



SUPERIOR COURT OF JUSTICE
COUNSEL SLIP/ENDORSEMENT

COURT FILE

NO.: CV-19-615270-00CL

HEARING

DATE: July 5, 2022

TITLE OF
PROCEEDING

ROYAL BANK OF CANADA V. DISTINCT INFRASTRUCTURE GROUP INC ET
AL

BEFORE MADAM JUSTICE KIMMEL

NAMES OF COUNSEL AND PARTY:



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ENDORSEMENT OF JUSTICE KIMMEL:

The Receivership

[1] On March 11, 2019, Deloitte Restructuring Inc. ("Deloitte") was appointed by the Court as Receiver (the "Receiver"), without security, of all of the assets, undertakings and properties of Distinct Infrastructure Group Inc. (the "Company") and its subsidiaries, DistinctTech Inc., Distinct Infrastructure Group West Inc., iVac Services Inc., iVac Services West Inc. and Crown Utilities Ltd. (collectively with the Company, "DIG") pursuant to an order (the "Appointment Order") of the Ontario Superior Court of Justice (Commercial List) (the "Court").

This Approval Motion

[2] The Receiver brings this motion for Court approval of the settlement of multiple actions/legal proceedings commenced after DIG's insolvency. The Receiver is also seeking Court approval for the distribution of the settlement proceeds in accordance with the agreement of the parties to the settlements and Court approval of the Receiver's Third Special Report dated June 23, 2022 and the activities described therein. The Receiver is further seeking a sealing order in respect of the settlements.

The Settlements

[3] The settlements were reached following a lengthy and complex mediation before the Honourable Justice Dennis O'Connor. The mediation was conducted over five days in 2021 and resulted in three distinct but related settlements that finally dispose of seven out of nine proceedings arising out of this receivership (collectively, the "settlements").

[4] Two of the seven proceedings were settled separately. The other settled proceedings are covered by the proposed approval order (supplemented by a separate consent dismissal order in the proceedings commenced by Seafort Capital Inc.).

[5] Of the two remaining proceedings that have not been finally settled, the proposed approval order contains some provisions that deal with one of them, namely the action against the former auditors of DIG, MNP LLP ("MNP"), that is continuing. It is expected that there will be a separate order or agreement to be finalized in the action commenced by Rogers Financial Management Inc. ("Rogers") and others that has been settled with seven of the eight originally named defendants, but is continuing against the one remaining defendant, AltaCorp Capital Inc. ("AltaCorp"). AltaCorp and MNP may collectively be referred to as the "non-settling defendants."

[6] Douglas Cunningham, Q.C. was appointed as Special Receiver to pursue certain claims of DIG, including against certain former directors and officers and the former auditor, MNP.

[7] The three settlement agreements (collectively, the "Settlement Agreements") are comprised of:

- a. A main settlement contained in Minutes of Settlement dated March 22, 2022 (the "Settlement Agreement");
- b. A side-letter agreement that deals with the manner in which any proceeds from the MNP action will be distributed (the "MNP side-letter settlement"); and
- c. An agreement also dated March 22, 2022 that settled claims for recovery of expenses from two former CEO's of the Company (the "personal expense settlement agreement").

[8] The Receiver recommends that the Court approve the Settlement Agreements. The Receiver has advised the court that the compromises reflected in the settlements reflect a commercially reasonable resolution of a myriad of litigation claims that were settled through complex and arduous negotiations in the Mediation. The Receiver is further of the view that the Settlement Agreements reflect the best commercial resolution in the circumstances. The settlements are supported by the Special Receiver. The applicant Royal Bank of Canada was consulted throughout the mediation and also supports the settlements.

[9] The Receiver's Motion and its Special Third Report were served on the Service List and there has been no opposition to the relief sought. At the initial return of this approval motion on July 5, 2022, the non-settling defendants asked for some additional language to be included in the approval order to protect their discovery and other rights in the continuing litigation against them. The parties with an interest in those continuing proceedings have had an opportunity to comment upon and further negotiate those revised terms, resulting in some amendments to the proposed form of order as it relates to the continuing action against MNP (received by the court on July 21, 2022) and to the removal of corresponding provisions from the proposed form of order as it relates to the continuing action against AltaCorp, with a view to those arrangements being worked out separately.

Analysis and Decision on Approval Motion

[10] The Court accepts the recommendation of the Receiver, supported by the Special Receiver. I find that the Settlement Agreements represent a fair and reasonable commercial resolution of the settled claims in the circumstances. The Court also takes comfort in the fact that there is no opposition to the approval of the Settlement Agreements or the distributions contemplated thereby. The Settlement Agreements and the distributions provided for are approved.

[11] The activities undertaken by the Receiver in the pursuit of these settlements are reflected in the Receiver's Third Special Report. The Court's approval of that report and the activities reflected therein flows from the Court's approval of the Settlement Agreements and distributions contemplated thereby.

The Confidentiality and Sealing Order

[12] The Settlement Agreement contains the following provisions dealing with confidentiality:

25. These Minutes of Settlement shall be kept confidential. They may only be disclosed by the parties to their respective immediate family (in the case of parties who are individuals), lawyers, financial advisors, auditors, accountants and then only upon a promise to keep them confidential. These Minutes of Settlement may also be disclosed as necessary to enforce their terms, to comply with law (including an order of a court of competent jurisdiction) or a bona fide requirement of CRA, or as permitted by paragraph 28. In the event of such disclosure, the fact that these Minutes of Settlement were made without admission of liability shall receive the same publication at the same time, and the parties shall use their best efforts to ensure that confidential treatment will be accorded such information.

26. If court approval of these Minutes of Settlement is required then the motion for approval will be brought after June 1, 2022, and the party seeking such approval shall seek a sealing order from the court

order that these Minutes of Settlement be received by the court under seal.

[13] The MNP side-letter agreement and personal expense settlement agreement also both contain provisions requiring the parties to keep the settlement terms confidential and not to disclose them. All of these Settlement Agreements contain confidential financial settlement terms and commercially sensitive information and are the product of, and reflect, hard fought private negotiations as between different plaintiff groups competing for their share of the settlement proceeds, and eventually the compromises made to reach a deal in this case. These are, for the most part, sophisticated commercial parties with other business interests and dealings. The personal expense settlement agreement also contains personal information specific to the settling former CEO's and their spouses.

[14] The parties negotiated and entered into these Settlement Agreements upon the understanding and expectation that their terms would remain confidential and the contents of those agreements were thus not curtailed with a view to the possibility of their public disclosure.

[15] There are further confidentiality considerations that come into play because not all of the outstanding proceedings are being settled at this time. While the non-settling defendants are entitled to certain limited information, they are not, at this time, entitled to know the financial terms of the settlements.

[16] The Receiver seeks an Order sealing the Confidential appendices to its Special Third Report that summarize and attach the Settlement Agreements, pending further order of this Court.

[17] Subsection 137(2) of *the Courts of Justice Act* provides that the Court may order that any document filed in the civil proceeding be treated as confidential, sealed, and not form part of the public record.

[18] In *Sherman Estate v. Donovan*, 2021 SCC 25, the Court, at para 38, reaffirmed and reformulated the test applicable to a determination whether a sealing order should be granted, as set out in its 2002 decision in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 (CanLII):

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 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).

[19] The Receiver argues that all three prerequisites have been met and that an order is justified in the circumstances of this case:

- a. Disclosure of the Confidential Appendices to the Receiver's Special Third Report containing the terms of the Settlement Agreements poses a serious risk to two important public interests recognized by the courts, namely:
 - i. The overriding public interest in favour of the settlement of disputes and the avoidance of litigation, which is the rationale for litigation settlement privilege that the Supreme Court of Canada has repeatedly recognized the importance of in the effective administration of justice. See *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC 37. Settlement communications are presumptively privileged. Settlement privilege is a class privilege and a "social value of superordinate importance capable of justifying a sealing order". See *Sable*, at paras. 2, and 11-13; *Hollinger Inc., Re*, 2011 ONCA 579, at paras. 16 and 20.
 - ii. The general commercial interest in preserving private confidential financial information, which includes settlements and other agreements bound by confidentiality terms, such as has been recognized in recent cases, such as *Shell Canada Limited v. The Queen*, 2022 TCC 39 at para. 18: "if the exposure of confidential information would cause a breach of a confidentiality agreement, there is a general commercial interest of preserving confidential information".
- b. There are no reasonable alternatives to sealing in the circumstances. The entirety of these settlements is commercially sensitive because of the complexity of the interrelated business and financial interests. They contain payment terms. They are subject to confidentiality terms that have been agreed to by multiple parties as part of a complex multi-party mediation. Redaction is therefore unfeasible.
- c. The benefits of a sealing order outweigh its negative effects. A sealing order would protect two important public interests as described above, and this is not outweighed by the public's interest in accessing the details of the settlement that involve multiple parties (including third parties that are not subject to these receivership proceedings).

[20] The public interest in promoting settlements and preserving commercially sensitive confidential information is clear and unassailable.

[21] The parties all agreed to keep the Settlement Agreements confidential. But for the requirement of the Receiver to seek Court approval of the settlements and its activities, the need for public access would not have arisen. In *Bombardier*, the Supreme Court of Canada acknowledged (for example, circa para. 66) that even if the terms of a settlement agreement may be disclosed to the court for the purposes of enforcement, they may also still be confidential as between the parties and the public. The court noted that there may be a need for a sealing order where a settlement agreement is to be enforced, and held that "potentially sensitive information" tendered in support of an application to enforce a settlement agreement can be sealed so long

as the *Sierra Club* test [now, as reformulated in *Sherman Estate*] is met. In my view, the same logic can be applied to a situation where the need for disclosure of confidential settlements to the court arises in the context of a receivership proceeding such as this.

[22] No party will be prejudiced by the sealing order (to the contrary, all have either requested the confidentiality by signing the Settlement Agreements, or do not oppose the sealing order). I find the proposed sealing order to be proportionate. While there may be situations in which redactions could be applied to avoid the need to seal the entirety of a settlement agreement and all of its terms, the court has been advised that would not be practical in this case given how these Settlement Agreements were structured and the nature of the proceedings and the parties involved. There is also the added layer of complication in this case because of the continuing claims against the non-settling defendants AltaCorp and MNP.

[23] Further, the proposed sealing order is not absolute. It remains subject to further order of the court. It may be that some or all of the confidential Settlement Agreements, and the summary of their terms, can be unsealed at some future point in time.

[24] In the circumstances of this case, the important public interest in promoting settlements, especially complex multi-party and multi-proceeding settlements involving commercial parties who seek to protect their private and commercially sensitive information (and the personal private information of some of the individuals as well) by the confidentiality provisions they incorporated into their Settlement Agreements, outweighs any negative effects on the open court principle.

[25] I am satisfied that the prerequisites outlined by the Supreme Court in *Sherman Estate* for a sealing order over the Confidential Appendices to the Receiver's Special Third Report have been met in this case. The requested sealing order is granted.

A Word of Caution

[26] Parties should not assume that, just because they include a confidentiality clause or agreement to seek a sealing order in their agreements (whether they be settlement or other agreements), the Court will automatically grant a sealing order in any circumstance in which the agreements need to be referred to in legal proceedings. The chances of the court granting a sealing order may be enhanced where the agreement is the product of a settlement, but even so, there is no guarantee that the court will rubber stamp sealing orders just because of a confidentiality or sealing order clause. Settlement negotiations and agreements entered into in circumstances where it is known or expected that court approval is required can and should, where possible, be tailored so as to avoid the necessity of the entire agreements being sealed and to allow for limited redactions where needed.

[27] The sealing order must be based on a principled analysis and a record that supports concerns about disclosure. In this case, the sealing order was justified by virtue of the lengthy history of negotiations that were a product of, the nature and complexity of the issues, the nature and numerosity of the parties, the multitude of proceedings, including some that have not yet settled, and the identified commercial sensitivities that were not restricted to discrete parts of the Settlement Agreements and could not be easily redacted.

[28] Each case must be justified on its own merits.

Final Disposition and Orders

[29] There was a discussion at the hearing about some changes to the proposed form of order relating to the ongoing preservation and production obligations that had been requested by the non-settling defendants. A revised form of approval order was provided to the court today incorporating changes to the provisions

relating to the ongoing preservation and production obligations and ancillary relief that has been approved by all of the parties to the MNP Action. The provisions relating to the ongoing preservation and production obligations and any ancillary relief in the continuing action against AltaCorp have been removed from the approval order and will be addressed separately by the parties to that action.

[30] The Approval Order to go in the revised form signed by me today, with immediate effect.

[31] The supplemental consent order for the dismissal of the actions commenced by Seafort Capital Inc. against certain named individuals under court file numbers CV-19-627225-0000 and CV-21-0065966-00CL to go in the form signed by me today, with immediate effect and without the necessity of formal issuance and entry.

[32] These signed orders may be issued and entered, but they are not required to be.

[33] Counsel for the Receiver is responsible for ensuring that a physical hard copy of the motion records containing the sealed confidential exhibits to the Receiver's Special Third Report is filed with the court, together with a copy of the order by which they are sealed.

A handwritten signature in black ink, appearing to read "Kimmel J.", with a stylized, cursive script.

KIMMEL J.

July 21, 2022