertise of the Receiver, and is not to intervene or "second guess" the Receiver's recommendations and conclusions (*Royal Bank of Canada v Keller & Sons Farming Ltd*, 2016 MBCA 46 at para. 11). The court is to ensure the integrity of the process is maintained through the exercise of procedural fairness in any negotiations and bidding.

> ... The court should not proceed against the recommendations of its Receiver except in special circumstances and where the necessity and propriety of doing so are plain. ... [*Crown Trust Co v Rosenberg* (1986), 60 OR (2d) 87 (H Ct J) at para. 65]

[29] Here, the Receiver undertook a thorough process in attempting to attract and identify an acceptable bidder and ultimate purchaser, in consultation with Yukon

government and the Kaska Nation. By its own account, it provided substantial assistance to potential bidders throughout the summer of 2021, including extending deadlines, participating in multiple calls to clarify and understand their proposals, and providing them with necessary information and connections to enable them to complete their due diligence. The SISP has already been approved as fair and reasonable by this Court and as noted above, the Receiver's appears to have implemented the SISP fairly and in good faith.

[30] Yukon government agreed with the termination of the SISP, indicating that the Receiver's good faith efforts were the best that could be achieved at this time. Welichem did not oppose the termination of the SISP.

[31] While the confidential documents set out the more detailed reasons why the Receiver has concluded there are no appropriate bidders, scrutiny or assessment of these reasons is not the Court's role.

[32] I note that the SISP process may have some value for future in that entities with interest in the project were identified and educated about the process, and a large amount of information was gathered and learned about the Mine both by the interested parties and the Receiver in consultation with Yukon government and the Kaska Nation. This may have some value for future bidding or sales processes.

[33] For these reasons, the termination of the SISP is approved. The draft Approval and Vesting Order filed by the Receiver on this application is approved, with appropriate adjustments to reflect appearances of counsel.

Sealing Order

[34] The Receiver seeks an order sealing its Confidential Supplemental Eighth Report to the Court containing the results of the SISP and attached documents. The report sets out details of the process including:

(a) the names of the bidders, and the kind of work the Receiver engaged in over the summer of 2021 to advance the bids according to the evaluation criteria;

(b) the details of each bid, including price and conditions;

(c) the challenges of each bid;

(d) the Receiver's review and application of the evaluation criteria; and

(e) the reasons why certain bidders withdrew or were eliminated from the process.

[35] The documents attached to the report include unredacted:

(a) expressions of interest;

(b) binding bids;

(c) Removal Letters;

(d) Termination Letters;

(e) Almaden's bid; and

(f) Almaden's Purchase Agreement.

[36] The Receiver argues that the information in this report disclosing its application of the evaluation criteria and the challenges and problems with the bids, as well as the documents themselves, contain sensitive commercial information that would cause harm to any future efforts to market the Mine. Information about the identity of bidders, the proposed purchase prices, the proposed terms and conditions, the reasons for the

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

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

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

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

> (1) court openness poses a serious risk to an important public interest;
>
> (2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and,
>
> (3) as a matter of proportionality, the benefits of the order outweigh its negative effects.

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

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

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

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

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

were like those of the case at bar in that only two of the five assets were sold through the initial sales process. The court ordered the monitor file an unredacted version of its report after the sale was completed and the monitor's certificate filed with the court. However, the company requested a further sealing of the report and documents for six months because it was continuing its efforts to sell the remaining assets and was in discussion with some of the same parties who submitted bids under the initial completed sales process. The court applied the principles in *Sierra Club*, noting that the "important commercial interest" must be more than the specific interest of the party requesting the confidentiality order, such as loss of business or profits. There must be a general principle at stake, such as a breach of a confidentiality agreement through the disclosure of the information.

[42] The court in *Look* noted at para. 17:

> It is common when assets are being sold pursuant to a court process to seal the Monitor's report disclosing all of the various bids in case a further bidding process is required if the transaction being approved falls through. Invariably, no one comes back asking that the sealing order be set aside. That is because ordinarily all of the assets that were bid on during the court sale process end up being sold and approved by court order, and so long as the sale transaction or transactions closed, no one has any further interest in the information. In *8857574 Ontario Inc. v. Pizza Pizza Ltd.* (1994) 23 B.L.R. (2nd) 239, Farley J. discussed the fact that valuations submitted by a Receiver for the purpose of obtaining court approval are normally sealed. He pointed out that the purpose of that was to maintain fair play so that competitors or potential bidders do not obtain an unfair advantage by obtaining such information while others have to rely on their own resources. In that context, he stated that he thought the most appropriate sealing order in a court approval sale situation would be that the supporting valuation materials remain sealed until such time as the sale transaction had closed.

[43] The court in *Look* granted the company's request for a sealing order for a further six months, finding that even though the remaining sales would not occur under the original sale process, the commercial interest in ensuring the assets were sold for the benefit of all stakeholders was the same.

[44] Here, I acknowledge the importance of sealing the Receiver's Confidential Supplemental Eighth Report to the Court and attached documents during the sale process and until any ongoing sale process is complete. The important interest is the commercial interests of the bidders, the creditors, the stakeholders and maintaining the integrity of the sales process. The Receiver's counsel advised they represented to the bidders that the process would be confidential until completion. The bidders all signed non-disclosure agreements before they received access to the data. These interests outweigh the negative effects of a sealing order. Redaction of the documents or reports is not a reasonable alternative as virtually all of the information contained in the report and documents (other than the parts that are already public) is confidential for the reasons noted.

[45] The issue of a future sales process of some kind however, is far less certain than it was in *Look*, where the new sales process was underway at the time of the court application. All parties in this case agree that the current Receiver-led SISP process is exhausted, and the unopposed or supported request for court approval of its termination confirms this. The Receiver has no intention of starting a new sales process.

[46] Counsel for Yukon government indicated that they would be open to discussing the sale of some or all of the Yukon Zinc assets in future if approached by a potential purchaser. Yukon government confirmed it had no intention of commencing a similar

sales process to the SISP in the near future, as their priority will be care and maintenance of the Mine when this responsibility is transitioned from the Receiver to them, likely in the fall of 2022.

[47] The Receiver noted in its public reports several of the ongoing issues affecting a potential sale. These include the regulatory complexities of obtaining a new water licence, the uncertainty of the responsibilities and costs of restoring the Mine to an operable state, the uncertain value of the mineral claims, and the possibility of ongoing litigation over the Welichem assets if a settlement is not achieved. Unless one or more of these factors changes, the possibility of a future sale is unlikely, in the Receiver's view. This is different from *Look*, where the new sales process had commenced at the time the sealing order was requested.

[48] The Supreme Court of Canada has emphasized the importance of the fundamental principle of open and accessible court proceedings. Court openness is protected by the constitutional guarantee of freedom of expression and is essential to the proper functioning of our democracy (*Canadian Broadcasting Corp v New Brunswick (Attorney General)*, [1996] 3 SCR 480 at para. 23 ("*New Brunswick*"); *Vancouver Sun (Re)*, 2004 SCC 43 at paras. 23-26). Public and media access to the courts is the way in which the judicial process is scrutinized and criticized. "The open court principle has been described as "the very soul of justice," guaranteeing that justice is administered in a non-arbitrary manner" (*New Brunswick* at para. 22). There is a strong presumption in favour of court openness. Judicial discretion in determining confidentiality or sealing orders must be exercised against this backdrop.

[49] Given these unique factual circumstances, and applying the legal principles described above, I conclude the following in relation to sealing the materials.

[50] Once the Almaden sale is complete, and the Receiver's certificate has been filed with the Court, the redacted material related to Almaden's purchase of the Logan Interests will be unsealed. The Receiver has disclosed most of the information related to this purchase and sale but some information such as the purchase price remains redacted. As the sale of this portion of the assets will be over once this transaction is completed, there is no reason to continue to seal the Almaden documents contained in the Confidential Supplemental Eighth Report to Court that have not already been disclosed.

[51] The remoteness of a future sale of the remaining assets evident from the Receiver's materials and submissions means that the length of a sealing order could be indefinite. As noted in *Sierra Club* at 545, a court is to restrict the sealing order as much as is reasonably possible while preserving the important interest in question. While it is still in the public interest to maintain the sealing order where a future sale is a possibility, at some point that possibility may no longer be realistic. Or, so much time will have passed that the information in the original bids may have little relationship to the actual situation so the importance of the interest to be protected is diminished.

[52] The Receiver in this case advised that some of the current circumstances that prevented the success of the sales process would have to change before a sale is likely. Yukon government confirmed that their focus in the near term will be on care and maintenance issues and not on the longer term issues related to remediation, reconstruction, or water licence. It is possible, however, over the next few years, that

some of these circumstances may change. For example, the litigation between Welichem and the Receiver over its assets will either be settled or judicially determined, more clarity on the responsibilities for remediation or even further steps taken towards remediation and reconstruction may occur, or more work may be done to value the mineral claims. Some or all of these changes could lead to a successful sale.

[53] I will grant the sealing order over the Receiver's Confidential Supplemental Eighth Report to the Court, and attached documents, except for the documents related to the Almaden purchase once the Receiver's certificate is filed with the Court, for a period of three years, or until further order of this Court. The report shall be filed as of the date of these Reasons.

[54] The draft sealing order filed by the Receiver on this application should be modified to reflect the terms set out in these reasons and to reflect the presence of all counsel.

DUNCAN C.J.

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CITATION: Rose-Isli Corp. v. Frame-Tech Structures Ltd., 2023 ONSC 832
COURT FILE NO.: CV-22-00682959-00CL
DATE: 20230202

SUPERIOR COURT OF JUSTICE – ONTARIO

(COMMERCIAL LIST)

RE: ROSE-ISLI CORP., 2631214 ONTARIO INC., SEASIDE CORPORATION, and 2735440 ONTARIO INC., Applicants

AND:

FRAME-TECH STRUCTURES LTD., MICHAEL J. SMITH, FRANK SERVELLO, CAPITAL BUILD CONSTRUCTION MANAGEMENT CORP., and 2735447 ONTARIO INC., Respondents

BEFORE: Kimmel J.

COUNSEL: *See Counsel Slip (attached)*

HEARD: December 15, 2022, January 6, 2023 (with further written submissions provided on January 13, 2023) and January 26, 2023

ENDORSEMENT

(RECEIVER'S MOTION FOR AVO AND CROSS-MOTION TO REDEEM AND/OR APPROVAL OF CREDIT BID)

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

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

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

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

Prior Court Orders

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

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

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

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

[8] The prescribed responsibilities and powers of the Receiver under the Appointment Order are similar to those prescribed in insolvency situations when a receiver is appointed under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3. However, the Appointment Order was not predicated upon any finding that the Company was insolvent. It was made in the context of the

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

within oppression remedy application commenced by 273 Ontario and others as a result of a breakdown in the relationship between the joint venture participants in the Rosehill Project.

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

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

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

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

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

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

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

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

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

consummating such transactions, and such other matters as the Receiver may determine.

[17] The bid deadline was November 25, 2022.

The Motions

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

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

a. approving the agreement of purchase and sale dated December 9, 2022 (the "APS") between the Receiver and ORA Acquisitions Inc. ("Ora" or the "Purchaser") for the purchase and sale of the assets, undertakings and properties of the Company (the "Purchased Assets"), including but not limited to the Property, and authorizing the Receiver to complete the transaction contemplated therein (the "Transaction");
b. vesting the Purchased Assets in the Purchaser upon the closing of the Transaction, free and clear of all security interests, liens and the like, whether secured or unsecured; and
c. ordering that immediately after the delivery of the Receiver's certificate confirming the closing of the Transaction, each of the Unit Purchaser Agreements (as defined hereinafter) shall be deemed to have been terminated by the Receiver and any rights or claims thereunder or relating thereto are not continuing obligations effective against the Property or binding on the Purchaser.

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

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

Borrowings Charge (as defined in the Appointment Order), and (iv) a limited sealing order in respect of certain identified confidential exhibits to the Receiver's Second Report dated December 11, 2022.

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

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

[23] During the January 6, 2023 hearing, the court raised a question about the aspect of the relief sought by the Receiver that would deem the condominium unit purchase agreements (the "Unit Purchaser Agreements") to be terminated upon the closing of the Transaction. The Unit Purchaser Agreements were entered into by the Company prior to the receivership with purchasers of pre-sale residential and commercial condominium units (the "Unit Purchasers").

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

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

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

a. There may have been a misunderstanding between the Receiver and 273 Ontario about the importance and timeliness of the request by 273 Ontario for the Receiver to determine the validity of 273 Ontario's security and confirm the accepted amount of the 273 Ontario Loan and to determine the Registered Lien Claims. 273 Ontario considered both requests to be essential to its ability to exercise its right of redemption and/or make a Credit bid and to determine its essential conditions and structure. Once received, the prospect of an alternative transaction emerged (under

the 273 Ontario Credit Bid or by virtue of the exercise of a right of redemption, if permitted) that does not terminate or disclaim the Unit Purchaser Agreements, albeit proposing to treat other stakeholders, such as the Registered Lien Claimants, less favourably than under the Transaction. The full implications of this have not been canvassed.

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

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

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

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

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

g. Not every situation involving a deemed termination or approval of disclaimer of purchase agreements in pre-sale condominium projects in receivership will necessarily require notifying purchasers. Each case must be considered on its own facts. As noted, the legal rights of these purchasers may be limited, even if their interests are not necessarily limited to their strict legal rights.

h. Prejudice (if it can be established) is also a relevant consideration. It is not just the prejudice to the Unit Purchasers, but also to the Registered Lien Claimants and to the Purchaser, that must be considered and balanced (along with the interests of the

secured creditors and any other creditors that the court is typically concerned with on these types of approval motions).

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

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

[27] In the court's January 18, 2023 endorsement, the court cautioned that the Unit Purchaser's positions would not be the only, or determinative, factor. It was noted that when the matter returned to court on January 26, 2023, the determination of the two remaining substantive issues: a) the purported exercise of 273 Ontario's right to redeem, and b) the approval of the APS, Transaction and proposed AVO, will involve, among other things, the court's consideration of the interests of, and prejudice to, all of the different stakeholders whose rights and interests are impacted differently by the different potential outcomes: see *Kruger v. Wild Goose Vintners Inc.*, 2021 BCSC 1406, at para. 74; *BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc.*, 2020 ONSC 3659, at para. 47; *Royal Bank of Canada*; *Ravelston Corp. Re.* (2005), 24 C.B.R. (5th) 256 (Ont. C.A.), at para. 40.

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

Factual Background

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

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

[30] The Purchased Assets and the Property were part of the Rosehill Project, a joint venture between the applicants and the respondents for the development of a proposed six-story mixed use residential and commercial development. The Rosehill Project is anticipated to comprise of approximately 80 condominium units. The Company is the entity through which the joint

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

venture was developing the Rosehill Project and is the registered owner of the Property. As at the date of the Appointment Order, 60 residential suites and one commercial unit had been pre-sold.

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

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

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

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

The Registered Lien Claims

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

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

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

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

The 273 Security and Loan Amount

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

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

The Bidding Process

a) The 273 Ontario Bid

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

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

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

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

[45] 273 Ontario submitted a non-binding letter of intent on the bid deadline. Even though it did not satisfy the requirements for bids under the Sale Process (nor was it accompanied by a

commitment for firm irrevocable financing or a deposit), the Receiver received and considered its terms and continued discussions with 273 Ontario thereafter.

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

b) Ora and other Bids

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

c) Request for Binding APA from 273 Ontario

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

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

d) The Receiver's Decision

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

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

[52] On Monday, December 12, 2022, 273 Ontario supplemented its Credit Bid with financing commitments sufficient to pay certain priority payables, including the Trez Loan and the

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

Receiver's Borrowing Charge, but not the Registered Lien Claims. Rather, the Credit Bid contains a closing condition that requires the Registered Lien Claims to be withdrawn or declared by the court to be invalid or dismissed. The Credit Bid does not require the termination or vesting out of the Unit Purchaser Agreements.

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

The APS

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

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

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

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

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

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

The Assignment of the Trez First Mortgage Position

[58] Trez gave notice of default under its first mortgage in August 2022. The mortgage loan matured and became due and payable in September 2022. The net proceeds from the Transaction

are projected to exceed the amounts owing to Trez. As noted above, the AVO contemplates paying out this first mortgage in full.

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

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

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

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

Issues to be Decided

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

a. Are there stakeholders who should have been served with the motions:
   i. The Unit Purchasers?
   ii. The Registered Lien Claimants?
b. Does 273 Ontario have the right to redeem the Property?
c. Should the Transaction and the APS be approved and the proposed AVO be granted?
d. Should the Ancillary Order be granted?

Analysis

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

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

a. The Receiver made efforts to contact the Unit Purchasers and their counsel of record to notify them of the motions and provide them with the link to access the court

materials by email and phone. They were invited to respond to the Receiver if they wished to put their positions before the court.

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

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

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

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

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

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

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

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

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

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

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

The Right to Redeem

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

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

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

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

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

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

Should 273 Ontario be Permitted to Redeem the Property?

[75] The Receiver relies on *B&M Handelman Investments Limited v. Mass Properties Inc.* (2009), 55 C.B.R. (5th) 271 (Ont. S.C.) to argue that 273 Ontario should not be permitted to exercise its right of redemption at this stage in the proceedings.

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

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

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

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

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

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

decision in *Hester*, in which the court was unequivocal on the use of a redemption in a sales process:

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

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

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

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

[83] The court engages in a balancing analysis of the right to redeem against the impact on the integrity of the court approved receivership process: see *BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc.*, 2020 ONSC 3659, at para. 41. The importance of the timing of the process in relation to the purported exercise of the right to redeem is emphasized at para. 36:

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

The Balancing of Interests

[84] The rights enunciated in *Hester* and relied upon by 273 Ontario must be balanced with the integrity of the court approved sale process. That in turn requires a consideration of whether

that sale process was carried out in a procedurally fair manner, with a view towards achieving the best (and not an improvident) price, and with regard to the interests of all stakeholders. That consideration is part of the analysis that the court must engage in under the *Soundair* principles when deciding whether to approve the Transaction and grant an AVO, discussed in the next section of this endorsement.

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

[86] The stakeholder interests identified in this case include:

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

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

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

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

e. The Unit Purchasers whose Unit Purchase Agreements will be terminated (and deposits returned) under the proposed Transaction, if approved. They have now been given notice and have not come forward with a strong voice of opposition to the

termination of those agreements by the court.[6] Of those who have expressed a view, more prefer this than oppose it, and more still were silent on the point. The number and substance of the opposition is underwhelming, given how far away the Rosehill Project is from completion.[7]

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

[87] The court recognizes that all stakeholder interests may not be equal: "[a]lthough the interests of the debtor and purchaser are also relevant, on a sale of assets, the receiver's primary concern is to protect the interests of the debtor's creditors": *Skyepharma PLC. v. Hyal Pharmaceutical Corp.* (1999), 12 C.B.R. (4th) 87 (Ont. S.C.), at para. 6.

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

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

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

[91] Similarly, 273 Ontario only sought to redeem at the end of the court approved Sale Process that it was consulted on and participated in, after it became apparent that it was not able to make a competitive bid by the time of the extended bid deadline it was given of December 9, 2022. Allowing this right to be exercised at that late stage also undermines the Sale Process. If

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

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

273 Ontario had wanted to reserve its right to redeem to the end of the Sale Process, that is something that should have been expressly addressed at the time the Sale Process Order was made.

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

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

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

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

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

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

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

b. it has considered the interests of all stakeholders;

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

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

a) The Receiver's Efforts and Actions Were Provident

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

> [W]hen a receiver's sale is before the court for confirmation the only issues are the propriety of the conduct of the receiver and whether it acted providently. The

> function of the court at that stage is not to step in and do the receiver's work or change the sale strategy adopted by the receiver. Creditors who asked the court to appoint a receiver to dispose of assets should not be allowed to take over control of the process by the simple expedient of supporting another purchaser if they do not agree with the sale made by the receiver. That would take away all respect for the process of sale by a court-appointed receiver.
>
> ...
>
> When deciding whether a receiver had acted providently, the court should examine the conduct of the receiver in light of the information the receiver had when it agreed to accept an offer. In this case, the court should look at the receiver's conduct in the light of the information it had when it made its decision on March 8, 1991. The court should be very cautious before deciding that the receiver's conduct was improvident based upon information which has come to light after it made its decision.

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

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

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

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

b) Consideration of Stakeholder Interests

[102] Under the second consideration, I agree with 273 Ontario that the court should be primarily concerned with the interests of creditors. It is secondarily concerned with the process

considerations and the interests of other stakeholders: see *Soundair*, citing *Crown Trust Co. et al. v. Rosenberg et al.* (1986), 60 O.R. (2d) 87 (H.C.).

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

> I should like to add that where there is a small number of creditors who are the only parties with a real interest in the proceeds of the sale (i.e., where it is clear that the highest price attainable would result in recovery so low that no other creditors, shareholders, guarantors, etc., could possibly benefit therefrom), the wishes of the interested creditors should be very seriously considered by the receiver.

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

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

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

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

[108] The Receiver, in its discretion, determined that there was a risk of losing the Ora Binding APA and that is what led to the decision to accept it after evaluating the two options available. The Receiver's judgment at the time, for which no grounds have been suggested as warranting a

lack of deference, was that Ora could walk from the Transaction if the Receiver did not sign back the Ora Binding APA. The Receiver was worried about the terms and conditions of the Credit Bid and its conditional financing at the time.[8] The Receiver's business judgment about the potential loss of the Ora Binding APA, weighed against the inability of 273 Ontario to come forward with a firm Credit Bid, is not something that the court should second guess.

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

> The process is very important. It should be carefully protected so that the ability of court-appointed receivers to negotiate the best price possible is strengthened and supported.

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

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

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

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

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

c) The Commercial Efficacy and Integrity of the Sale Process

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

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

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

d) No Unfairness in the Working out of the Process

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

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

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

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

meant that the requirement that the bid be unconditional for it to even be considered was being waived (as an accommodation to 273 Ontario, something that the Receiver did not have to do).

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

[122] Similar criticisms are made about the Receiver's failure to prioritize the evaluation of the Capital Build Lien (which 273 Ontario had maintained was fraudulent from the outset). Yet, when asked to prioritize this, the Receiver did so and made the decision to seek approval from the court to disallow it. The timing of 273 Ontario's requests for the security review (and subsequent request for confirmation of the accepted amount of the 273 Loan) and for the determination of the Registered Lien Claims have been addressed earlier in this endorsement. 273 Ontario suggests that, because it was funding the receivership, its requests should have been given priority by the Receiver. The Receiver's duties are to the court and all stakeholders. But it did prioritize issues when they were raised by 273 Ontario, so these complaints are unfounded both legally and factually.

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

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

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

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

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

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

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

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

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

e) Approval of the APS, Transaction and AVO

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

Should the Ancillary Order be Granted?

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

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

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

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

[137] Finally, the requested sealing order is appropriate.

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

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

[140] These salutary effects outweigh any deleterious effects, including the effects on the public interest in open and accessible court proceedings. I am satisfied that the limited nature and scope of the proposed sealing order is appropriate and satisfies the *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522 requirements, as modified by

the reformulation of the test in *Sherman Estate v. Donovan*, 2021 SCC 25, 458 D.L.R. (4th) 361, at para. 38.

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

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

Costs and Final Disposition

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

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

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

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

KIMMEL J.

Date: February 2, 2023

SUPERIOR COURT OF JUSTICE

COUNSEL SLIP

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

NO. ON LIST: 3

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

BEFORE JUSTICE: **MADAM JUSTICE KIMMEL**

PARTICIPANT INFORMATION

For Plaintiff, Applicant, Moving Party, Crown:

Name of Person Appearing	Name of Party	Contact Info
JASON WADDEN *(counsel)*	Rose-Isli Corp., 2631214 Ontario Inc., Seaside Corporation, 2735440 Ontario Inc.	jwadden@tyrllp.com
CARLOS SAYAO *(counsel)*		csayao@tyrllp.com

For Other:

Name of Person Appearing	Name of Party	Contact Info
SHARON KOUR *(counsel)*	Ernst & Young Inc. (Receiver)	skour@reconllp.com

CAITLIN FELL *(counsel)*		cfell@reconllp.com
SHAUN PARSON *(counsel)*		sparson@reconllp.com
NATHANIEL READ-ELLIS *(counsel)*	Ora Acquisitions Inc. (Purchaser)	nreadellis@agbllp.com
SEAN PIERCE *(counsel)*		spierce@agbllp.com
ADAM WYGODNY *(counsel)*	Purchasers of Unit No. 604	awygodny@groiaco.com
CAMERON NEIL (counsel)	KNYMH lien claimant	neilc@simpsonwigle.com
In total there were approximately 38 observers and participants at the hearing, including the above named counsel and a number of individual purchasers. Three purchasers, *MARY RAPPULO, NICOLA LACANTORE*, and *VINCENZO PATERINO* addressed the court.		

4

SUPREME COURT OF NOVA SCOTIA
IN BANKRUPTCY AND INSOLVENCY

Citation: *Scotian Distribution Services Limited (Re)*, 2020 NSSC 131

Date:20200406
Docket: No. 43999
Registry: Halifax
Estate Number: 51-2624515

In the Matter of: The Proposal of Scotian Distribution Services Limited

Judge:	Raffi A. Balmanoukian, Registrar
Heard:	March 27, 2020, in Halifax, Nova Scotia (via Teleconference)
Counsel:	Tim Hill, QC, for the Applicant

Balmanoukian, Registrar:

[1] The word "Bankrupt" is derived from the Italian "*banca rotta*." In times of yore, an insolvent merchant's place of business would be trashed by irate creditors; the result was a "broken bench."

[2] In Nova Scotia, the Bench will not break.

[3] During the Great Plague of 1665-6, the Court in London moved from Westminster to Oxford (as did Parliament). But yet, they persisted.

[4] In 2020, we are blessed with far greater modalities of communication and administration. As circumstances direct they are being, and will be brought, to bear in the interests of delivering both justice and access to justice.

[5] As I write, and with a hat tip to Mr. Yeats, mere anarchy is loosed upon the world.

[6] It is not business as usual. Virtually nothing is.

[7] On March 19, 2020, the Supreme Court of Nova Scotia adopted an "essential services" model in response to the Covid-19 pandemic. This has meant that only matters deemed urgent or essential by the presiding jurist will be heard

until further notice; and those, by the method of least direct personal interaction that is consistent with the delivery and administration of justice. This can, in appropriate instances, include written, virtual, electronic, telephone, video, or other modalities, and adaptations of procedures surrounding filing of affidavit and other material.

[8] On March 20, 2020, I issued a memorandum to all Trustees in Nova Scotia reflecting this as it applies to this Court, and underscoring the "urgent or essential" standard. It can be obtained from the Deputy Registrar whose contact coordinates, in turn, are posted on the Court website (courts.ns.ca).

[9] "Essential" means such matters that must be filed, with or without a scheduled hearing, to preserve the rights of the parties – such as those which face a legislative limitation period. "Urgent" means matters that simply cannot wait, in the opinion of the presiding jurist.

[10] Both the Chief Justice of Nova Scotia, the Honourable Chief Justice Michael J. Wood, and the Chief Justice of the Supreme Court of Nova Scotia, the Honourable Chief Justice Deborah K. Smith, have been clear that this does not mean that Courts, being an essential branch of government and the guardian of the

rule of law, cease to function. It means that they operate during this global emergency – and its local manifestation – on an essential services basis.

[11] Accordingly, scheduled matters are deemed to be adjourned *sine die* unless brought to my attention in accordance with the memorandum noted above and I (or a presiding Justice) deem the standard to be met.

[12] Against that backdrop, evolving in real time, I faced the present application. It is a motion for an extension of time to file a proposal, pursuant to Section 50.4(9) of the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3, as amended (the "BIA"). That section reads:

> **(9)** The insolvent person may, before the expiry of the 30-day period referred to in subsection (8) or of any extension granted under this subsection, apply to the court for an extension, or further extension, as the case may be, of that period, and the court, on notice to any interested persons that the court may direct, may grant the extensions, not exceeding 45 days for any individual extension and not exceeding in the aggregate five months after the expiry of the 30-day period referred to in subsection (8), if satisfied on each application that
>
> > **(a)** the insolvent person has acted, and is acting, in good faith and with due diligence;
> >
> > **(b)** the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and
> >
> > **(c)** no creditor would be materially prejudiced if the extension being applied for were granted. [emphasis added]

[13] The present motion had been scheduled for March 27, 2020. The applicant's Notice of Intention had been filed on February 28, 2020, meaning that its expiration, 30 days thereafter, was at the end of March, 2020 (BIA s. 50.4(8)). The

scheduled motion was therefore at the very end of this timeline, and the lack of an extension would result in a deemed assignment in bankruptcy (BIA s. 50.4(8)).

[14] The applicant sought to have the matter heard by teleconference. After a review of the file material, I agreed. The Deputy Registrar, with my gratitude, arranged for recording facilities; this is still an open Court of record. Affected entities are still entitled to notice, and they are still entitled to be heard. As well, our open court principle remains and is at least as important as ever.

[15] To that end, the applicant was directed to provide affected entities, including creditors, with particulars of the conference call, including time and call-in particulars. That was done, and a creditor (who did not object to the application) did indeed avail itself of this facility.

[16] I note that the affidavit of service, and other material, was filed electronically. That is perfectly in order in accordance with the current directives in effect at present.

[17] I have granted the order based on the following factors:

[18] First, I am satisfied that the 'urgent or essential' threshold was met. The limitation period in BIA 50.4(8) was nigh. The deemed assignment would be

automatic. As I will recount below, such an assignment would at least potentially have impacts that run beyond solely the individual interests of the corporate debtor.

[19] Section 50.4(9) requires the Court to be satisfied that the applicant meets a three part test each time it is asked for an extension: that it has and continues to act with due diligence; that there is a likely prospect of a viable proposal; and that no creditor would be materially prejudiced by the extension. The burden is on the applicant each time, to meet each test.

[20] The applicant's affidavit evidence is that the applicant continues in operation and is diligently pursuing the proposal process; the evidence of the current status of the process (ie the engagement of MNP Ltd., review of operations, and review of assets and liabilities) satisfies me, at present, of the good faith requirement.

[21] It has employees and contracts. Its operations include transportation operations, which at least for the basis of the current application are important and perhaps essential on both a micro and macroeconomic basis. While "bigger picture" ramifications outside the particular debtor and creditors are not part of the Section 50.4(9) test, I believe I can take them into account when assessing and placing appropriate weight on the benefit/detriment elements which are the overall thrust of that tripartite standard.

[22] No creditor objected, and there is no evidence that the extension would cause material prejudice to any creditor. Although this burden, too, is on the applicant, I can take judicial notice that proposals, if performed, generally result in a greater net recovery to creditors overall; while there is some indication that the applicant will seek to resile from certain obligations, the test is whether the extension would be prejudicial, not whether the proposal itself would be.

[23] This would be the applicant's first extension under 50.4(9), which allows for a series of extensions of up to 45 days each, to a maximum of five months.

[24] To say that virtually all economic prospects in the near to medium term are moving targets is a considerable understatement. The applicant must still demonstrate that it is "likely [to] be able to make a viable proposal" with the extension in place, but in the current context I consider this to be a threshold in which the benefit of any doubt should be accorded to the applicant. This does not relieve the burden of proof on the applicant of establishing that likelihood to a civil standard; it does, however, indicate that at least on a first extension, it will not likely be a difficult standard to meet.

[25] I can take further judicial notice that especially in the current environment, a bankruptcy of an operating enterprise would almost inevitably be nasty, brutish,

and anything but short. Creditors would be well advised to consider the viability and desirability of a proposal through that lens.

[26] This Court will, no doubt, face a considerable additional case load as the economic fallout of the current human disaster works its way through what is and remains a robust legal process. An applicant should have every reasonable opportunity to avail itself of a restructuring rather than a bankruptcy, assuming it otherwise meets the requirements of BIA 50.4(9).

Conclusion

[27] The application is granted, and I have issued the order allowing the time to file a proposal to be extended to and including May 11, 2020.

Balmanoukian, R.

5

Convergix, Re 2006 NBQB 288

IN THE COURT OF QUEEN'S BENCH OF NEW BRUNSWICK

IN BANKRUPTCY AND INSOLVENCY

JUDICIAL DISTRICT OF SAINT JOHN

Court Numbers: 12381, 12382, 12383, 12384 and 12385
Estate Numbers: 51-879293, 879309, 879319, 879326 and 879332

IN THE MATTER of the Proposals of Convergix, Inc., Cynaptec Information Systems Inc., InteliSys Acquisition Inc., InteliSys (NS) Co., InteliSys Aviation Systems Inc.

BEFORE:	**Justice Peter S. Glennie**
HEARING HELD:	**Saint John**
DATE OF HEARING:	**July 27, 2006**
DATE OF DECISION:	**August 1, 2006**

COUNSEL:

R. Gary Faloon, Q.C., on behalf of the Applicants

DECISION

GLENNIE, J. (Orally)

[1] The issue to be determined on this application is whether related insolvent corporations are permitted to file a joint proposal pursuant to the *Bankruptcy and Insolvency Act*. For the reasons that follow, I conclude that such corporations are permitted to do so.

OVERVIEW

[2] The Applicants, Convergix, Inc., Cynaptec Information Systems Inc., InteliSys Acquisition Inc., InteliSys (NS) Co., and InteliSys Aviation Systems Inc. (the "Insolvent Corporations") are each wholly owned subsidiaries of InteliSys Aviation Systems of America Inc. ("IYSA").

[3] For all intents and purposes, the Insolvent Corporations have operated as one entity since 2001. The Insolvent Corporations have one "directing mind" and have the same directors. The Insolvent Corporations maintain one bank account.

[4] The Insolvent Corporations are considered related companies under the provisions of the *Income Tax Act (Canada).*

[5] Payments to all creditors of the Insolvent Corporations, including some of the major creditors such as Atlantic Canada Opportunities Agency have all been made by one of the Insolvent Corporations, namely, InteliSys Aviation Systems Inc., ("InteliSys"), even though loan agreements may have been made with other of the Insolvent Corporations. Similarly, all employees of all the Insolvent Corporations are paid by InteliSys.

Filing of Notice of Intention to make a Proposal

[6] The Insolvent Corporations attempted to file a joint Notice of Intention to Make a Proposal pursuant to the *Bankruptcy and Insolvency Act* (the "BIA") on June 27th, 2006 in the Office of the Superintendent of Bankruptcy ("OSB"). By letter dated June 28th, 2006 the OSB advised that it would not accept the filing of this joint Proposal.

[7] On June 29th, 2006 each of the Applicants filed in the OSB a Notice of Intention to Make a Proposal. The Insolvent Corporations have each filed in the OSB a Projected Monthly Cash-Flow Summary and Trustee's Report on Cash-Flow Statement.

Extension Pursuant to Subsection 50.4(9) of the BIA

[8] IYSA is required to file quarterly reports with the U.S. Securities and Exchange Commission in Washington, D.C. It is a publicly traded security, over-the-counter, on the NASDAQ. The Applicants say the implications on IYSA created by the financial situation of the Insolvent Corporations must be considered. The Applicants assert that the initial 30 day period of protection under the BIA is not sufficient time for all of the implications on IYSA to be determined and dealt with.

[9] The Applicants say that their insolvency was caused by the unexpected loss of their major client which represented in excess of 25% of their combined revenue. They say that time is needed to assess the market and determine if this revenue can be replaced and over what period of time.

[10] The Insolvent Corporations and Grant Thornton Limited have completed a business plan. It has been presented to investors and/or lenders. The Insolvent Corporations will need more time than the initial period of protection of 30 days under the BIA to have these lenders and investors consider the business plan and make lending and/or investment decisions.

[11] Counsel for the Applicants advise the Court that the OSB does not object to joint proposals being filed by related corporations but requires a Court Order to do so.

[12] The Insolvent Corporations host systems for several Canadian airlines. They provide all aspects of reservation management including booking through call centers and web sites as well as providing the capability to check in and board passengers. The total reservation booking volume is about 1300 reservations per day which results in a revenue stream of $520,000 per day. The applicants say the loss of revenue for even one day would be catastrophic. They assert that serious damage would be caused to the various client airlines. The Applicants also say it would take at least 30 days to bring another reservation system online.

ANALYSIS

[13] There are no reported decisions dealing with the issue of whether a Division I proposal can be made under the BIA on a joint basis by related corporations. There are two decisions, one dealing with partners [***Howe Re,*** [2004] O.J. No. 4257, 49 C.B.R. (4th) 104, 2004 CarswellOnt 1253] and the other dealing with individuals [***Nitsopoulos Re***, [2001] O.J. No. 2181, 25 C.B.R. (4th) 305, 2001 CarswellOnt 1994].

[14] Section 2 of the BIA provides that 'persons' includes corporations.

[15] When interpreting the breadth of the BIA section dealing with proposals, I am mindful of the following comments from ***Bankruptcy and Insolvency Law of Canada*** by Hon. L.W. Houlden and Hon. G. B. Morawetz, Third Edition Revised, (2006, Release 6, pages 1-6 and 1-6.1):

> The *Act* should not be interpreted in an overly narrow, legalistic manner: *A. Marquette & Fils Inc. v. Mercure,* [1977] 1 S.C.R. 547, 65 D.L.R. (3d) 136, 10 N.R. 239; *Re Olympia and York Developments Ltd. (*1997), 143 D.L.R. (4th) 536, 45 C.B.R. (3d) 85, 1997 CarswellOnt 657 (Ont. Gen. Div.); *Sun Life Assurance Co. of Canada v. Revenue Canada (Taxation),* 45 C.B.R. (3d) 1, 47 Alta L.R. (3d) 296, 1997 CarswellAlta 254, [1997] 5 W.W.R. 159, 144 D.L.R. (4th) 653 (C.A.); *Re County Trucking Ltd.* (1999), 10 C.B.R. (4th) 124, 1999 CarswellNS 231 (N.S.S.C.). It should be given a reasonable interpretation which supports the framework of the legislation; an absurd result should be avoided: *Re Handelman* (1997), 48 C.B.R. (3d) 29, 1997 CarswellOnt 2891 (Ont. Gen. Div.).
>
> The *Act* puts day-to-day administration into the hands of business people - - trustees in bankruptcy and inspectors. It is intended that the administration should be practical not legalistic, and the *Act* should be interpreted to give effect to this intent: *Re Rassell* (1999), 177 D.L.R. (4th) 396, 1999 CarswellAlta 718, 12 C.B.R. (4th) 316, 71 Alta. L.R. (3d) 85, 237 A.R. 136, 197 W.A.C. 136 (C.A.).

[16] In ***Howe,*** *supra,* the debtors brought a motion for an order directing the OSB to accept for filing a joint Division I proposal, together with a joint statement of affairs, joint assessment certificate and joint cash flow statement.

[17] The OSB accepted that the filing of a joint Division I proposal by the debtors was appropriate as the debts were substantially the same and because the joint filing was in the best interests of the debtors and their creditors. However, the OSB attended at the motion to make submissions regarding its policy in relation to the filing of joint Division I proposals. The policy stipulated

that the OSB would refuse the filing of a proposal that did not on its face meet the eligibility criteria set out in the BIA. The policy further provided that the OSB would refuse the filing of a joint Division I proposal where the trustee or the debtors failed to obtain a Court Order authorizing the filing.

[18] Registrar Sproat rejected the OSB's position as expressed in the policy. He held that the OSB had no authority to reject the filing of a proposal, subject to the proposal meeting the requirements of section 50(2) of the BIA, namely the lodging of documents.

[19] The Registrar reviewed case law dealing with the permissibility of joint Division I proposals under the BIA. He found that, while not explicitly authorized, the provisions of the BIA could reasonably be interpreted as permitting a trustee to file with the official receiver a joint Division I proposal. In this regard he quoted from his comments in ***Re Shireen Catharine Bennett,*** Court File No. 31-207072T, where he stated:

> It seems to me that the decision of Farley J. in *Re Nitsopoulos* (2001) 25 C.B.R. (4th) 305 (Ont. S.C.) is clear on the issue that the BIA does not prohibit the filing of a joint proposal and. . .does not formally approve/permit a joint proposal to be filed. In my view, it would be consistent with the purpose of the BIA and most efficient and economical to extend the decision in *Re Nitsopoulos* and hold that joint proposals may be filed. . .I am not persuaded that a formal court order is required to permit a joint proposal to be filed. It seems to me that potential abuses can be avoided in the fashion outlined at paragraph 9 of *re Nitsopoulos* i.e. on an application for court approval. . .and determination of abuse (if any) can be dealt with on that application.
>
> Thus to summarize, no order is necessary for a joint Division I proposal to be filed. In the event that the Trustee has difficulty in the said filing the matter may be restored to my list and the OSB shall attend on the date agreed upon.

[20] In the result, the Registrar ordered the OSB to accept for filing the joint proposal. The Court further held that a joint Division I proposal is permitted under the BIA and that the OSB must accept the filing of the joint proposal even in the absence of a Court Order authorizing such filing.

[21] In ***Nitsopoulos,*** *supra,* a creditor of each of Mr. and Mrs. Notsopoulos brought a motion for an order that a proposal could not be filed on a joint basis.

[22] The joint proposal lumped all unsecured creditors of the Nitsopouloses into one class, whether such creditors were creditors of the husband, the wife, or both. Justice Farley identified the issue as whether the BIA allowed a joint Division I proposal to be made.

[23] He focused on an important distinction between a Division II consumer proposal and a Division I proposal. A Division I proposal must be approved by the Court to be effective. In contrast, a Division II proposal need not be specifically approved by the Court unless the Official Receiver or any other interested party applies within fifteen days of creditor acceptance to have the proposal reviewed. Justice Farley stated that the role of the Superintendent in Bankruptcy, on a directive basis, is not necessary given that there will automatically be a review by the Court to determine whether the terms and conditions of the proposal are fair and reasonable and generally beneficial to the creditors. He concluded that this review would encompass a consideration equivalent to section 66.12(1.1) of the BIA such that it would be able to determine if a joint proposal should be permitted.

[24] Justice Farley concluded that the BIA should not be construed so as to prohibit the filing of a joint Division I proposal.

[25] In my opinion the filing of a joint proposal is permitted under the BIA and with respect to this case, the filing of a joint proposal by the related corporations is permitted. The BIA should not be construed so as to prohibit the filing of a joint proposal. As well, I am not persuaded that a formal court order is required to permit a joint proposal to be filed.

[26] In this particular case, the affidavit evidence reveals various facts which support the view that a joint filing is in the best interest of the Insolvent Corporations and their creditors.

[27] I am satisfied that the Insolvent Corporations have essentially operated as a single entity since 2001. Payments to all creditors have been made by InteliSys, even though the loan agreements may have been made with other of the insolvent corporations. Inter-corporate accounting for the Insolvent Corporations may not reflect these payments or transactions.

[28] In reaching the conclusion that a joint filing is in order in this case, I have taken the following factors into consideration:

(a) The cost of reviewing and vetting all inter-corporate transactions of the Insolvent Corporations in order to prepare separate proposals would be unduly expensive and counter-productive to the goal of restructuring and rehabilitating the Insolvent Corporations.

(b) The cost of reviewing and vetting all arms-length creditors' claims to determine which Insolvent Corporation they are actually a creditor of would be unduly expensive and counter-productive to the goal of restructuring and rehabilitating the Insolvent Corporations.

(c) The cost of reviewing and determining ownership and title to the assets of the Insolvent Corporations would be unduly expensive

and counter-productive to the goal of restructuring and rehabilitating the Insolvent Corporations.

[29] In addition, certain of the Insolvent Corporations have only related party debt. Pursuant to section 54(3) of the BIA, a related creditor can vote against a proposal, but not in favor of the proposal. As a result, InteliSys (NS) Co. and InteliSys Acquisition Inc. cannot obtain the required votes for the approval of an individual proposal without a court order.

[30] In my opinion, these considerations are consistent only with a finding that a joint proposal is the most efficient, beneficial and appropriate approach in this case.

[31] In view of the reasoning in ***Howe*** and ***Nitsopoulos***,, the interrelatedness of the Insolvent Corporations, the court review inherent in any Division I proposal, and the lack of any prejudice to the creditors of the Insolvent Corporations, I conclude that the Insolvent Corporations ought to be permitted to file a joint proposal.

[32] In ***Re Pateman*** [1991] M.J. No. 221 (Q.B.), Justice Oliphant commented, "I have some serious reservations as to whether a joint proposal can be made save and except in the case of partners, but since I need not determine that issue, I leave it for another day."

[33] In my opinion, the companies in this case are in effect corporate partners because they are so interrelated. They have the same bank account, the same controlling mind and the same location of their offices.

[34] I am of the view that the filing of a joint proposal by related corporations is permitted under the BIA, and that on the facts of this case, an Order should issue authorizing such a filing. Such an Order is consistent with the principles underlying the interpretation of the BIA, and is in the best interests of all stakeholders of the Insolvent Corporations.

Extension of Time for Filing a Proposal

[35] The Applicants also seek an order pursuant to Section 50.4(9) of the BIA that the time for filing a Proposal be extended by 45 days to September 10th, 2006.

[36] The Proposal sections of the BIA are designed to give an insolvent company an opportunity to put forth a proposal as long as a court is satisfied that the requirements of section 50.4(9) are met: ***Re Doaktown Lumber Ltd.*** (1996), 39 C.B.R. (3d) 41 (N.B.C.A.) at paragraph 12.

[37] An extension may be granted if the Insolvent Corporations satisfy the Court that they meet the following criteria on a balance of probabilities:

(a) The Insolvent Corporations have acted, and are acting, in good faith and with due diligence;
(b) The Insolvent Corporations would likely be able to make a viable proposal if the extension is granted; and,
(c) No creditor of the Insolvent Cororations would be materially prejudiced if the extension is granted.

[38] In considering applications under section 50.4(9) of the BIA, an objective standard must be applied and matters considered under this provision should be judged on a rehabilitation basis rather than on a liquidation basis: See ***Re Cantrail Coach Lines Ltd.*** (2005), 10 C.B.R. (5th) 164.

[39] I am satisfied that the Insolvent Corporations' actions demonstrate good faith and diligence. These actions include the following:

(a) The Insolvent Corporations have retained the professional services of Grant Thornton Limited to assist them in their restructuring;
(b) The Insolvent Corporations have completed a business plan;
(c) The Insolvent Corporations are diligently working on the Restructuring;
(d) Since the filing of the five Notices of Intention to Make a Proposal, representatives of the Insolvent Corporations and Grant Thornton Limited have met with representatives of ACOA, the principle outside creditor of the Insolvent Corporations, to advise them of these proceedings, and
(e) Representatives of the Insolvent Corporations have met with outside investors.

[40] The test for whether insolvent persons would likely be able to make a viable proposal if granted an extension is whether the insolvent person would likely (as opposed to certainly) be able to present a proposal that seems reasonable on its face to a reasonable creditor. The test is not whether or not a specific creditor would be prepared to support the proposal. In ***Re Baldwin Valley Investors Inc.*** (1994), 23 C.B.R. (3d) 219 (Ont. G.D.), Justice Farley was of the opinion that "viable" means reasonable on its face to a reasonable creditor and that "likely" does not require certainty but means "might well

happen" and "probable" "to be reasonably expected". See also ***Scotia Rainbow Inc. v. Bank of Montreal*** (2000), 18 C.B.R. (4th) 114 (N.S.S.C.).

[41] The Affidavit evidence in this case demonstrates that the Insolvent Corporations would likely be able to make a viable proposal as there appears to be a core business to form the base of a business enterprise; management is key to the ongoing viability of the business and management appears committed to such ongoing viability; and debts owing to secured creditors can likely be serviced by a restructured entity.

[42] I am satisfied that the proposed extension would not materially prejudice creditors of the Insolvent Corporations. My conclusion in this regard is based on the following facts: the Insolvent Corporations continue to pay equipment leases and the equipment continues to be insured and properly maintained and preserved by the Insolvent Corporations; the principle debt of the Insolvent Corporations is inter-company debt; the collateral of the secured creditors is substantially comprised of equipment and software and its value is unlikely to be eroded as a result of an extension; based on the Projected Monthly Cash-Flow Summary the Insolvent Corporations have sufficient cash to meet their ongoing current liabilities to the end of September, 2006 and in a bankruptcy scenario it is likely that there will be little if any recovery for the unsecured creditors of the Insolvent Corporations.

[43] Accordingly, I conclude that each of the requirements of section 50.4(9) of the BIA are satisfied on the facts of this case and that an extension of time for filing a proposal should be granted.

CONCLUSION AND DISPOSITION

[44] In the result, an Order will issue that the Insolvent Corporations may file a joint proposal pursuant to the provisions of the BIA, and that, pursuant to Section 50.4(9) of the BIA, the time for filing a Proposal is extended by 45 days to September 10th, 2006.

Peter S. Glennie
A Judge of the Court of Queen's Bench
of New Brunswick

13p.

6

IN THE SUPREME COURT OF NOVA SCOTIA
IN BANKRUPTCY AND INSOLVENCY
Citation: Lundrigan (Re), 2012 NSSC 231

Date: June 18, 2012
Docket: B 36348
Registry: Halifax

District of Nova Scotia
Division No. 3 - Sydney
Court No. 36348
Estate No. 51-1464188

In the Matter of the Bankruptcy of Daniel George Lundrigan

D E C I S I O N

Registrar: Richard W. Cregan, Q.C.

Heard: May 10, 2012

Present: Joseph R. Wall, representing the Attorney General of Canada.

Rita Anderson, representing the Trustee, PricewaterhouseCoopers.

Daniel George Lundrigan, representing himself.

[1] Background

This is an application by Daniel George Lundrigan for relief under Subsection 178(1.1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (*BIA*) with respect to two student loans which have remained outstanding after his discharge from Bankruptcy. It is opposed by the Attorney General of Canada.

[2] Mr. Lundrigan enrolled in a two year course at the Marconi Campus in Sydney in 2003. However after completing one and a half years, his common law relationship ended leaving him responsible for debts totalling $27,000.00, in addition to two student loans, one under Federal sponsorship and the other under Provincial sponsorship, on which were owing on the date of his assignment, February 17, 2011, balances of $14,575.97 and $3,799.49 respectively.

[3] He ceased to be a student in June 2004. This date is 4 months short of seven years from the date of his assignment. Accordingly, because of the provisions of Subsection 178(1)(g) of the *BIA*, the student loans were not discharged with his automatic discharge on November 18, 2011.

[4] There was considerable pressure on him to deal with the indebtedness from his broken relationship. His father agreed to help him. They arranged a loan with the TD Bank for the $27,000.00. His father co-signed the loan on condition that he live at home and thus be able to make $600.00 payments each month against this loan. He had to leave his studies and find work. The loan apparently was paid in a timely manner. He then addressed his student loans. He had an understanding with the collection agency that he would pay $150.00 per month. That was all he could pay as he was no longer living at home. He only made 9 payments.

[5] He has been working throughout as a cashier at the casino in Sydney. He has married. He and his wife, Michelle Lynn Lundrigan, have twins, born July 19, 2010.

[6] His monthly take home pay averages $1,500.00. His wife's monthly take home pay averages $1,084.00. She also receives the Child Tax Benefits of $223.00 and Universal Child Care Benefit of $200.00 each month. The total current household monthly income is now $3,007.00.

[7] He works the evening shift at the casino and she works during the day so that one of them is always able to look after their children. This way they avoid child care expenses.

[8] The claims made in his bankruptcy, in addition to the student loans, consisted of a secured claim by TD Canada Trust for $10,875.47, and an unsecured claims of Capital One Services, LLC for $4,163.76.

[9] Mr. Lundrigan's work at the casino is steady but he does not see any opportunity for advancement. He does not see that there are other opportunities in the region for him which would pay more.

[10] If he had completed the course at the Marconi Campus, he would be qualified for much better paying work. He needed another half year of study to complete it. He doubts that he could now complete the course. He probably would have to start all over again as the technology involved is always changing.

[11] Law

To be relieved of student loans under Subsection 178(1.1) a bankrupt must satisfy the court that:

> (a) the bankrupt has acted in good faith in connection with the bankrupt's liabilities under the debt; and
>
> (b) the bankrupt has and will continue to experience financial difficulty to such an extent that the bankrupt will be unable to pay the debt.

[12] I must be satisfied that Mr. Lundrigan has acted in good faith with respect to these debts. The following is a review I have made of cases and commentary on good faith. A number of points are relevant to Mr. Lundrigan's situation.

[13] I shall start by quoting what I wrote in *Hankinson (Re)*, 2009 NSSC 211:

> [17] *Re Minto* (1999), 14 C.B.R. (4th) 235 (Sask., Registrar Herauf) is often referred to for its list of factors relevant to the determination of good faith. In paragraph [62] he says:
>
> > I agree with counsel that in the context of student loans one can look at certain factors considered in determining whether a condition should be imposed on the discharge of a bankrupt with student loan liabilities; namely, whether the money was used for the purpose loaned, whether the applicant completed the education, whether the applicant derived economic benefit from the education (ie: is the applicant employed in an area directly related to the education), whether the applicant has made

> reasonable efforts to pay the debts and whether the applicant has made use of available options such as interest relief, remission, etc.

[18] Registrar Sprout in *Kelly, Re,* 2000 CanL II 22 497 (Ont., S.C.) after referring to these factors added:

> - the timing of the bankruptcy, and
> - whether the student loan forms a significant part of the bankrupt's overall indebtedness as of the date of bankruptcy.

[19] I would add the following:

> - whether the applicant had sufficient work and income to be reasonably expected to make payments on the loan,
> - the lifestyle of the applicant,
> - whether the applicant has had sufficient income for there to be surplus income under the Superintendent's standards,
> - what proposals the applicant may have made to the loan administrators and the responses received, and
> - whether the applicant was at any time disabled from working by illness.

[14] Black's Law Dictionary (9th ed): gives the following definition:

> A state of mind consisting in (1) honesty in belief or purpose, (2) faithfulness to one's duty or obligation, (3) observance of reasonable commercial standards or fair dealing in a given trade or business, or (4) absence of intent to defraud or to see unconscionable advantage. - Also termed *bona fides.*
>
> > "The phrase 'good faith' is used in a variety of contexts, and its meaning varies somewhat with the context. Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party; It excludes a variety of types of conduct

> characterized as involving 'bad faith' because they violate community standards of decency, fairness or reasonableness.,

and Barron's Law Dictionary, 3rd edition, the following:

> GOOD FAITH a total absence of any intention to seek an unfair advantage or to defraud another party; an honest and sincere intention to fulfill one's obligations. In the case of a merchant, good faith refers to honest in fact and the observance of reasonable commercial standards of fair dealing in the trade. U.C.C. §2-103(1)(b). More generally, the term means "honesty in fact in the conduct or transaction concerned. "U.C.C. §1-201(19).

[15] In Frank Bennett: *Bennett on Bankruptcy,* 14th ed, at page 564 the following factors are suggested:

- whether the money was used for the purpose loaned;
- whether the bankrupt completed the education;
- whether the bankrupt derived economic benefit from the education, namely whether the bankrupt obtained a job in the area directly related to the education;
- whether the bankrupt made reasonable efforts to repay the debts;
- whether the bankrupt had made use of available options such as interest relief, remission, etc.;
- the timing of the bankruptcy;
- whether the student loans form a significant part of the bankrupt's overall debts.
- whether the bankrupt has acquired a significant estate, property, savings, investments or has the bankrupt incurred and discharged other debts for non-necessaries,

while continuing in default of the student loan;

- whether the bankrupt had sufficient work and income to be reasonably expected to make payments on the loan;

- the lifestyle of the applicant;

- whether the applicant has had sufficient income for there to be surplus income under the Superintendent's standards;

- what proposals the applicant may have made to the loan administrators and the responses received; and

- whether the applicant was at any time disabled from working by illness.

[16] The following is said in Roderick J. Wood: *Bankruptcy & Insolvency Law,* Irwin Law, 2009, at page 295:

> The good faith requirement means that the debtor must have acted honestly both in the bankruptcy and in obtaining the student loan.

[17] *Houlden, Morawetz & Sarra: Bankruptcy and Insolvency Law of Canada,* Fourth Edition, at H§40, page 6-185, says the following:

> "Good faith" implies honesty of intention. Failure to properly disclose the debtor's marital status on the student loan application shows dishonesty of intention: *Re Dustow* (1999), 14 C.B.R. (4th) 186, 1999 Carswell Sask 831, 193 Sask. R. 159 (Sask. Q.B.).
>
> In determining whether the bankrupt acted in good faith, the following factors may be

> considered:
>
> 1. Was the money used for the purpose loaned?
>
> 2. Did the bankrupt complete the education or make an honest effort to do so?
>
> 3. Did the bankrupt derive benefit from the education in the sense of gaining employment in an area directly related to the education?
>
> 4. Did the bankrupt make reasonable efforts to pay the loan or did the bankrupt make an immediate assignment in bankruptcy?
>
> 5. Did the bankrupt take advantage of other options with respect to the loan such as interest relief or loan remission?
>
> 6. Was the bankrupt extravagant or irresponsible with his or her finances?
>
> 7. Did the bankrupt fairly disclose his or her circumstances on the application for the loan in the sense of acting with an honest intention?

[18] In *Duke* v. *Nanaimo* (*Regional District*)(1998), 50 M.P.L.R. (2d) 116 (B.C.S.C.) at paragraph 52 one finds the following:

> Although the phrase "good faith" always contains a component of honesty, it often connotes additional qualities depending on the circumstance in which it is used. In my view, the requirement of good faith mandates genuineness, realism and reasonableness both subjectively and objectively.

[19] *Lowe, Re,* 2004 ABQB 255 (Romaine J.) concerned a modest balance owing on a student loan of a bankrupt, the head of a family of eight. He ran a successful business. The family income was well in excess of $100,000. It was observed they lived very well - two cars, several computers,

involvement in sports, the expenses for which were very high. He never made voluntary payments on the student loan in question. He spent his money on family priorities. The point made in this case is that, although it is important that children be given access to sports, cultural activities etc., good faith requires that one's priorities reasonably reflect community standards. Put another way, a certain life style is necessary to earn a living and be a part of a community, and children should be able to participate in community activities, sports, etc., but the expenditures must be reasonable; extravagance is not acceptable. This observation applies to both the bankrupt's good faith and ability to pay.

[20] In *Cardwell, Re*, 2006 SKQB 164, Registrar Herauf was first concerned with whether Subsection 178(1.1) relief was available to one who had made a consumer proposal. He determined that it did, but questioned whether making such was indicative of good faith. He said:

> 55.To put it bluntly, I have not been convinced that the applicant has satisfied the requirements in subsection 178(1.1) of the *Act*. The applicant made no attempt to make any payment until compelled to do so by enforcement action brought against him. He did not take advantage of any interest relief mechanisms. While I certainly appreciate the effort by the applicant to complete a Consumer Proposal I cannot equate that effort as a show of good faith. It

> was judgment enforcement that prompted the Consumer Proposal and not a genuine effort by the applicant to pay down this debt.
>
> 56. I also agree with the respondent's submission that the applicant is gainfully employed in a profession for which he received a student loan funded education. Furthermore, he will be employed in that area for the foreseeable future. The applicant earns substantial remuneration for this work. To allow the application in the present circumstances would make a farce of this provision.

[21] In *Fournier, Re*, 2009 Carswell Ont. 3522, Registrar Nettie considered the need for the applicant to have acquired a new automobile when it was apparent that she could be well served by public transit, as she lived and worked in central Toronto. He said:

> 14. When what apparently gives in her budget at the same time that the car is leased are the payments to the student loans, I find this not to be acting in good faith in respect of those loans. No evidence was offered of any real exploration of taking public transit, or of keeping the old car, either of which would have permitted continued or increased payments on the student loans, and I draw the adverse inference that either of those options could have resulted in money being paid under the loans, . but that the Applicant chose to have a new car for reasons personal to herself, and not in keeping with her obligation to act in good faith to these two loan programs.
>
> 15. Turning to the second part of the test, financial difficulty, I find that while the Applicant certainly appears to be in financial difficulty, her present difficulty is of her own choosing - the car. But for that new car, which increases her regular transit

> costs from approximately $200.00 per month for bus passes to $800.00 or more, she would be able to make her support payments and pay something to the student loans.

[22] Analysis - Good Faith

Mr. Lundrigan has not benefitted from the education acquired with the money borrowed. The technology behind it is now stale. The asset he acquired with the loans in now of little, if any, value to him.

[23] One might criticize him for abandoning his studies with only six months left in the course. However, one must consider the situation he was in. In addition to these loans he was confronted with the debts he assumed from his previous relationship. No doubt he was being pursued by creditors more aggressive than the student loan authorities. He was a person with limited qualifications in an acknowledged depressed economic area. His father was willing to help him with the assumed debts. He let him stay at home free, so that from a modest income he was able to repay them, no doubt with his father seeing that such happened as quickly as possible. His father's generosity did not extend to the student loans. He had done his part. It might be argued that he preferred these creditors to his student loan

creditors. I do not see this as a strong argument. He managed what he could with limited income. His father's help was limited.

[24] One can second guess what he did. Maybe he could have made a few more payments, but with his limited income the amount available would not be significant. In the situation he found himself I do not see that he can be accused of acting unreasonably. There is no suggestion of extravagance on his part nor of dishonesty. With the birth of his children and with his limited income I see no basis for suggesting that he should be paying anything on these loans to prove that he has been acting in good faith.

[25] As to the period before his children's birth, there is nothing before me to suggest that he was not acting in good faith. He made some payments. He discharged the other loans, which would not have been possible without his father's help and discipline. There would have been little, if anything, left over.

[26] Although the respondent has suggested bad faith on Mr. Lundrigan's part, and one must be careful in this regard, no real incidents of it have been

proved. The question is simply - Has Mr. Lundrigan, considering all the circumstances and looking at the total picture, acted in good faith?

[27] He found himself in debt because of personal misfortune. He was fortunate that his father offered to help him out. He would not help him with the student loan, but at least he was relieved of the greater part of his indebtedness. There were few options for him. He did what he could, maybe not perfectly. He would not have had any significant surplus income prior to the birth of his children, and certainly has had none since. The most he could find for the student loans would be very little.

[28] Some flexibility and generosity regarding human nature has to be given in determining whether one has acted in good faith. One must look at his actions and ask whether he has he acted in good faith. His resources have been limited. To act in good faith does not require perfection. I think he, on the whole, has acted with honesty and reasonableness. I am thus satisfied that he has acted with the good faith required of him.

[29] Analysis - Financial Difficulty

As to financial difficulty, the household monthly income is approximately $3,000.00. The Superintendent's Standard for a family of four is currently $3,680.00. There is no reasonable expectation of any significant increase in the family income. He and his wife have two young children to raise on a modest income. Their circumstances are such that I am quite satisfied that they will continue to have financial difficulty and be unable to pay off these loans.

[30] Conclusion

He is entitled to the relief provided by Subsection 178(1.1) of the *BIA*.

R.

Halifax, Nova Scotia
June 18, 2012

7

SUPREME COURT OF NOVA SCOTIA
IN BANKRUPTCY AND INSOLVENCY

Citation: *Atlantic Sea Cucumber Limited (re)*, 2023 NSSC 238

Date: 20230721
Docket: No. 45461
Registry: Halifax
Estate Number: 51-2939212

In the Matter of: The intention to make a proposal by Atlantic Sea Cucumber Limited

Registrar:	Raffi A. Balmanoukian, Registrar in Bankruptcy
Heard:	July 17, 2023, in Halifax, Nova Scotia
Final Written Submissions:	July 17, 2023
Counsel:	Darren O'Keefe and Caitlin Fell, for the applicant Atlantic Sea Cucumber Limited ("ASC" or the "Debtor") Joshua Santimaw, for the Trustee MSI Spergel Inc. (the "Trustee") Gavin D.F. MacDonald and Meaghan Kells, for the objecting creditor, Weihai Tawei Haiyang Aquatic Food Co. Ltd. ("WTH")

Revised Decision: The text of the original decision has been corrected according to the attached erratum, dated **July 25, 2023.**

Balmanoukian, Registrar:

[1] On July 19, 2023, I wrote to Counsel in the form attached, dismissing the application by Atlantic Sea Cucumber Limited ("ASC" or "Debtor") for an extension of time to file a proposal pursuant to s. 50.4(9) of the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3 as amended (the "BIA"), following an unsuccessful application to convert the matter to a proceeding under the *Companies Creditors Arrangement Act* , RSC 1985, c. C-36, as amended (the "CCAA"). This exension application also sought to abridge time for making that application, and for the matter to be heard by a Justice or by the Registrar on an emergency basis, *ex parte*. The Trustee, MSI Spergel Inc. (the "Trustee") supported this application. The objecting creditor, Weihai Tawei Haiyang Aquatic Food Co. Ltd. ("WTH") did not. This document is to put that communication in reportable form. With the exception of this introductory paragraph, and to add paragraph numbers, there have been no changes from the body of that letter, and it is so reproduced below.

[2] On Monday, July 17, 2023 at 4:00 pm, I heard this application on an emergency basis. At the conclusion of that hearing, I gave a 'bottom line' decision dismissing the application, with reasons to follow, in accordance with the Court of

Appeal's comments in *R. v. Desmond*, 2020 NSCA 1 respecting written supplements to oral decisions. As I understand an appeal has been filed (which I have not seen), I will do so in this format and in a summary fashion.

[3] On May 1, 2023, the Debtor filed a Notice of Intention to make a proposal. On May 26, 2023, Debtor's counsel filed a first application to extend time pursuant to s. 50.4(9) of the BIA. I granted it (and an application for abridgement of time) on May 31, 2023, which was the last day of the initial stay. Mr. MacDonald, for WTH, did not object to the abridgement but did object to the extension (or in the alternative sought a shorter extension). I granted the extension for the full 45 days, given that a 30 day period proposed by Mr. MacDonald as an alternative to a refusal would coincide with the Canada Day weekend. However, I expressed significant concern both with the timing of the application, in light of the timing of the Trustee's first report (May 24, 2023) and observed that there may have been incomplete communication between Trustee and Debtor for a period of time between the initial NOI and the Trustee's first report. I emphasized to all parties that I would be seeking fulsome evidence of substantive progress, should a further extension be sought.

[4] On July 6, 2023, the Debtor sought to convert to CCAA proceedings. That was heard, I understand on a contested basis, before Justice Rosinski on July 13,

2023, two days before the BIA stay was set to expire. No prior application was made to extend the BIA stay. I was advised by counsel that the determination to seek to proceed under the CCAA was made in "late June" and that it was deemed to be a "no brainer" that the initial CCAA order would be granted, notwithstanding that it was to be contested.

[5] On the afternoon of July 13, 2023, Justice Rosinski heard the CCAA application and I understand that was dismissed on Friday, July 14, 2023 with reasons that are yet to follow.

[6] WTH asserts that the BIA stay expired on Saturday, July 15. It argues that the federal Interpretation Act, not the Civil Procedure Rules, applies and that Saturdays "count" for such purposes. As such, the application for extension of time that was filed and heard on Monday, July 17 was out of time. That application also sought to abridge time, and for the matter to be heard *ex parte* (although WTH, the Trustee, and perhaps others were in fact served).

[7] That application was filed with the Supreme Court, not with me as Rule 9(5) of the BIA *General Rules* require; in fairness, the cover email to the Court sought either a Justice or the Registrar, and the matter was redirected to me.

[8] I did not explicitly deal with the *ex parte* element of the application, as the objecting creditor and trustee in fact appeared, and I was prepared for the sake of argument to accept that the July 17 application was not out of time.

[9] I was presented with the Trustee's second report, which was principally if not exclusively for the CCAA proceedings. I was also advised that the Trustee had completed an inventory and the report contains a cash flow projection (including $325,000 in professional fees over four months on $800,000 in sales), and obtained an opinion on the "validity and enforceability" of security granted by the Debtor to a non-arm's length entity.

[10] WTH objects to various assumptions and elements in this opinion, including under ss. 95 and 137 of the BIA and the *Statute of Elizabeth*. It points out that the security was granted just after Justice Coughlan's decision in favour of WTH against the Debtor (2023 NSSC 27), and just two months prior to the Debtor's NOI, although it purports to secure advances made in 2018.

[11] Because of this dispute (and continuing developments in determining creditors), it is currently unclear whether WTH has a 'veto' on any proposal or not. Although I am cognizant of Justice Moir's decision in *Kocken* (2017 NSSC 80) that adverse statements by a veto-holder with respect to a proposal are not

determinative of its ultimate viability, in these circumstances I did pay some attention to WTH's comments, for reasons to which I will return.

[12] Against that backdrop, I considered (using the assumption that the application was not in fact out of time to begin with) the three part test in s. 50.4(9) BIA, which may be summarized as present and continuing good faith and diligence, the "likelihood" of an ultimate viable proposal, and lack of material prejudice to any creditor. I further considered whether, should the test be met, granting an extension would be a proper exercise of my resultant discretion. I will discuss the 50.4(9) requirements in inverse order.

Prejudice

[13] WTH concedes that an extension would not materially prejudice it under 50.4(9)(c). I agree.

Proposal viability

[14] I was asked for a ten day extension, following Justice Rosinski's oral decision. This was not ultimately for the purposes of getting a proposal out to creditors or before the Court, but to assemble the materials to make a *further* extension application. In short, the "no brainer" that the Debtor thought it had in

obtaining the CCAA initial order caught the Debtor with its pants down when the application was refused at a minutes-to-midnight deadline.

[15] This is not the test under 50.4(9)(b) respecting "proposal viability" although I conclude that the application fails not for lack of viability, but under 50.4(9)(a)'s requirement for good faith and due diligence or, if I am wrong, because I would not exercise my discretion in favour of the Debtor.

[16] In *Re T&C Steel Ltd. et al*, 2022 SKKB 236, Justice Scherman reviewed the "viability" test, particularly in the context of a second (or subsequent) application, as follows:

> [7] In Enirgi Group Corp. v Andover Mining Corp., 2013 BCSC 1833, 6 CBR (6th) 32 [Enirgi Group], the Court said:
>
> > [66] Turning to s. 50.4(9)(b), a viable proposal is one that would be reasonable on its face to a reasonable creditor; "this ignores the possible idiosyncrasies of any specific creditor": Cumberland [[1994] OJ No 132 (Ont Ct J)] at para. 4. It follows that Enirgi's views about any proposal are not necessarily determinative. The proposal need not 2022 SKKB 236 (CanLII) - 4 - be a certainty and "likely" means "such as might well happen." (Baldwin [[1994] OJ No 271 (Ont Ct J)], paras. 3-4). And Enirgi's statement that it has lost faith in Andover is not determinative under s. 50.4(9): Baldwin at para. 3; Cantrail at paras. 13-18).

[17] The Court went on to cite my own decision in *Re Scotian Distribution Services Limited*, 2020 NSSC 131, drawing a distinction between a "first extension" and a subsequent one. Justice Scherman was quite critical of the dearth of information before it, granting the second extension by the proverbial skin of its teeth.

[18] In summary, the test for the likelihood of a viable proposal is an objective one: *Nautican v. Dumont*, 2020 PESC 15 at paras. 16-18. Chief Justice Kennedy put it this way (invoking the inimitable Justice Farley in the process) in *Re Scotian Rainbow Ltd. et al*, (2000), 186 NSR (2d) 154 at para. 17 *et seq.*:

> [17] As to s. 50.4(9)(b), that the insolvent person would likely be able to make a viable proposal of the extension being applied for were granted. Counsel for the primary creditor Shur Gain, in support of the applicant, has brought to this Court's attention the case of *Re Baldwin Valley Investors Inc.* (1994), 23 C.B.R. (3d) 219. In that matter Justice Farley of the Ontario Court of Justice (General Division) (which it then was), Justice Farley considers the phrase a viable proposal as set out in subsection (b) of s. 50.4(9). He says that that phrase should take on a meaning akin to one that seems reasonable, a proposal that seems reasonable on its face to the reasonable creditor. Reasonable on its face to the reasonable creditor. Justice Farley says this ignores the possible idiosyncrasies of any specific creditor. Justice Farley also examines the meaning of the word 'likely', and refers to the Concise Oxford Dictionary of current English where likely is defined, and I quote:
>
> > Might well happen or turn out to be the thing specified.
>
> [18] Might well happen or turn out to be the thing specified...I am in agreement with Justice Farley's determinations as to the meaning of these

> words, and I adopt his findings as to their meanings for our purposes. When I make reference to those words for our purposes, I am adopting Justice Farley's definitions.

[19] While I have very considerable doubts in the context of a second extension of "viability," particularly given WTH's express loss of confidence in the Debtor and its ability to drive a proposal, given the objectivity of the test and the binding comments of Justice Moir in *Kocken*, I am compelled on a bare balance of probabilities *for current purposes* to conclude that the "viability" test, as interpreted by the caselaw, has been met.

Good faith and due diligence

[20] That leaves us with 50.4(9)(a) – the due diligence and good faith tests – and with my discretion.

[21] Mr. O'Keefe urges that in his experience, the 59.4(9)(a) inquiry is little more than a catechism – a recitation by the Trustee that good faith and due diligence are at hand. I do not accept that is appropriate. It is a determination to be made by the Court, not by the Trustee. It is also something of an exercise in "don't ask a barber if you need a haircut." I observed this in stark relief at the initial extension application when the Trustee's representative (a different individual from that later involved in the file) became quite agitated when I challenged the timeline leading

up to that initial (and successful) extension application and whether developments to that date passed the "due diligence" test."

[22] The current case is something of an unusual situation in that although there were notable developments between May 31 and July 6, they were primarily if not exclusively geared towards converting the insolvency to CCAA proceedings. As I read the BIA, the "good faith and due diligence" requirement relates to the development of a viable proposal, not to other insolvency options. In *Re Royalton Banquet and Convention Centre Ltd.* 2007 CanLii 1970 (Ont. SC), the Court refused an extension when nothing had been done "in preparing the proposal." While there was no indication on whether any other work had been done at all (unlike the present case), I read this as supporting the view that due diligence relates to moving the (likely viable) proposal forward – not other options.

[23] Again, it appears that the Debtor thought a Justice would "rubber stamp" an initial CCAA order, filed on the eve of the expiry of the initial BIA extension, and when it was unsuccessful was left scrambling for a second BIA extension – not having left time either for a Justice to consider the CCAA application in a timely fashion, or to make a timely application to extend the 50.4 timeline should that be unsuccessful (as it ultimately was). As I discuss below, as well, I question whether in the last 75 days, more could have been done to determine who are the creditors

and what is their status. On balance, I am not convinced that what has been done, in these circumstances, are adequate to satisfy me to a civil standard of due diligence.

[24] Which brings me to good faith. There are two places where this is relevant: directly, in the 50.4(9)(a) test, and more holistically under Section 4.2(1) of the BIA.

[25] I begin by observing that a failure to prove good faith is not the same as a finding of bad faith. It does not require malice or caprice or abuse of process. It is an affirmative test – that there is good faith; not the presence or absence of bad faith.

[26] At all Court stages of this and the CCAA proceeding, there have been distinct flavours of attempts to "strong arm" the Court by compressing timelines where the upshot has been "you have to sign this or disaster will result." It will be recalled that the initial 50.4(9) extension was filed on May 26 (together with an application for abridgement of time) and was heard on the very last possible day. The CCAA application was heard on the last juridical day before that extension expired (having been filed seven days prior). The CCAA materials make the point that if the initial CCAA order was not granted, a disastrous bankruptcy would

follow; when that was rejected, the Debtor returned (arguably out of time) to this Court making the same argument, and sought to do so *ex parte* (although again, in fairness, having in fact given short notice to adverse parties).

[27] I was not presented with any reason for this. It is not consistent with good faith and fair dealing. It is, conversely, consistent with attempting to compel the Court to the Debtor's agenda and objectives.

[28] Inconsistent with good faith as well is the current state of affairs. Distilled, it is this: "we were unsuccessful in the CCAA application. We don't have any additional materials to put in front of you; we don't even know what the creditor matrix is going to look like, given a potential substantial additional creditor and the security dispute. So give us ten days to pull that all together because we didn't think we would fail on the CCAA application."

[29] In *Cogent Fibre Inc.*, 2015 ONSC 5139, Justice Penny said this, which I find completely consistent with my prior comments on "recalcitrant creditors" not being determinative but yet not relieving the Debtor of its burden under 50.4(9):

> [17] In effect, Cogent says it needs more time to continue discussions with its two major creditors when at least one of those creditors (a creditor with veto power) has not engaged in any discussions with Cogent and has no intention of doing so. Cogent's position is, I find, entirely tautological.

> [18] In his factum and in oral submissions, counsel for Cogent emphasized the rehabilitative nature of the proposal sections. He relied heavily on recent Ontario and B.C. authority to the effect that a veto-empowered creditor's statement that it will never agree to a proposal is not dispositive of whether to terminate or refuse to extend a stay. I quite agree with this position and the supporting law. Creditors often, for strategic reasons, say they will never agree.
>
> [19] Nevertheless, it seems to me there must be a certain forthrightness on the part of the debtor about what is sought to be achieved. There must also be an air of reality about the likelihood of any proposal being viable. [emphases added]

[30] In this case, the Debtor is essentially saying, "we need more time to get a third extension request in front of you, because we didn't get what we wanted under the CCAA. We know there will be a sale, but we can't tell you yet what that is going to look like or who is going to be voting in what proportions on it." I cannot consider that, on a balance of probabilities, to be "forthright....about what is to be achieved," or in furtherance of good faith. It is at least questionable whether it meets the test of due diligence as well.

[31] In making these comments, I wish to be clear that I am not making negative aspersions as to any individual. I am not privy to the communications among Debtor, Trustee, or Counsel. I am aware that the Debtor's principal is in China and that this posed logistical and perhaps language barriers. This was not a new development and existed at least from the original NOI onward. What is clear is that, for whatever reason, the Debtor found itself in a situation that was awkward at

best and out of time at worst, and expected the Court essentially as a matter of right or rote, to fix it.

Discretion

[32] Finally, I turn to my discretion. 50.4(9) is permissive, not mandatory. It states that I "may" grant an extension (assuming it to be made in time) if the three part test is met. I have assumed the application was timely, and concluded the test was not met. If I am right on the first point and wrong on the second, however, I would not exercise my discretion in favour of the Debtor.

[33] The case law recognizes that a 50.4(9) extension is a discretionary order, if the conditions for its exercise have been met: see *Re Dynamic Transport* 2016 NBCA 70 at paras. 4 and 9; *Re Entegrity Wind Systems Inc.* 2009 PESC 25 at para. 30; *Re Entegrity Wind Systems Inc.* 2009 PESC 33 at para. 36; *Royalton Banquet and Convention Centre Ltd.* 2007 CanLii 1970 (Ont. SC).

[34] Thrice in this insolvency has the Debtor come forward on an "emergency" basis, in effect seeking forgiveness not permission. There are circumstances when that comes with the territory of insolvency. The subject can be on occasions sedate, in others it can develop in real time. However, here it was known both that there was a substantial adversarial and opposing creditor, that the Court was

concerned with the prior timelines, and that the Creditor would be seeking to convert to CCAA proceedings no later than late June. It frankly appears that the Creditor did indeed consider such an application to be what counsel described to me as a "no brainer" and got caught flat-footed when (again at the last possible moment) the initial CCAA order was refused.

[35] It was argued that while this may have been a strategic or procedural mistake, the Debtor should not be held to account for that, given the alleged inimical consequences of a bankruptcy. While both the CCAA and BIA 50.4(9) arguments focused on this alleged destruction of value, no evidence of that was presented to me. I pointed out that a bankrupt can make a proposal (50(1) BIA), and this was argued to be undesirable given the dynamics of who would be "driving the bus" in a bankruptcy proposal versus an insolvency proposal. I did not find that persuasive in convincing me to exercise my discretion if I am wrong in finding that the 50.4(9) "good faith and due diligence" tests have failed. Indeed, it may well be that a change of drivers is exactly what is needed to move the sale process forward, given the other disputes in the file.

[36] As I have said, I am aware that my "bottom line" decision is under appeal, on grounds that I have neither seen nor heard. These reasons will illustrate the basis upon which that decision was made.

[37] Costs were not argued before me. In the circumstances, that issue should it arise is best left to the appellate Justice.

[38] Mr. O'Keefe, solicitor for the Debtor, is to provide a copy of this decision to the service list forthwith.

Balmanoukian, R.

SUPREME COURT OF NOVA SCOTIA
IN BANKRUPTCY AND INSOLVENCY

Citation: *Atlantic Sea Cucumber Limited (re)*, 2023 NSSC 238

Date: 20230721
Docket: No. 45461
Registry: Halifax
Estate Number: 51-2939212

In the Matter of: The intention to make a proposal by Atlantic Sea Cucumber Limited

ERRATUM

Registrar:	Raffi A. Balmanoukian, Registrar in Bankruptcy
Heard:	July 17, 2023, in Halifax, Nova Scotia
Final Written Submissions:	July 17, 2023
Erratum Date:	July 25, 2023
Counsel:	Darren O'Keefe and Caitlin Fell, for the applicant Atlantic Sea Cucumber Limited ("ASC" or the "Debtor") Joshua Santimaw, for the Trustee MSI Spergel Inc. (the "Trustee") Gavin D.F. MacDonald and Meaghan Kells, for the objecting creditor, Weihai Tawei Haiyang Aquatic Food Co. Ltd. ("WTH")

Erratum:

[1] Meaghan Kells was added as co-counsel for the objecting creditor.
[2] Additional underlining was included in paragraph 29.
[3] The word "Debtor" was added the counsel section on the title page and added to the decision in paragraph 1.

8

1986 S.H. No. 55728

89235 004

IN THE SUPREME COURT OF NOVA SCOTIA

TRIAL DIVISION

BETWEEN:

PETER R. ARNOLD, CARL T. BOSWICK, FRED HANSEN and FRANCIS DUNSWORTH, in their own right and as representatives of all the limited partners in One Oak Street Limited Partnership, Invesco Developments Limited Partnership and Kencrest Estates Limited Partnership and in their own right and also as representatives of all the beneficial owners of property held in trust by Templeton Woods Limited and Skyline Apartments Limited

Plaintiffs

- and -

PERRY N. ROCKWOOD, GEOFFREY P. CHRISTOPHERSON, DIVERSIFIED EQUITIES LIMITED, a body corporate (formerly known as Rockwood Real Estate Limited); RESCOM PROPERTY INVESTMENTS LIMITED, a body corporate (formerly called Rockwood Management Group Limited); ONE OAK STREET LIMITED PARTNERSHIP, a limited partnership, ONE OAK STREET LIMITED, a body corporate; INVESCO DEVELOPMENTS LIMITED PARTNERSHIP, a limited partnership, INVESCO DEVELOPMENTS LIMITED, a body corporate, KENCREST ESTATES LIMITED, a body corporate, TEMPLETON WOOD LIMITED, a body corporate and SKYLINE APARTMENTS LIMITED, a body corporate

Defendants

HEARD: at Halifax, Nova Scotia, before the Honourable Mr. Justice J. M. Davison, in Chambers on April 5th and 6th, 1989

DECISION: August 3, 1989

COUNSEL: Darrel I. Pink, Esq.
Janet M. Chisholm, Esq.
- for the Receiver, Coopers & Lybrand Limited

Michael S. Ryan, Q.C.
Phillip Jenkins, Articled Clerk
- for the general partner of Invesco, B & R Holdings Limited

1986 S.H. No. 55728

IN THE SUPREME COURT OF NOVA SCOTIA
TRIAL DIVISION

BETWEEN:

PETER R. ARNOLD, CARL T. BOSWICK, FRED HANSEN and FRANCIS DUNSWORTH, in their own right and as representatives of all the limited partners in One Oak Street Limited Partnership, Invesco Developments Limited Partnership and Kencrest Estates Limited Partnership and in their own right and also as representatives of all the beneficial owners of property held in trust by Templeton Woods Limited and Skyline Apartments Limited

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PERRY N. ROCKWOOD, GEOFFREY P. CHRISTOPHERSON, DIVERSIFIED EQUITIES LIMITED, a body corporate (formerly known as Rockwood Real Estate Limited); RESCOM PROPERTY INVESTMENTS LIMITED, a body corporate (formerly called Rockwood Management Group Limited); ONE OAK STREET LIMITED PARTNERSHIP, a limited partnership, ONE OAK STREET LIMITED, a body corporate; INVESCO DEVELOPMENTS LIMITED PARTNERSHIP, a limited partnership, INVESCO DEVELOPMENTS LIMITED, a body corporate, KENCREST ESTATES LIMITED, a body corporate, TEMPLETON WOOD LIMITED, a body corporate and SKYLINE APARTMENTS LIMITED, a body corporate

Defendants

DAVISON, J.:

This is an application by Coopers & Lybrand Limited (Coopers), a court appointed receiver of the defendants (except Perry N. Rockwood), to fix a proper remuneration pursuant to

Civil Procedure Rule 46.03 and for an order providing for distribution of the remaining funds in the hands of the receiver and discharging the receiver. The amounts submitted for remuneration of the receiver and the amounts submitted as an account for Patterson Kitz, solicitors for the receiver, are vigorously contested by B & R Holdings limited, the general partner of Invesco Development Limited Partnership (Invesco).

The defendants, Perry N. Rockwood and Geoffrey P. Christopherson, were promoters of a number of business ventures in the Halifax and Dartmouth area. The other defendants were the general and limited partners of various properties in the area. By an order of this court dated February 26th, 1986, Coopers was made receiver and manager of the properties and assets of the partnership defendants including Invesco. The appointment was extended by further orders of the court, the last being dated the 1st day of March, 1988, which provided that the appointment should terminate on the 1st day of June, 1988, unless extended. No further steps were taken to extend the appointment of the receiver beyond June 1st, 1988. In addition, the general partner takes the position there was a period between October 26th, 1986, and December 1st, 1987, when the receiver acted without authority because an order of the court in August, 1986, stipulated the appointment was to terminate October 26th, 1986, and there was no further order until December 1st, 1987, which provided the appointment would terminate on

March 1st, 1988.

The work for which the receiver and its solicitors seek compensation all relate to services performed in connection with Invesco. At the time the receiver was appointed, the only asset of Invesco was raw land situate at Lake Banook in Dartmouth, Nova Scotia.

Marcus Wide was a vice-president of Coopers who conducted the receivership and he described the situation at the time the receiver was appointed. He said the mortgages on the properties of the various defendants were, for the most part, in arrears and there was co-mingling of funds between the various projects. While the books and records of the companies were incomplete, it was apparent that the defendant companies were not meeting their obligations and that the property stood in jecpardy of being lost for the investors.

Invesco had granted a mortgage to Dover Mortgage Corporation Limited whereby its sole asset was used to secure the advance of a sum of $300,000.00 at 16½%. In addition, lands owned by Perry Rockwood at Liscomb Court in Dartmouth were used as security for the advance under the mortgage. The Dover mortgage was actually second to a mortgage in favour of Atlantic Trust Company but there was default under both mortgages and an action for forclosure and sale was commenced on February

12th, 1986.

The present proceeding (the receivership action) was commenced on February 26th, 1986, whereby Coopers was appointed receiver and manager of the property and assets of Invesco and its general partner, Invesco Developments Limited.

On April 12th, 1986, Coopers, with the assistance of their solicitor, arranged for a meeting with the investors with a view to giving the investors information as to the status of their investments and an estimate of the costs required to keep the various projects in operation. One of the objectives of the meeting for the receiver was to obtain instructions from the investors and, in particular, a decision as to whether they wanted to advance sufficient funds to maintain the properties or have the properties sold. There was no consensus at the meeting. It was clear that there was sufficient value in the properties to cover the mortgages. Only the investment of the investors was in jeopardy. At that meeting, there was a discussion about the Dover mortgage. Concern was expressed by the receiver about the validity of the mortgage. Generally, the meeting concluded with instructions given to the receiver to solicit proposals from prospective new general partners and to seek purchase proposals with respect to the various enterprises.

Mr. Wide gave evidence as to what took place with

respect to each of the businesses and the extent of success achieved in attaining general partners and arrangements for the sale of the various properties.

The next meeting of investors took place on May 26th, 1986. After a discussion, two resolutions were passed. It was resolved that Coopers would take steps to challenge the validity of the Dover mortgage and that Cocper should obtain court approval to borrow funds and sell the mortgaged property.

One of the positions taken by the general partner (B & R) in the proceeding before me is the amount of the fees of Patterson Kitz which should be allowed in defending the Dover mortgage action in view of comments which took place at the meeting of May 26th, 1986. Lecnard A. Kitz, Q.C., senior partner of Patterson Kitz, attended at the meeting as an observer. Mr. Kitz was not an investor nor was he acting as a solicitor. The members of the firm who were acting as solicitors for the receiver and for the investors were Douglas A. Caldwell, Q.C. and Darrell Pink. At a time when the cost of the forclosure was being discussed, Mr. Kitz rose and advised the assembled investors that if the defence of the Dover mortgage action did not succeed, the law firm which bears his name would only charge $5,000.00. It is common ground that the defence did not succeed and Patterson Kitz claims for fees, as it relates to the defence of that action, the amount of $38,333.12.

Evidence is before me by way of affidavit and viva voce from various persons as to what took place at the meeting. B & R filed the affidavits of two solicitors and a chartered accountant of Halifax, all of whom were representing investors. These three affidavits are consistent in stating that there was considerable concern expressed by the investors about the costs being incurred by the receiver and its solicitor. Mr. Caldwell, who was chairing the meeting, was asked as to the extent of the anticipated costs of the action involving the Dover mortgage. He suggested a figure in the vicinity of $30,000.00 to $50,000.00. When this seemed to receive a negative reaction from the persons assembled, Mr. Kitz rose and advised that if the action was lost, the law firm would charge no more than $5,000.00 but if the defence was successful, they would be paid on a full solicitor and client basis. One of the solicitors, in his affidavit, deposed that Mr. Caldwell took no steps to distance himself from Mr. Kitz's statement after it was made. The chartered accountant deposed to the view that he believed that the affirmative resolution to challenge the Dover mortgage was made on the strength of Mr. Kitz's undertaking.

Mr. Wide, in his testimony, described how Mr. Caldwell had given the meeting a range of $20,000.00 to $50,000.00 for the anticipated fees. At that point, the investors had difficulty making up their mind if they wanted to commit themselves to that amount of money. At this point, Mr. Kitz interjected with

his suggestion. Mr. Wide said he was surprised at this suggestion and wondered if Mr. Caldwell would permit "that to stand, that offer of Mr. Kitz". Mr. Wide then testified as follows:

> The conversation very quickly continued and it was my perception that Mr. Caldwell indicated that he did not necessarily agree with his partner, Mr. Kitz, or recognizing him as a senior partner in the firm and I believe he restated the range of values that he thought it would take and the meeting moved on.

On cross-examination, Mr. Wide agreed that the solicitor, whose affidavit was filed, had probably had a better recollection than that of Mr. Wide.

Mr. Douglas A. Caldwell, Q.C. in his affidavit stated that, after Mr. Kitz made his comment, he informed the meeting that Mr. Kitz's estimate was not realistic and the fees depended upon the complexity of the proceedings. Mr. Caldwell was cross-examined on his affidavit and he testified that he believed that Mr. Kitz attended the April 12th meeting and not the May 26th meeting, even though he and all of the other deponents stated that Mr. Kitz attended at the May 26th meeting. Mr. Caldwell said that he came to this conclusion after he reviewed his files and found a letter dated April 28th which he directed to the investors and which made reference to the costs of defending the foreclosure action having been discussed at the April 12th meeting and the statement in the letter was - "We suggested that the order of magnitude would be $50,000.00 rather

than $5,000.00. However, as we review the matter, we can forsee that the costs might be in the order of $15,000.00 to $25,000.00." As this evidence contradicted all of the existing affidavits, including Mr. Caldwell's own affidavit, counsel for B & R requested an adjournment to have this issue thoroughly canvassed. Subsequently, I was advised both parties accept the fact that the remarks of Mr. Kitz were made at the meeting of May 26th, 1986.

Following the meeting on May 26th, 1986, solicitors for the receiver proceeded to defend the action for forclosure and sale on the Dover mortgage. The matter was originally set for trial for April 1987 but adjourned until December 8th and 9th, 1987. On December 5th, 1987, there was a meeting of the investors of Invesco and B & R was appointed as the new general partner of Invesco and instructed to take all necessary steps to settle the Dover forclosure action even if it was necessary to consent to judgment. At the same meeting, B & R were instructed to apply to the court to discharge Coopers as receiver and Patterson Kitz as solicitors for the partnership. The trial which had been set for December 8th and 9th was adjourned.

The affidavit evidence would indicate that during the fall months of 1987, Dover solicited and purchased units in Invesco with a view to calling a meeting which eventually

took place on December 5th, 1987, for the purpose of discontinuing Invesco's defence of the foreclosure action.

By letter dated January 6th, 1988, Mr. Ryan, solicitor for B & R, wrote to Mr. Wide requesting details of the outstanding accounts for the receiver and the receiver's solicitor. In that letter, Mr. Ryan suggested that because the rate of interest on the Dover mortgage was 16%, the balance on the mortgage should be paid against an irrevocable letter of credit. Mr. Ryan suggested that there had been a substantial depletion of monies by reason of the difference between the rate of interest earned on monies held by the solicitors in trust for the eventual payment of the mortgage, if necessary, and the rate of interest that was accruing on the Dover mortgage in a compound fashion. The receiver replied by letter dated January 13th, 1988, advising that at the time the Invesco lands were sold in July of 1986, the funds were invested in term deposits and that the solicitors for the receivers had obtained the consent of the court to leave these funds invested in that manner. The receiver went on to say that even if the funds were not under the control of the court, he had difficulty in agreeing to pay off the mortgage because they took the view that the mortgage was invalid and if the mortgage was paid off, the investors would lose the interest that accrues on the term deposits. In his evidence, the receiver suggested that the court was not prepared to take a substitute security and that any letter of credit was subject

to negotiation. On cross-examination, Mr. Wide admitted that it would probably have been prudent to have changed the security if the court had permitted such a change and that terms could be arranged which would be acceptable to the receiver. The issue had never been brought to the attention of the limited partners or discussed with the limited partners.

Mr. Caldwell said that he and the receiver had frequent discussions concerning the differential in the interest rates between the mortgage and the term deposits. Mr. Caldwell said that he felt the court had found that the money should go to the Accountant General. On discovery examination, Mr. Caldwell advised that he did not give any consideration to approaching Dover to ascertain if some solution could be reached including payment against security by way of letter of credit or guarantee.

In his affidavit, Mr. Caldwell stated that by February of 1988, the general partner had taken no steps to discharge the receiver. On March 23rd, 1988, the receiver applied to the court for directions and, by an order of that date, Mr. Justice Grant declared that the resolutions passed on December 5th, 1987, at the meeting of the limited partners involving the appointment of B & R as general partner and the instructions to the general partner to take necessary steps to conclude the Dover forclosure action and to make application for the court to discharge Coopers, were all binding resolutions in full force and effect.

On May 25th, 1988, Coopers applied to Mr. Justice Nathanson in Chambers for an order discharging Cocpers as receiver and directions regarding the approval and payment of the accounts of the receiver and the solicitor for the receiver. The affidavit of Michael S. Ryan, Q.C. indicates that at the time of this hearing, Patterson Kitz applied for a charging order in respect of its fees and disbursements, which application was opposed by counsel for B & R and counsel for Dover. The matter was adjourned without day.

On June 16th, 1988, the solicitor for Dover applied before Mr. Justice Richard of this court who heard and allowed an application to strike a defence by Coopers in the foreclosure action commenced by Dover. At the same time, the court granted an order for judgment in Dover's favour in the foreclosure action. An appeal from this decision was heard by the Appeal Division on November 14th, 1988, and the appeal was dismissed. This concluded and resolved the Dover mortgage litigation and, at the same time, concluded all of the outstanding matters with respect to the receivership.

In November of 1986, the Receiver received, pursuant to an order of the court, fees in the amount of $118,316.50 and disbursements in the amount of $48,629.47. These disbursements included the account to date of Patterson Kitz. In this application, the receiver seeks fees in the amount of

$56,867.00 under the following headings:

Advice to investors	$24,761.25
R.C.M.P. investigation	11,141.25
Dover Foreclosure Action	5,142.50
Alternate Recovery	7,252.50
General Administration	8,569.50

The receiver also seeks approval for accounts of Patterson Kitz in the amount of $59,251.53 attributable to the following:

Dover mortgage foreclosure action	$21,792.77
Alternate recovery	14,465.84
Other general matters	22,992.92

In addition, the receiver seeks $4,000.00 for fees for the discharge and Patterson Kitz has rendered a account of $15,012.49 with respect to time spent by solicitors of that firm on the present application.

It is the position of B & R that the account of the receivers should not exceed $10,000.00 and that the account of Patterson Kitz should be confined to $5,000.00 and a reasonable amount for the discharge application. In particular, it is the submission of B & R that:

1) The receiver engaged in activities for which it had no authority by reason of the determination of the appointment.

2) The receiver engaged in activities which exceeded the powers given to it by the court order. B & R also take the position that the fees of Patterson Kitz should be reduced where it acted as solicitor for the receiver on matters where the receiver exceeded his authority.

3) The receivers acted negligently and in breach of a fiduciary duty which it owed to the limited partners and thereby caused them a loss that should be deducted from any fees to which the receiver would be entitled.

4) Finally, the law firm undertook to charge the limited partners no more than $5,000.00 in the event that the receiver was unsuccessful in defending the Dover foreclosure action and the fees to the firm should be confined to $5,000.00.

By virtue of the **Judicature Act**, s. 39(9), the court can appoint a receiver "in all cases where it appears to the court to be just or convenient that such an order should be made ..." A receiver is an officer of the court who has the duty to discharge his powers in a bona fide fashion and also has a fiduciary duty with respect to all interested parties to act in the best interest of those parties. See **Parsons et**

al v. Sovereign Bank of Canada, [1913] A.C. 160 at 167; **Kerr on Receivers,** 16th ed. at p. 114.

A receiver derives his authority from the order of a court and does not have an inherent power. If he exceeds the power enumerated in the court order, "he may be deprived of his indemnity for fees and expenses" (emphasis added). See Bennett, **Receiverships,** 1985, p. 116. On the other hand, if the receiver does act beyond the terms of the order of the court, and he does so on such terms where he can demonstrate that he did so bona fide, "and that such actions were required to discharge his duties and were a benefit to the operations", the court would have discretion to indemnify him for such services (See Bennett, **Receiverships,** 1985, p. 19).

In **Belyea and Fowler v. Federal Business Development Bank** (1983), 46 C.B.R. (N.S.) 244, the New Brunswick Court of Appeal stated that the fixing of a fee for a remuneration should be based on what was a fair and reasonable value of the services. The court pointed out that sufficient fees should be paid to encourage competent persons to act as receivers but that the receivership should be administered as economically as reasonably possible. The court indicated that the considerations applicable in determining the reasonable remuneration to be paid to the receiver should include the nature, extent and value of the assets handled, the complications and difficulties encountered,

the degree of assistance provided by the debtor, the time spent, the receiver's knowledge, experience and skill, the diligence and throughness displayed, the responsibilities assumed, the results of the receiver's efforts and costs of comparable services when performed in a prudent and economical manner.

With respect, I fully endorse the comments of the New Brunswick Court of Appeal.

I realize that those engaged in the speciality of management of professions advocate the fixing of remuneration almost totally on the amount of time spent on the affairs of clients, but in my view, such a barometer should be tempered with the factors referred to by the New Brunswick Court of Appeal including the result obtained, the responsibility assumed and the quality of service rendered. These are the same factors to which the Code of Professional Conduct published by the Canadian Bar Association makes reference as proper criteria to use in fixing legal fees. In the proceeding before me, I am advised that the fees and disbursements of the receiver and its counsel were in excess of 30% of the monies recovered by the sale of the properties. Undoubtedly, there are occasions when the extent of the value of the assets or the complexity of the issues render such a ratio appropriate but, on my examination of the material before me, it did not appear that that situation existed in the present case.

The purpose of passing accounts of a receiver is to afford judicial protection to the receiver with respect to the performance of his duties and to permit interested parties to question the activities of the receiver. The court will protect the receiver in pursuit of his remuneration and should pass accounts which are fair and reasonable, but should not "rubber stamp" accounts for persons who are acting as officers of the court. As stated by Mr. Justice Stratton in **Belyea and Fowler v. Federal Business Development Bank** (supra) at p. 246, the allowances for services "must be just, but nevertheless moderate rather than generous".

In his text, Bennett at p. 304, discussed two techniques employed in assessing the reasonableness of remuneration. He stated that the first technique was on a percentage of the proceeds of realization and the second was on a quantum meruit basis according to the time, trouble and degree of responsibility involved. With respect to the first technique, he pointed out that the court may look to the rate afforded to trustees in bankruptcies as a guideline and went on to state:

> In a bankruptcy, the trustee's remuneration of seven and one-half percent of receipts after payment to secured creditors can be varied by the court depending on the time involved and the complexity of the estate. In receiverships, the seven and one-half percent rule appears to be high especially where receipts are generated easily. In older cases, it has been held that if the receiver had not encountered exceptional difficulties during his administration, he was entitled to a commission of five percent of the funds coming into his hands.

On the other hand, it is clear that if a chartered accountant is appointed as a receiver, consideration should be given to his normal hourly charge as he would have been earning that hourly rate if he had not been expending the time as receiver. Highly qualified people should not be discouraged from accepting work as receivers. It would seem that the court should take care to consider all of the factors when passing accounts and exercise its discretion by applying a fair balance between the various applicable considerations when arriving at a reasonable remuneration.

The issues raised before me did not include complaints as to the hourly rate charged by the receiver or its solicitors nor did they include a general complaint about the time expended by the receiver or its solicitors. In the proceedings before me, B & R is specific in its complaints with respect to the receiver's activities and accounts and I will deal with each of them.

1) Services performed after the lapse of the Receivership Order.

B & R suggest that the receiver was functus and without power to act between October 26th, 1986 and December 1st, 1987, and after June 1st, 1988.

A receiver has no inherent powers and derives its

authority from the order appointing it. It is important that the receiver comply with the terms of the order and report to the court on its activities on a regular basis. Normally, the term of the appointment is confined to a period of less than a year to require timely reporting and to enforce the control the court has over the activities of the receiver.

In my view, it was poor practice to permit the order to lapse. The failure of the receiver to continue the terms of appointment may have adversely affected some of the acts and duties performed by the receiver during the hiatus periods but I am not required and do not intend to make any finding on that issue. Notwithstanding the view I express, I am not prepared to reduce the receiver's remuneration for these periods. I am convinced, on the evidence before me, that the acts of the receiver during these periods were bona fide and were for the benefit of the interested parties. (Reference is made to Bennett, **Receiverships**, 1985, p. 19).

It is obvious that the receiver still had the duties and responsibilities of his position as a receiver during these periods and that he had not been discharged from these duties and responsibilities by the court. I am not prepared to reduce the remuneration because the receiver failed to apply to the court in a timely fashion for an order continuing its appointment.

2) The allegation that the receiver exceeded the authority set out in the Order of the court.

B & R take the position that the receiver did not have the authority to prepare operating statements, give tax advice, provide services to the R.C.M.P. and seek to recover monies from solicitors and accountants.

Under the terms of the order of Mr. Justice Richard dated the 26th day of February and under the terms of successive orders, the receiver was authorized to manage the properties and assets of the defendants and to retain agents and solicitors "for the purpose of preserving and utilizing on the property ... and carrying on the business and undertaking of the property and to enter into agreements with any person respecting the said business or property".

The order goes on to grant authority to the receiver to borrow monies, not exceeding $10,000.00, and to advance monies to itself and its solicitors in payment of fees and disbursements.

The order is short on specifics. Its main operative clause has the effect of appointing Coopers as receiver and manager of the property and the assets of the named defendants "with authority to manage the properties and assets as hereinafter authorized and to act at once and until further order of this court". There is little that follows in the order to assist in interpreting the words "as hereinafter authorized" except

that clause which permits it to retain agents, solicitors, assistance, employees and auditors as it considers necessary "for the purpose of preserving and utilizing on the property as provided herein and carrying on the business and undertaking of the property and to enter into agreements with any person respecting the said business or property". The order, which is the sole source of authority for the receiver, should be clear in enunciating the receiver's authority but, on the other hand, the general provision should be given a liberal interpretation to avoid the necessity and expense of needless applications to the court to amend the order. In my view, under the terms of the order, I can examine the activities to ascertain if they were necessary or desirable:

1) For the purpose of preserving and utilizing the property;
2) For the purpose of carrying on the business and undertaking of the property;
3) For the purpose of entering into agreements with any person respecting the business or property.

In my view, the time spent and charges made for examination of the issue of possible recovery from other sources fall within the terms of the order. The possibility of recovery against auditors and lawyers involved in the investments was the subject of discussion on several occasions, including discussions at the meetings with the investors. These activities clearly fell within the broad terms of the order requiring the

trustee or its agents to preserve the property and to carry on the business and undertaking of the property.

Nor would I consider deducting from the remuneration of the receiver the time spent in preparing tax statements. The trustee has a duty to conduct its affairs and to protect the business to the same extent as an ordinary businessman would supervise his own affairs. Mr. Wide testified that he considered it part of the principal obligations of the general partner and, therefore, of the receiver to operate the buildings as business enterprises which would include duties in respect to the preparation of financial statements and reporting to investors on the financial results of the operations and showing the share of losses or profits for income tax purposes. The obligations upon the general partner were set forth in the Limited Partnership Agreement because Coopers was receiver and manager for both the limited partnerships and, as the general partner, it assumed these responsibilities.

I can find no authority under the order for the work performed by the receiver at the request of the R.C.M.P. These activities were sufficiently divorced from the ordinary management of the properties that it was encumbent upon the receiver to apply to the court for authorization to conduct these activities.

I categorically reject the suggestion in the written

submission of the solicitor for the receiver that, should the court not allow the receiver's fees for assisting in the investigation, "it will be by the hand of the court, the very party having control of the receivership assets and judicial process, that will bring the administration of justice into disrepute". I find such a submission to be erroneous and inappropriate.

Obviously, it was desirable for those involved in criminal investigations to have the cooperation of the receiver and I would expect that a court would be quick to extend authorization if it had been requested (which is not to say that the court would necessarily authorize the receiver to charge a fee at its normal hourly rate). On the other hand, the investors have the right to be protected and to have control exercised over the expenditure of funds in the hands of the receiver. The duty was clearly with the receiver, if it wished to be remunerated for its services, to make the application to the court for authority to work with the investigation officials.

Any services performed by the receiver or its solicitor in connection with activities in cooperation with the R.C.M.P. will not be allowed.

3) The allegations of negligence on the part of the Receiver.

B & R submits that the receiver should not have permitted the interest on the mortgage in favor of Dover to accumulate but should have applied to the court to pay out the mortgage and take other security and, in particular, a letter of credit. The Affidavit of John Hickey, secretary of Dover Mortgage Corporation Limited, stated that from the date of the sale of the Invesco land (July 6th, 1986) to the date the mortgage was paid (August 8th, 1988) interest in the amount of $102,528.01 accrued. During the same period, an amount of $72,434.47 was earned on the sale proceeds. B & R suggest a reduction in the receiver's fees of $30,000.00 because of the failure of the receiver to mitigate this expense, particularly after the specific request to do so by the solicitor for B & R in his letter of January 6th, 1988, which request took this form:

> We are instructed that the rate of interest payable on the Dover mortgage is 16%. Our client as general partner suggests to Coopers & Lybrand Limited as receiver and manager that it would be a prudent act of management to pay out to Dover the amount presently due against an irrevocable letter of credit, all without prejudice to the rights of the defendants in the forclosure action. It is our client's position that if this can be done the receiver, manager can prevent further depletion of any residue of funds available for distribution to the limited partners. Our client is of the view that to date there has been a substantial depletion of monies because of the difference between the rate of interest earned on monies held by the solicitors in trust and the rate of interest payable on the Dover Mortgage.

By letter dated January 13th, 1988, Mr. Wide replied to Mr. Ryan's letter and stated his opinion that it would be imprudent to pay off the mortgage because, according to the advice from the receiver's solicitor, the mortgage was invalid and if the funds on hand were used to pay out the mortgage, the investors would lose the benefit of the interest on these funds.

During an examination for discovery, Mr. Wide said that the difference in interest rates was the subject of discussion with the receiver's solicitor but never discussed with the investors, the first general partner, B & R's predecessor, or with Dover. Mr. Wide admitted that if Dover had offered to substitute an irrevocable letter of credit in return for the payout of the mortgage, the proposal would have been a "sensible business arrangement".

During the hearing before me, Mr. Wide advised that when the Invesco lands were sold and the placement of funds in an interest bearing account was effected, "Dover had indicated several times that they felt that we should pay the mortgage out because of the high rate which it accrued" but that the receiver refused and adopted the "usual receiver's way of dealing with these things", that is, sell the asset and put the funds aside until the dispute is resolved. He said B & R's suggestion was refused because, first, it wasn't the usual arrangement

made by a receiver, second, the key part to the arrangement was the terms which could be negotiated in the letter of credit and, third, that it was his understanding that the court was not prepared to substitute the security.

I find these reasons unconvincing. No attempt was made by the receiver to seek permission of the court or to negotiate terms with Dover with respect to the letter of credit. On cross-examination, Mr. Wide agreed the substitution of a letter of credit would have been prudent if acceptable terms could have been negotiated.

In **Doncaster v. Smith** (1987), 65 C.B.R. 133, the receiver-manager sold an asset and thereby incurred substantial tax liability without seeking professional advice on the tax consequences. The evidence indicated that an amalgamation of three companies before the sale would have resulted in decreased tax liability and the trial court found that a prudent person would have effected the amalgamation but that the defendant was not liable for the breach of his duty because he did not have the right, without seeking additional power to effect the amalgamation. On appeal, the British Columbia Court of Appeal held that the prime duty of the receiver-manager was to seek such powers as he considered necessary to perform his duties. Mr. Justice Hinkson, in referring to **Plisson v. Duncan** (1905), 36 S.C.R. 647 stated at p. 137:

> ... the duty of the receiver-manager is to manage the companies' affairs with the same prudence and supervision as an ordinary man would give his own business. If he does not, he is liable for his failure to take such care.

The court rejected the suggestion that the obligation to seek further powers is as much that of those who appointed the receiver as it is that of the receiver. The Court of Appeal agreed with the trial judge that an appropriate remedy if the receiver breached his duty was to deduct from his compensation the amount of tax which had been paid as a result of the breach.

In my opinion, the ordinary man in the position of the receiver, in managing his own business, would have taken steps to reduce the interest liability which was accruing on the Dover mortgage and I find that the failure of the receiver to seek permission of the court and to make further inquiries as to the terms of a letter of credit to be a breach of its duties as receiver-manager and that the appropriate remedy to the investors is to reduce the fee of the receiver. In view of the contingencies which existed, I am not prepared to reduce the fee for this breach by more than $15,000.00.

4) <u>The appropriate fee due Patterson Kitz for the defence of the foreclosure action</u>.

It is the position of the general partner that the fees of Patterson Kitz with respect to the defence of the action

on the Dover mortgage should be restricted to $5,000.00 because of the comments made by L. A. Kitz, Q.C. at the meeting of investors on May 24th, 1986.

It is the position of the law firm that because the receiver does not question the solicitor's fees and because there was no "condition" placed on the firm's retainer - "that should be the end of the matter". This argument is tantamount to saying the court has no control over the fees of the solicitors. The law firm says that none of the affidavits filed referred to an "undertaking" and "no commitment" was given to the investors to limit fees to $5,000.00.

The affidavits filed by B & R in this proceeding were unchallenged. The solicitor for the receiver advised the court that there was no request to cross-examine the deponents. I have for consideration on this issue, the affidavits of two lawyers who attended the meeting on behalf of clients, the affidavit of a chartered accountant and the viva voce evidence of Mr. Wide and Mr. Caldwell, together with the discovery evidence of Mr. Kitz.

There is little dispute as to what was said by Mr. Kitz and the main differences arise from what was intended by the comment and what was the effect of the comment in law.

In his affidavit, Robin McDonald, a member of the

Nova Scotia Barristers' Society, said that great concern was expressed at the meeting by a number of investors as to ongoing costs and that a number of questions came from the flocr concerning the costs incurred, to date, by the receiver and its solicitor and the costs of future proceedings. McDonald said that it was his impression that the mocd of the meeting "varied from ccncerned to hostile". He stated that a number of investors had signed documents authorizing the retention of Patterson Kitz "which they felt might make them responsible for future legal fees in an open-ended sense". The Dover mortgage action was discussed and Mr. Douglas Caldwell was asked how much it would cost to challenge the mortgage and Caldwell said "it might be as much as $50,000.00". Mr. McDonald said the general mocd of the room appeared reluctant to authorize this sort of expenditure and I quote from Mr. McDonald's affidavit as follows:

> 12. THAT at this time the room was a little unruly and there was generally negative conversation going on with respect to the costs of proceedings to date and the projected costs for the future. At this point, Mr. Kitz stood up and said generally to the audience words to the effect as follows:
>
> > "Are you gamblers? I am a gambler and am prepared to take the risk on this--I know that my partners won't like this but we'll do the file on the basis that if we lose, we'll charge no more than $5,000.00 but, if we win, we will want to be paid full solicitor and client costs as taxed. How much is it worth it to you to challenge $300,000.00? Surely it is worth $5,000.00? You have to look at this from a business point of view."

13. THAT the statement set forth in quotations above is not intended to be a literal quotation from Mr. Kitz but, in my opinion, sets forth the substance of what he said and generally in the words that he said as I remember them. He spoke for slightly longer than the quotation reads but not substantially longer.

14. THAT subsequent to this statement by Mr. Kitz, Mr. Caldwell took no steps that I could notice to distance himself from this statement or to suggest that Patterson Kitz would not be bound by it. I paid close attention to the proceedings.

15. THAT I was present from that point forward until the eventual close of business of the meetings late in the evening and at no time heard any clarification, retraction, or qualification from Mr. Caldwell or Darryl Pink of the assurance given by Mr. Kitz.

16. THAT on behalf of my clients, I was left with the impression that Patterson Kitz had agreed that, if it pressed forward the claim against Dover, it would do so on the basis that it would not be paid any more than $5,000.00 unless it was successful in increasing the return to the investors available from immediate settlement.

17. THAT I had the impression that Patterson Kitz was of the view that the Dover claim was probably worth challenging.

18. THAT I had the impression that the mood of the room would not have authorized proceedings against Dover without the assurance provided by Mr. Kitz.

Mr. Lawrence Freeman was at the meeting as solicitor for Dover and he stated Mr. Caldwell and Mr. Pink quoted a fee for challenging the mortgage of between $20,000.00 and $40,000.00 and that the investors appeared "disinterested" in challenging the mortgage as it related to such legal costs. Mr. Freeman

said that Mr. Kitz stood on behalf of his firm and advised the investors that if the law firm was not successful in challenging the security, the investors would not be charged more than $5,000.00 for the legal fees. Mr. Freeman's affidavit goes on to state:

> 7. THAT the Limited Partners of Invesco Developments Limited Partnership then proceeded to vote on what appeared to be that basis to challenge the mortgage and instructed Patterson Kitz to proceed.

The affidavit of Terry Degen, President of B & R Holdings Limited, alsc referred to the meeting and the comments made by Mr. Kitz. Mr. Degen deposed that neither Mr. Pink nor Mr. Caldwell made any comment whatsoever to the meeting regarding the comments of Mr. Kitz.

Allan Conrod is a chartered accountant of Halifax, Nova Scotia who deposed that there was a discussion about the anticipated fees of Patterson Kitz at the meeting and that Mr. Kitz advised the meeting that if the law firm was unsuccessful, the fees would be $5,000.00 and if successful, the fees would be charged in accordance with the normal rate. Mr. Conrod went on to state:

> 7. THAT I do verily believe that the limited partners agreed to instruct the Receiver to challenge the Dover mortgage on the strength of the undertaking given by L. A. Kitz. That was my understanding at the conclusion of the meeting.

It is clear from these affidavits that an undertaking was made by Mr. Kitz that the law firm, which bears his name, would not charge more than $5,000.00 if the defence of the action on the Dover mortgage was unsuccessful. It is also clear from the affidavits that reliance was placed on this undertaking and that probably the motion to proceed with the defence was based, to some extent, on the representation made by Mr. Kitz.

In his evidence given by way of discovery, Mr. Kitz testified that the comments made by him were similiar to that set out in the affidavits and there appears this question and answer:

> Q. What do you say as to what you're entitled to by way of fees for the services you rendered in the defence of the Invesco foreclosure action?
>
> A. Oh, I think we are entitled to all of our fees saving that which is attributable to the trial action with a cap of Five thousand dollars.

Earlier in this judgment I made specific reference to the evidence of Mr. Wide on this issue when he was speaking of the possibility that Mr. Caldwell had negated the impression left by Mr. Kitz, he spoke in terms of his "perception" and his "belief" of what Mr. Caldwell said. It was my view that Mr. Wide was attempting to be as accurate as possible in his evidence and he was not able to state with any degree of certainty what transpired after Mr. Kitz made his comments to the meeting.

Mr. Caldwell said that he informed the meeting that Mr. Kitz's estimate was not realistic and that the fees depended upon the complexity of the proceedings. Nevertheless, it is clear to me from the evidence before me, which remains undisputed, that Mr. Kitz gave an undertaking to those who were assembled with respect to the limits to be placed on the fees by the Patterson Kitz firm if the defence was unsuccessful. I also find that the investors relied on this undertaking when they agreed to carry on with the defence of the action. It is common ground that the defence failed and the fees of Patterson Kitz, with respect to the action on the mortgage, will be set at $5,000.00 plus reasonable disbursements.

The solicitor for the receiver, in his written submission, refers to the exhibits on file and the sum of $38,928.35 fees and $5,857.33 in disbursements and states that "an analysis of the fees preferred by the receiver's counsel indicates that the total fees associated with the Dover mortgage action exclusively are $18,942.59 or forty-eight per cent of the total fees. The equivalent percentage of disbursements is $2,850.18 for a total of $21,792.77."

There was no evidence before me to support this submission. Furthermore, it is not clear to me, from the written submission, how counsel was distiguishing between services relating to the Dover mortgage action and services with respect

to other matters. In my view, the sum of $5,000.00 should be substituted for the fee which has been charged for the services required as a result of the decision made at the meeting on May 24th, 1986, to defend the forclosure action.

CONCLUSION

I have spent considerable time reviewing the accounts and time charges which were filed with the court in the hope I could set out definitive figures in this judgment. Unfortunately, there appears to be accounts rendered which relate to services in more than one area. Alsc, it is difficult to relate the submissions of counsel to the figures before me in some instances. I would prefer to permit counsel to attempt resolution of the arithmetic matters based on the principles and findings made herein and to inccrporate the figures in an order. If there is no agreement, I will hear further argument.

To assist counsel in reaching agreement on the calculations, I will set out my conclusions with further observations:

1. The receiver's account will be reduced by
   (a) The sum of $15,000.00 representing the amount assessed for breach of duty.
   (b) Fees and disbursements incurred with respect to the R.C.M.P. investigation.

2. With respect to the solicitor's account:

   (a) It will be reduced by the amount which relates to the R.C.M.P. investigation.

   (b) The sum of $5,000.00 will be substituted for the fee, exclusive of disbursements, charged for the services required for the defence of the foreclosure action.

   (c) Little attention was given to the claim for fees of the solicitors for service relating to the present application before me. I understand an amount in excess of $15,000.00 is requested and I would require further submissions on this point.

An order will issue fixing the remuneration of the receiver and its solicitors, providing for the distribution of the remaining funds in the hands of the receiver and discharging the receiver.

J.

Halifax, Nova Scotia
August 3, 1989

1986 S.H. No. 55728

IN THE SUPREME COURT OF NOVA SCOTIA

TRIAL DIVISION

BETWEEN:

PETER R. ARNOLD, CARL T. BOSWICK, FRED HANSEN and FRANCIS DUNSWORTH, in their own right and as representatives of all the limited partners in One Oak Street Limited Partnership, Invesco Developments Limited Partnership and Kencrest Estates Limited Partnership and in their own right and also as representatives of all the beneficial owners of property held in trust by Templeton Woods Limited and Skyline Apartments Limited

Plaintiffs

- and -

PERRY N. ROCKWOOD, GEOFFREY P. CHRISTOPHERSON, DIVERSIFIED EQUITIES LIMITED, a body corporate (formerly known as Rockwood Real Estate Limited); RESCOM PROPERTY INVESTMENTS LIMITED, a body corporate (formerly called Rockwood Management Group Limited); ONE OAK STREET LIMITED PARTNERSHIP, a limited partnership, ONE OAK STREET LIMITED, a body corporate; INVESCO DEVELOPMENTS LIMITED PARTNERSHIP, a limited partnership, INVESCO DEVELOPMENTS LIMITED, a body corporate, KENCREST ESTATES LIMITED, a body corporate, TEMPLETON WOOD LIMITED, a body corporate and SKYLINE APARTMENTS LIMITED, a body corporate

Defendants

D E C I S I O N

9

SUPREME COURT OF NOVA SCOTIA

Citation: Toronto-Dominion Bank v. Karlsen Shipping Company Ltd., 2015 NSSC 204

Date: July 13, 2015
Docket: Hfx No. 348504
Registry: Halifax

Between:

The Toronto-Dominion Bank

v.

Karlsen Shipping Company Limited

DECISION

Judge:	The Honourable Justice Glen G. McDougall
Heard:	September 25, 2014, in Halifax, Nova Scotia
Counsel:	Stephen Kingston, Esq. and John D. Stringer, Q.C. for PricewaterhouseCoopers Inc. Christopher Robinson, for 3264741 Nova Scotia Limited

By the Court: McDougall, J.

INTRODUCTION:

[1] PricewaterhouseCoopers Inc. ("PwC") was appointed Receiver of all assets, undertakings and properties of Karlsen Shipping Company Limited ("Karlsen Shipping") by virtue of a Receivership Order granted by the Honourable Justice Arthur J. LeBlanc of this court on the 17th day of May, 2011.

[2] PwC acted in its capacity as Receiver for Karlsen Shipping until 14 September, 2012 at which time it was discharged. Grant Thornton Limited ("GTL") was then substituted to assume the role of Receiver in place of PwC.

[3] The discharge of PwC and the appointment of GTL was done at the request of 3264741 Nova Scotia Limited ("No. Co.") which acquired the debts and security of the Toronto-Dominion Bank ("T-D Bank") by way of assignment.

MOTION / BACKGROUND:

[4] PwC now seeks approval of its fees and disbursements as Receiver along with those of its legal counsel, McInnes Cooper.

[5] In support of its motion PwC relies on the affidavit of Mr. Derek Cramm, Senior Vice-President of PwC, sworn to on November 20, 2012 (filed on November 21, 2012) and a subsequent affidavit sworn to on January 17, 2014 (filed on March 7, 2014).

[6] PwC further relies on the Fifth Report of Receiver dated August 15, 2012 which was filed with the court on August 16, 2012.

[7] A review of the five Reports filed by PwC sets out the work carried out by the Receiver during the period commencing from the date of its appointment on May 71, 2011 until the date of discharge on September 14, 2012 – a period of approximately 16 months.

[8] The Fifth Report of the Receiver attaches copies of the accounts rendered by it as Receiver along with the accounts of its counsel. Copies of subsequent accounts are attached as exhibits to Mr. Cramm's affidavit of November 20, 2012.

[9] PwC rendered one additional invoice for $9,262.14 (includes HST) covering a period ending November 27, 2012. There remains an outstanding balance on this invoice of $8,247.98 according to paragraph 14 of the Cramm affidavit of January 17, 2014. I believe this is incorrect. When one looks at paragraph 14 of the November 20, 2012 affidavit, it reports a remaining trust balance of $1,017.16. When this amount is applied to the November 28, 2012 invoice it results in an outstanding balance of $8,244.98. A slight difference, I admit, but a difference nonetheless.

[10] PwC's legal advisors, McInnes Cooper, rendered one further invoice after November 21, 2012. It totals $3,622.32 which includes disbursements and HST. Payment remains outstanding for this amount and for invoices dated May 31, 2012 ($4,296.80), June 29, 2012 ($5,152.23), July 31, 2012 ($2,665.70), August 31, 2012 (8,659.21), and September ($2,183.16). In total some $26,579.42 remains unpaid. [Reference para. 17 of the January 17, 2014 affidavit of Derek Cramm].

[11] McInnes Cooper has additional unbilled work-in-progress of approximately $2,000.00 plus taxes and disbursements [See para. 18 of the January 17, 23014 "Cramm" affidavit].

[12] PwC reports unbilled work-in-progress of approximately $1,800.00 plus taxes and disbursements. [See para. 19 of the January 17, 2014 "Cramm" affidavit].

[13] The terms of the Order discharging PwC as Receiver included the following provision, at para. 3:

> 3. PWC is hereby discharged as Receiver and is relieved of its obligations under the Receivership Order, provided that all privileges and protections afforded by the Receivership Order granted to the Receiver shall continue to accrue to the benefit of PWC. [sic] for any and all activities undertaken by PWC prior to its discharge, including but not limited to that charge provided for in section 17 of the Receivership Order over all the assets of the Respondent, charging same with respect to the fees of PWC and its counsel, which shall remain a first charge.

[14] Counsel for No. Co. opposes the granting of an order approving the fees of the former Receiver and its' counsel and requests a reduction of the fees claimed. He submits that the fee sought to be approved by PwC "*are excessive, unreasonable, and bear no resemblance to the size of the state and the revenues*

realized solely through the efforts of the receiver and its counsel." [Page 4 of the Respondent's Memorandum of Law filed on September 22, 2014].

[15] Counsel further argues that approximately 58% of the total revenues realized (approximately $910,000.00) were derived from:

Cash in the Bank:	$652,352.77
Insurance Claim:	$236,036.15
HST collected:	$ 21,000.00

[16] He suggests that the realization of these funds "*involved little if any effort on the part of PWC or its counsel.*" [Page 4 of Respondent's counsel's Memorandum of Law filed September 22, 2014]. In his memorandum of Law filed on behalf of PwC on March 7, 2014, Mr. Stephen Kingston summarized the activities performed by PwC in fulfilling its assignment "*which included (but were not limited to):*"

1. Meeting with Karlsen's President and making other inquiries to identify and locate Karlsen's property and assets;
2. Taking possession of Karlen's [sic] books and records;
3. Reviewing claims regarding monies held by Karlsen on deposit at the time of the appointment of the Receiver;
4. Securing and maintaining Karlsen's commercial office property at 55 Crane Lake Drive, Halifax Regional Municipality pending sale by the Receiver;
5. Obtaining advice re the valuation of Karlsen's commercial office property, and conducting a sale process to identify interested parties;
6. Concluding the sale of Karlsen's commercial office property, including a Motion to obtain the approval of this Honourable Court;
7. Obtaining advice regarding the valuation of Karlsen's yacht "Polar Sun", and conducing a sale process to identify interested parties;
8. Concluding the sale of the "Polar Sun", including a Motion to obtain the approval of this Honourable Court;
9. Obtaining advice re the valuation of properties owned by Karlsen in Chester and New Harbour, Lunenburg County, and conducting a sale process to identify interested parties;

10. Concluding the sale of Karlsen's property at 3389 North Street, Chester, including a Motion to obtain the approval of this Honourable Court;

11. Obtaining advice regarding various priority claims, including claims pursuant to the *Pensions Benefits Standards Act*, R.S.C. 1985, c. 32;

12. Conducting detailed inquiries regarding Karlsen's motor vessel 'Polar Star', which was situate at a shipyard in the Canary Islands, Spain;

13. Obtaining advice regarding the physical condition and value of the 'Polar Star', possible further repairs, required sea trials and regulatory approval regarding future operation of the vessel;

14. Obtaining advice regarding the Spanish legal process involved in seeking recognition of the Receiver in the Canary Islands;

15. Obtaining advice regarding various maritime lien claims and other *in rem* claims regarding the 'Polar Star' in the Canary Islands and other jurisdictions, including the Spanish shipyard where the vessel was situate;

16. Conducting a sale process seeking to identify interested parties as regards the purchase of the 'Polar Star';

17. Determining whether the 'Polar Star' had any net value which could be realized for the benefit of Karlsen's creditors;

18. Bring a Motion before this Honourable Court to obtain approval for a Partial Distribution of Funds by the Receiver to creditors;

19. Participating in the Motion regarding the discharge of PWC as Receiver, and dealing thereafter with the new Receiver as regards transition arrangements, transfer of trust funds, transfer of documentation and records, etc.

[Pages 2 and 3 of the Memorandum of Law, *supra*]

These activities are described in greater detail both in the Reports of the Receiver as well as in the two affidavits of Mr. Cramm referred to earlier.

[17] Counsel for No. Co., in his submissions, acknowledged other receipts in addition to:

(i) Cash in bank,

(ii) Insurance claim,

(iii) HST referred to earlier

[18] The additional revenues are:

- Sale of 55 Crane Lake Drive -- $485,000.00
- Sale of Yacht (Beneteau) -- $140,000.00
- Sale of Land (Chester) -- $42,500.00

Altogether these receipts add up to $1,576,888.92. This figure does not include two other insurance claims paid directly to two of the original secured creditors one of which was the T-D Bank. No. Co.'s counsel suggests these latter payments should be ignored as these claims were already in progress when the Receivership Order was first made. Counsel contends that very little effort had to be expended by PwC to realize on these claims.

[19] No. Co. also questions the efforts required to sell company-owned property in Chester and the Beneteau yacht since, respectively, a real estate agent and a yacht broker were retained to sell these assets.

[20] Furthermore, No. Co. challenges the fees incurred by PwC before finally deciding that there was no point in pursuing buyers for the MV Polar Star which had been towed to Las Palmas in the Canary Islands for repairs. PwC determined that there was little chance of generating sale proceeds in excess of the maritime lien claims attached to the vessel. Eventually the MV Polar Star was acquired by No. Co. for approximately $200,000.00.

[21] PwC also had to devote a considerable amount of time and effort to determine if there might be any net realizable value in the company's shares in Karlsen Norway SA. Unfortunately, there was nothing. It could not, however, have been ignored by the Receiver. It is easy to criticize PwC, in hind-sight, for having nothing to show for their efforts. But is it fair? I do not believe it is. If the Receiver had not pursued these assets without first doing their due diligence then, yes, they could be criticized. By doing the prudent and correct thing they should not now be expected to forego remuneration for its *bona fide* efforts in trying to maximize revenues for distribution amongst company creditors.

[22] Nor should PwC be criticized for retaining the services of qualified real estate brokers or agents and yacht brokers to sell company assets after having first attempted to solicit offers on their own. This is standard practice. To try to sell these assets without the advice and guidance of industry experts would only open

up PwC to legitimate criticism and potential allegations of negligence in carrying out their court-ordered duties.

[23] Some of the other complaints and criticisms directed towards PwC and its legal advisors concerned billing for time of more than one individual for in-house discussions involving two or more team members. PwC and McInnes Cooper lawyers had to deal with a number of complex issues including deposits made towards the cost of future travel by customers of Karlsen Shipping, the claims of company employees to pension funds, HST rebates, and tracking company assets in different parts of the world to name a few.

[24] McInnes Cooper law firm is of a size and composition that it can offer expert advice in pretty well any area of the law. Likewise, PwC has a stable of qualified business and financial experts such that it does not have to regularly consult outside experts save for legal advice.

[25] It is quite common for more than one individual to work on a file of the complexity of the one now before the court. Oftentimes the principal assigned to the task delegates different aspects of the file to other professionals within the organization. Very often the delegated work does not require the same level of intellectual sophistication or expertise as some other work might and so can be produced at a lower cost.

[26] Sometimes a pooling of resources produces a synergy that might well result in an overall reduction in the ultimate cost.

[27] It should also be noted that the lawyers at McInnes Cooper who worked on this file agreed to reduce their regular hourly fees in an effort to address a concern raised by the T-D Bank. They did not have to but they did and the savings were passed on for distribution to the creditors.

LAW:

[28] The Motion was brought pursuant to Civil Procedure Rule 73.11 which states:

> 73.11 - Passing accounts and discharge
>
> (1) A receiver who completes the tasks for which the receivership order was granted must make a motion for an order passing the receiver's accounts, approving fees and expenses not yet approved, and discharging the receiver.

(2) A judge who hears a motion for a discharge may do any of the following:

(a) pass the accounts or order repayment of an expense not approved;

(b) approve the receiver's fees and disbursements and allow payment of them or, if advances exceed the amount approved, order repayment;

(c) discharge the receiver wholly, or on conditions.

(3) A judge who is satisfied that a receiver delays in bringing a receivership to conclusion or in making a motion to pass accounts, set remuneration, and be discharged may do any of the following:

(a) replace the receiver;

(b) refuse some or all remuneration;

(c) order the receiver to pay expenses caused by the delay.

[29] Counsel for No. Co. referred the Court to a relatively recent case of the Ontario Superior Court of Justice in *Bank of Nova Scotia v. Diemer*, 2014 ONSC 365. The Honourable Andrew J. Goodman, at para. 3 of his decision, said this:

> 3 One of the leading authorities dealing with approval of the fees of a receiver is found in the case of *Re Bakemates International Inc.*, [2002] O.J. No. 3569. In *Re Bakemates*, the Ontario Court of Appeal held that when a receiver asks the court to approve its compensation, there is an onus on the receiver to prove that the compensation for which it seeks the court's approval is fair and reasonable and a court could adjust the fees and charges of the receiver.

[30] At para. 7, Justice Goodman also referred to a New Brunswick Court of Appeal case in this fashion:

> 7 In an authoritative case from New Brunswick, the Court of Appeal in *Federal Business Development Bank v. Belyea*, [1983] N.B.J. No. 41, 46 C.B.R. (N.S.) 244 (NB CA), (cited with approval by the Ontario Court of Appeal in *Re Bakemates*), held that the underlying premise for compensation is "usually allowed either as a percentage of receipts or a lump sum based upon time, trouble and degree of responsibility involved". The governing principle is that compensation allowed a receiver should be measured by the fair and reasonable value of his service; and while sufficient fees should be paid to induce competent persons to serve as receivers, receiverships should be administered as economically as reasonably possible.

[31] Borrowing further from the *Belyea* case, *supra*, Justice Goodman said the following at para. 9:

> 9 The jurisprudence from *Belyea* advances factors that a court ought to consider in assessing the compensation of a receiver, (albeit the discussion in the case was in the context of *quantum meruit*). They include:
>
> * the nature, extent and value of the assets handled;
>
> * the complications and difficulties encountered;
>
> * the degree of assistance provided by the company, its officers or its employees and the time spent;
>
> * the receiver's knowledge, experience and skill;
>
> * the diligence and thoroughness displayed;
>
> * the responsibilities assumed;
>
> * the results of the receiver's efforts; and
>
> * the cost of comparable services when performed in a prudent and economical manner.

[32] Before getting into an analysis of the case that was before him, Justice Goodman also cited from a case penned by Justice Farley of the Ontario General Division [Commercial List] at para. 6 of *Belyea, supra*:

> 6 In *BT-PR Reality Holdings Inc. v. Coopers & Lybrand*, [1997] O.J. No. 1097 (Sup. Ct.) Farley J. held at paras. 22 & 23:
>
> > The issue on a s. 248(2) hearing is whether the fees charged by the receiver are fair and reasonable in the circumstances as they existed - that with the benefit of the receivership going on, not with the benefit of hindsight. I would also note that it would be an unusual receivership and an unusual receiver where a receiver was able to be up to full speed instantaneously upon its appointment. There is a learning curve for the

> particular case and probably a suspicion equation to solve. The receiver must demonstrate that it acted in good faith and in the best interests of the creditor as opposed to its own interest or some third party's interests. The receiver must also demonstrate that it exercised the reasonable care, supervision and control that an ordinary man would give to the business if it were his own: see *Re Ursel Investments Ltd.* (1992), 10 C.B.R. (3d) 61 (Sask.C.A.). The receiver is not required to act with perfection but it must demonstrate that it acted with a reasonable degree of confidence: see *Ontario Development Corp. v. I.C. Suatac Construction Ltd.* (1978), 26 C.B.R. (N.S.) 55 (Ont. S.C.).
>
> While sufficient fees should be paid to induce competent persons to serve as receivers, receiverships should be administered as economically as reasonably possible. Reasonably is emphasized. It should not be based on any cut rate procedures or cutting corners and it must relate to the circumstances. It should not be the expensive foreign sports model; but neither should it be the battered used car which keeps its driver worried about whether he will make his destination without a breakdown.

[33] In his analysis, Justice Goodman, at para. 18 and 19, commented as follows:

> 18 As a general principle, the assessment of fees are in the discretion of the court. There is no fixed rate or tariff for determining the amount of compensation to pay a receiver or receiver's counsel. Similar to the approach in assessing costs, in approving a receiver's accounts, a determination should be made as to whether the remuneration and disbursements incurred in carrying out the receivership were fair and reasonable, rather than an amount fixed by the actual costs charged by receiver's counsel. The court must, first and foremost, be fair when exercising its discretion on awarding fees.
>
> 19 In my view, in an assessment of fees, there must be practical and reasonable limits to the amounts awarded and those amounts should bear some reasonable connection to the amount that should reasonably have been contemplated. It is not necessary for me to have to go through the dockets, hours, the explanations or disbursements, line by line, in order to determine what the appropriate fees are. Nor is the court to second-guess the amount of time claimed unless it is clearly excessive or overreaching. The appellate courts have directed that judges should consider all the relevant factors, and should award costs (or fees) in a more holistic manner. However, when appropriate and necessary, a court ought to analyze the Bill of Costs or dockets in order to satisfy itself as to the reasonableness of the fees submitted for consideration.

[34] I accept what Justice Goodman had to say and adopt what he borrowed from the various other cases cited.

ANALYSIS AND CONCLUSION:

[35] I do not propose to repeat all of No. Co.'s various concerns regarding the former Receiver's charges or those of its counsel. I will, however, mention one in particular. That is the manner in which PwC handed the MV Polar Star – a refurbished ice breaker that Karlsen Shipping used for Arctic, Antarctic and Northern Canada expeditions.

[36] In the Second Report of Receiver filed on September 27, 2011 the MV Polar Star was reported as being in drydock at the Astican Shipyard in Las Palmas, Canary Islands, Spain. Section 5, starting on page 4 of the Second Report, provides the following explanation of the Receiver's efforts in dealing with what appeared to be Karlsen Shipping's principle asset:

> At the date of the receivership, the Receiver determined that the Ship's crew were still on-board and that they had not been paid wages or salaries for almost two months. In addition, supplies on the Ship were running out. Over the next two weeks the Receiver, with the assistance of its office located in Las Palmas, performed the following duties:
>
> - Met with the Captain and crew and advised of the Receivership;
> - Acted as a liaison with the Astican shipyard officials;
> - Upon receipt of funds advanced by the Toronto-Dominion Bank, arranged for airline tickets, visas and spending money for the crew to complete their repatriation to their home countries, which included Poland, the USA and the Phillipines [sic];
> - With the assistance of the Ship's captain, arranged for the disposition to the authorities of the medical drugs and weapons which were on board; and Took possession of critical documentation including Ship's logs, certificates etc..
>
> Since the receivership, the Receiver, with the assistance of Martin Karlsen, has been actively pursuing a purchaser for the Ship. This included placing advertisements in the international trade magazines "The Tradewinds" and "Lloyd's List". As a result of these efforts the Receiver received interest from all over the globe, including Canada, Iceland, Belgium, Germany, UK, Australia, New Zealand, The Netherlands, Norway, Austria, India and Hong Kong. The serious buyers and the results of sales discussions are as follows:

- A Dutch shipowning concern involved in the polar expedition business, conducted two inspections of the Ship in Las Palmas. The Receiver and this party agreed to a sale price of US$6 million (subject to Court approval), but, in the end, the Receiver was informed that no bank would finance the acquisition on acceptable terms, despite the buyer's willingness to invest 50% equity. The Receiver was advised that the financing difficulties were related to the age of the Ship and the realisation that the Ship's engines would soon have to be replaced.
- Another apparently serious inquiry came forward through a broker representing a Swedish-Bermuda shipowning group. The Receiver and this party also agreed to a sale price of US$6 million (subject to Court approval), and the offer was not "subject to financing", according to the broker. Negotiations were quite advanced and an inspection was scheduled but never conducted, as the arrangement between the buyer and an ultimate user fell through. In the course of negotiations, the broker noted that all of the vessels presently engaged in the Arctic/Antarctic expedition business would have to be re-powered or replaced by 2014 due to new' restrictions on the use of heavy fuels in Arctic and Antarctic waters. The broker also reported that he has also been in touch with certain other shipping companies operating in the Arctic and Antarctic as regards the purchase of the Ship, but nothing concrete has arisen from the broker's efforts to date.
- A Canadian adventure travel firm, also had expressed interest, bitt continued to reduce their offer price and no deal was struck.
- The Ship was viewed by a scrap buyer, who offered $332.28 per lightship MT in late July, which amounts to approximately US$1.5 million.

All potential sales depended on the Receiver being in a position to deliver the ship free from liens and encumbrances and duly certified for passenger operations (except for the scrap offer). This was problematic, and would require substantial funding to bridge the gap between a firm sale agreement and closing. The Ship remains on dry land at the yard in Las Palmas. The shipyard is owed approximately 1,187,768 EUROS (approximately CDN$1.6 million) as at August 31, 2011.

Several seizure Orders have been issued by the Spanish Court, including the bunker supplier's claim.

The known Orders in addition to the shipyard are as follows:

Claimant	Main/Principal Amount Euros	Additional fees, interest, etc.	Total Amount Claimed
Crew	171,247.85	25,000.00	196,247.85
Bunkering AS	52,916.23	17,000.00	69,916.23
Suisca SLU	31,032.15	9,309.64	40,341.79
Wilhelmsen Ship S.	19,728.76	5,000.00	24,728.76
TOTAL	**274,924.99**	**56,309.64**	**331,234.63**

This represents approximately CDN$450,000.

In addition to the above, DNV (the Ship's Classification Society) made it clear that it would have to be paid in full before any certifications would be issued. DNV claims to be owed US$216,548 for prior work. The crew would also have to be paid out of any sale proceeds, since they are entitled to a maritime lien that takes priority over all other claims. Assuming the Ship could be extracted from Las Palmas based on some combination of agreements with the creditors, payments and/or posting security, the plan was to organise a quick judicial sale through the Gibraltar Court. This process would have the benefit of clearing the title to the Ship and by all accounts could be accomplished much more quickly than a judicial sale through the Spanish Court system.

In order to get the ship to Gibraltar (approximately two days steam from Las Palmas), however, additional start-up costs have been estimated at 338,230 EUROS (approximately CDN$460,000) as summarized in Schedule J.

The total of the above expenses amounts to approximately CDN$2,510,000. This does not include additional fees payable to DNV to recertify the Ship.

Other relevant considerations include:

- Confirmation from the secured lenders that they are not willing to fund any further protective disbursements or bridge financing to cover any of the above — noted costs;
- The Receivership Order was issued in the Supreme Court of Nova Scotia and no application has been made to have the Order recognized in the Spanish Courts.
- The shipyard has a possessory lien and has indicated that they will be proceeding to a judicial sale in the Spanish Courts.

> Based upon the above, the Receiver has concluded that there is little prospect of any significant return to creditors by continuing to actively pursue the sale of the Ship. The net proceeds are unlikely to exceed the amounts owed to the lien holders.
>
> Therefore the Receiver has concluded that the Ship be abandoned to the Astican Shipyard and the Receiver shall assist the shipyard, if required, as regards any local judicial sale of the Ship.

[37] PwC was criticized for sending a representative to Las Palmas to assess the situation instead of simply relying on personnel in its off-shore office. I see no reason to find fault with how PwC handled this situation. Indeed, if they had not travelled to Las Palmas to deal with the very important job of repatriating the crew and to liaise with shipyard officials as well as other lien holders they might otherwise have merited some criticism. But they do not, in my opinion, warrant any criticism for doing a good job.

[38] It should also be noted that the T-D Bank, as principal secured creditor, did not question the work done by the Receiver. It did challenge some of the legal fees which resulted in an across-the-board reduction in fees charged by legal counsel.

[39] I find that the time and effort expended on the Receivership, both by PwC and McInnes Cooper, were necessary and reasonable in the circumstances.

[40] Given the complexity of the problems that had to be handled including those connected to the MV Polar Star, the employee pension funds, the shares in Karlsen Norway SA and the sale of the various assets of Karlsen Shipping, I accept and approve the amounts charged for fees and disbursements by both PwC and McInnes Cooper Lawyers. I further approve payment of any amounts billed but not yet paid.

[41] I invite counsel for PwC to prepare an order approving the Receiver's Fifth Report along with its', and the Receiver's, final accounts which I will tax and approve if found satisfactory.

McDougall, J