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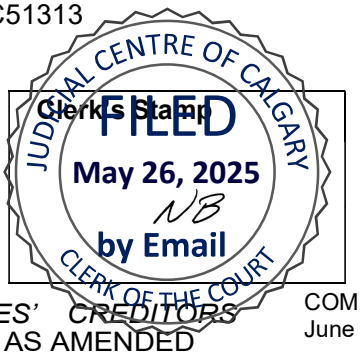

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June 3, 2025

COURT FILE NUMBER:	2401-17986
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
MATTER	IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED AND IN THE MATTER OF THE COMPROMISE OR ARRANGEMENT OF 420 INVESTMENTS LTD., 420 PREMIUM MARKETS LTD., GREEN ROCK CANNABIS (EC 1) LIMITED and 420 DISPENSARIES LTD
APPLICANTS	420 INVESTMENTS LTD., 420 PREMIUM MARKETS LTD., GREEN ROCK CANNABIS (EC 1) LIMITED, and 420 DISPENSARIES LTD.
DOCUMENT:	**BOOK OF AUTHORITIES OF THE APPLICANT**

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VI. LIST OF AUTHORITIES

1. *Companies' Creditors Arrangement Act,* RSC 1985, c C-36
2. *420 Investments Ltd (Re)*, 2025 ABKB 183
3. *Laurentian University of Sudbury,* 2022 ONSC 5645
4. *Bul River Mineral Corp*, *Re,* 2015 BCSC 113
5. *Canwest Global Communication Corp, Re,* 2010 ONSC 4209
6. *Canadian Airlines Corp., Re*, 2000 ABQB 442
7. *Metcalfe & Mansfield Alternative Investments II Corp, Re,* 2008 ONCA 587
8. *Lydian International Limited (Re),* 2020 ONSC 4006
9. *Delta 9 Cannabis Inc. et al*, Alberta Court of King's Bench Action No. 2401-09688, Order – Sanction of Plan and Stay Extension, granted on January 29, 2025
10. *Delta 9 Cannabis Inc. et al*, Alberta Court of King's Bench Action No. 2401-09688, Application of Delta 9 Cannabis et al filed January 2, 2025
11. *Target Canada Co et al*, CV-15-10832-00CL, Sanction and Vesting Order, granted on June 2, 2016 (ONSC)
12. *Re Payless Shoesource Canada Inc. and Payless Shoesource Canada GP Inc.*, Court File No. CV-19-006114629-00CL, Order of the Honourable Justice McEwen, dated September 15, 2020
13. *Rules of Court*, AR 124/2010
14. *Sierra Club of Canada v Canada (Minister of Finance),* 2002 SCC 41
15. *Sherman Estate v Donovan*, 2021 SCC 25
16. *Dow Chemical Canada ULC v Nova Chemicals Corporation*, 2015 ABQB 81
17. *Lewis v Uber Canada Inc*, 2023 ONSC 5134

CANADA

CONSOLIDATION

CODIFICATION

Companies' Creditors Arrangement Act

Loi sur les arrangements avec les créanciers des compagnies

R.S.C., 1985, c. C-36

L.R.C. (1985), ch. C-36

Current to May 5, 2025

Last amended on December 12, 2024

À jour au 5 mai 2025

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Compromise with secured creditors

5 Where a compromise or an arrangement is proposed between a debtor company and its secured creditors or any class of them, the court may, on the application in a summary way of the company or of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.

R.S., c. C-25, s. 5.

Transaction avec les créanciers garantis

5 Lorsqu'une transaction ou un arrangement est proposé entre une compagnie débitrice et ses créanciers garantis ou toute catégorie de ces derniers, le tribunal peut, à la requête sommaire de la compagnie, d'un de ces créanciers ou du syndic en matière de faillite ou liquidateur de la compagnie, ordonner que soit convoquée, de la manière qu'il prescrit, une assemblée de ces créanciers ou catégorie de créanciers, et, si le tribunal en décide ainsi, des actionnaires de la compagnie.

S.R., ch. C-25, art. 5.

Claims against directors — compromise

5.1 (1) A compromise or arrangement made in respect of a debtor company may include in its terms provision for the compromise of claims against directors of the company that arose before the commencement of proceedings under this Act and that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations.

Exception

(2) A provision for the compromise of claims against directors may not include claims that

(a) relate to contractual rights of one or more creditors; or

(b) are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.

Powers of court

(3) The court may declare that a claim against directors shall not be compromised if it is satisfied that the compromise would not be fair and reasonable in the circumstances.

Resignation or removal of directors

(4) Where all of the directors have resigned or have been removed by the shareholders without replacement, any person who manages or supervises the management of the business and affairs of the debtor company shall be deemed to be a director for the purposes of this section.

1997, c. 12, s. 122.

Transaction — réclamations contre les administrateurs

5.1 (1) La transaction ou l'arrangement visant une compagnie débitrice peut comporter, au profit de ses créanciers, des dispositions relativement à une transaction sur les réclamations contre ses administrateurs qui sont antérieures aux procédures intentées sous le régime de la présente loi et visent des obligations de celle-ci dont ils peuvent être, ès qualités, responsables en droit.

Restriction

(2) La transaction ne peut toutefois viser des réclamations portant sur des droits contractuels d'un ou de plusieurs créanciers ou fondées sur la fausse représentation ou la conduite injustifiée ou abusive des administrateurs.

Pouvoir du tribunal

(3) Le tribunal peut déclarer qu'une réclamation contre les administrateurs ne peut faire l'objet d'une transaction s'il est convaincu qu'elle ne serait ni juste ni équitable dans les circonstances.

Démission ou destitution des administrateurs

(4) Si tous les administrateurs démissionnent ou sont destitués par les actionnaires sans être remplacés, quiconque dirige ou supervise les activités commerciales et les affaires internes de la compagnie débitrice est réputé un administrateur pour l'application du présent article.

1997, ch. 12, art. 122.

Compromises to be sanctioned by court

6 (1) If a majority in number representing two thirds in value of the creditors, or the class of creditors, as the case may be — other than, unless the court orders otherwise, a class of creditors having equity claims, — present and voting either in person or by proxy at the meeting or

Homologation par le tribunal

6 (1) Si une majorité en nombre représentant les deux tiers en valeur des créanciers ou d'une catégorie de créanciers, selon le cas, — mise à part, sauf ordonnance contraire du tribunal, toute catégorie de créanciers ayant des réclamations relatives à des capitaux propres —

meetings of creditors respectively held under sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court and, if so sanctioned, is binding

(a) on all the creditors or the class of creditors, as the case may be, and on any trustee for that class of creditors, whether secured or unsecured, as the case may be, and on the company; and

(b) in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the *Bankruptcy and Insolvency Act* or is in the course of being wound up under the *Winding-up and Restructuring Act*, on the trustee in bankruptcy or liquidator and contributories of the company.

Court may order amendment

(2) If a court sanctions a compromise or arrangement, it may order that the debtor's constating instrument be amended in accordance with the compromise or arrangement to reflect any change that may lawfully be made under federal or provincial law.

Restriction — certain Crown claims

(3) Unless Her Majesty agrees otherwise, the court may sanction a compromise or arrangement only if the compromise or arrangement provides for the payment in full to Her Majesty in right of Canada or a province, within six months after court sanction of the compromise or arrangement, of all amounts that were outstanding at the time of the application for an order under section 11 or 11.02 and that are of a kind that could be subject to a demand under

(a) subsection 224(1.2) of the *Income Tax Act*;

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts; or

(c) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any

présents et votant soit en personne, soit par fondé de pouvoir à l'assemblée ou aux assemblées de créanciers respectivement tenues au titre des articles 4 et 5, acceptent une transaction ou un arrangement, proposé ou modifié à cette ou ces assemblées, la transaction ou l'arrangement peut être homologué par le tribunal et, le cas échéant, lie :

a) tous les créanciers ou la catégorie de créanciers, selon le cas, et tout fiduciaire pour cette catégorie de créanciers, qu'ils soient garantis ou chirographaires, selon le cas, ainsi que la compagnie;

b) dans le cas d'une compagnie qui a fait une cession autorisée ou à l'encontre de laquelle une ordonnance de faillite a été rendue en vertu de la *Loi sur la faillite et l'insolvabilité* ou qui est en voie de liquidation sous le régime de la *Loi sur les liquidations et les restructurations*, le syndic en matière de faillite ou liquidateur et les contributeurs de la compagnie.

Modification des statuts constitutifs

(2) Le tribunal qui homologue une transaction ou un arrangement peut ordonner la modification des statuts constitutifs de la compagnie conformément à ce qui est prévu dans la transaction ou l'arrangement, selon le cas, pourvu que la modification soit légale au regard du droit fédéral ou provincial.

Certaines réclamations de la Couronne

(3) Le tribunal ne peut, sans le consentement de Sa Majesté, homologuer la transaction ou l'arrangement qui ne prévoit pas le paiement intégral à Sa Majesté du chef du Canada ou d'une province, dans les six mois suivant l'homologation, de toutes les sommes qui étaient dues lors de la demande d'ordonnance visée aux articles 11 ou 11.02 et qui pourraient, de par leur nature, faire l'objet d'une demande aux termes d'une des dispositions suivantes :

a) le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*;

b) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, ou d'une cotisation prévue par la partie VII.1 de cette loi ainsi que des intérêts, pénalités ou autres charges afférents;

c) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, et qui prévoit la perception d'une somme,

Court of King's Bench of Alberta

Citation: 420 Investments Ltd (Re), 2025 ABKB 183

Date: 20250327
Docket: 2401 17986
Registry: Calgary

In the Matter of the *Companies' Creditors Arrangement Act* RSC 1985, c. C-36, as amended
In the Matter of the Compromise or Arrangement of 420 Investments Ltd., 420 Premium Markets Ltd., Green Rock Cannabis (EC 1) Limited and 420 Dispensaries Ltd.

Reasons for Decision
of the
Honourable Justice M.H. Bourque

I. Introduction and Background

A. NOI Proceedings

[1] On May 29, 2024 (**Filing Date**), 420 Investments Ltd (**420 Parent**), 420 Premium Markets Ltd (**420 OpCo**), and Green Rock Cannabis (EC 1) Limited (**Green Rock**), (collectively, **NOI Entities**) each filed a Notice of Intention to Make a Proposal (**NOI**) pursuant to section 50.4(1) of the *Bankruptcy and Insolvency Act*, RSC 1985 c B-3 (***BIA***), (**NOI Proceedings**). KSV Restructuring Inc (**KSV**) consented to act as proposal trustee (**Proposal Trustee**) in the NOI Proceedings.

[2] On June 27, 2024, the Court granted an order, among other things, extending the stay and time to make a proposal to August 12, 2024, approving a key employee retention plan, and granting typical administration and related charges.

[3] On August 12, 2024, the Court granted two orders, among other things, further extending the stay and time to make a proposal to September 26, 2024, and directing and accelerating the scheduling of an appeal of the decision of Applications Judge Farrington's decision in an action involving, on the one hand, 420 Parent, and, on the other, Tilray Inc (**Tilray**) and High Park Shops Inc. (**High Park**) (**Tilray Litigation**), described in greater detail below.

B. *CCAA* Proceedings

[4] On September 19, 2024, the Court granted an initial order on the application of the NOI Entities and 420 Dispensaries Ltd (**Dispensaries**) (collectively, **Applicants**) continuing the NOI

Proceedings under the *Companies Creditors Arrangement Act*, RSC 1985, c C-36 (***CCAA***) (***CCAA* Proceedings**). On the same date, the Court granted an amended and restated initial order (**ARIO**) extending the stay period to December 16, 2024, as well as a claims procedure order.

[5] On October 2, 2024, Jones J granted an order (**SISP Order**), approving a sale and investment solicitation process (**SISP**). As discussed in greater detail later, the SISP did not result in a sale transaction.

[6] On December 5, 2024 and again on February 14, 2025, the Court granted orders extending the *CCAA* stay period to February 25, 2025 and March 31, 2025 respectively.

C. Tilray Litigation

[7] At all material times, 420 Parent owned and operated retail cannabis stores in Alberta. Pursuant to an Arrangement Agreement dated August 28, 2019 (**Arrangement Agreement**), Tilray and High Park agreed to acquire 420 Parent for $70 million plus a potential additional $44 million in contingent consideration. As part of the proposed transaction, pursuant to a loan agreement (**Loan Agreement**), High Park provided $7 million in bridge financing (**Bridge Loan**) to 420 Parent to facilitate the continued development of retail stores before the closing of the Arrangement Agreement. The Loan Agreement provided for the repayment of the Bridge Loan on the later of (i) 180 days from the advance of funds or (ii) the termination of the Arrangement Agreement.

[8] On January 28, 2020, and February 4, 2020, Tilray and High Park provided 420 Parent with notices of alleged breaches of the Arrangement Agreement, which 420 Parent rejected because Tilray and High Park had not particularized the alleged breaches. On February 21, 2020, 420 Parent commenced an action against Tilray and High Park. On February 26, 2020, Tilray and High Park issued a notice of termination, citing 420 Parent's failure to cure the alleged breaches within the time allowed under the Arrangement Agreement.

[9] On March 11, 2020, High Park issued a notice of acceleration requiring 420 Parent to repay the Bridge Loan. When 420 Parent refused to repay the Bridge Loan, Tilray and High Park counterclaimed, seeking the repayment of the $7 million advance (**High Park Counterclaim**). In an unpublished endorsement dated February 7, 2024, Applications Judge Farrington granted High Park's application for summary judgment (**High Park Summary Judgment**), the effect of which was to make enforceable the repayment of the amount advanced under the Bridge Loan plus interest. 420 Parent appealed the High Park Summary Judgment. Shortly thereafter, High Park commenced enforcement proceedings against 420 Parent, which led the NOI Entities to file the NOI. 420 Parent appealed the High Park Summary Judgment.

[10] On October 16, 2024, Feasby J allowed 420 Parent's appeal of the High Park Summary Judgment (***420 Investments Ltd v Tilray Inc***, 2024 ABKB 610 (**Feasby Decision**)). Given their importance in these proceedings, I have set out the relevant portions of the Feasby Decision:

> [17] The Applications Judge recognized that Tilray and High Park may be liable in respect of [420 Parent's] main claim but did not see that as an obstacle to the enforcement of the Loan Agreement. His view was that the money advanced to 420 [Parent] was owing, and the Loan Agreement provided there was to be no set-off. He concluded that this meant that any claim regarding the Arrangement Agreement should be decided separately. Accordingly, it was appropriate to grant

summary judgment in respect of the counterclaim for the amount of the Bridge Loan.

[18] The Applications Judge's approach overlooked the words of Loan Agreement s 7.1. Loan Agreement s 7.1 makes repayment of the Bridge Loan contingent on the termination of the Arrangement Agreement. Put differently, termination of the Arrangement Agreement is a condition precedent to the enforcement of the Bridge Loan. This requires the Court to determine whether the Arrangement Agreement has been terminated.

[19] The Arrangement Agreement can only be terminated in accordance with its terms. Article 7.1 of the Arrangement Agreement provides the grounds on which it may be terminated, and art 4.7 outlines the required contents of a notice to terminate. To determine whether there has been a "termination of the Arrangement Agreement" for the purposes of Loan Agreement s 7.1 it is necessary to determine whether the procedural and substantive requirements for termination under the Arrangement Agreement have been satisfied. The parties have adduced conflicting evidence concerning whether the procedural and substantive requirements for termination of the Arrangement Agreement have been satisfied.

[20] Termination of the Arrangement Agreement is a question that is integral to 420's main claim for specific performance and Tilray and High Park's defence to that claim. Termination of the Arrangement Agreement is not amenable to summary determination. Whether the notices of termination provided the particulars required by Arrangement Agreement art 4.7 and whether the alleged grounds of termination can be proved are issues for trial. It would be contrary to the interests of justice to decide these issues summarily in the face of conflicting evidence when those issues are central to the main action.

[21] The only way around the interpretation of Loan Agreement s 7.1 that I have outlined is to do what the Applications Judge did and effectively read "termination of the Arrangement Agreement" as meaning "delivery of a notice of termination." This reading is not consistent with the text of Loan Agreement s 7.1 which refers to the Arrangement Agreement and, in my view, thereby requires the Court to consider whether the evidence shows that the termination provisions of the Arrangement Agreement have been satisfied. Further, from a practical standpoint, such an interpretation allows Tilray and High Park to call the Bridge Loan by issuing a notice of termination of the Arrangement Agreement even if they do not have a *bona fide* basis to issue a notice of termination.

[emphasis added in para 18]

[11] Accordingly, repayment of the Bridge Loan is not currently enforceable by High Park against 420 Parent because its repayment is contingent on whether termination of the Arrangement Agreement has occurred. The issue of whether the Arrangement Agreement has been terminated remains unresolved, and according to Justice Feasby, it cannot be resolved in a summary manner. High Park has appealed the Feasby Decision. The Court of Appeal has scheduled the hearing of High Park's appeal for April 17, 2025.

[12] Although the parties disagree on the degree of progress and advancement of 420's claim against Tilray and High Park, one claiming not very advanced, the other, significantly so, I need not decide as it does not impact my decision.

II. Applications and Cross-Application in Issue

[13] The Applicants seek an order permitting the filing of a plan of compromise and arrangement (**Proposed Plan**) and calling for a meeting of creditors to vote on the plan (**Creditors' Meeting**). Although the Applicants indicated an April 3, 2025 Creditors' Meeting date, in response to my questions at the hearing regarding the suitability of holding it after the Court of Appeal hearing, the Applicants expressed openness to doing so.

[14] The salient features of the Proposed Plan include the following:

a. the Applicants will borrow a pool of cash (**Creditor Cash Pool**);

b. the unsecured creditors of 420 OpCo and Green Rock (**OpCo Unsecured Creditors**) will have their proven claims satisfied in full through a combination of their proportional share of the Creditor Cash Pool, currently estimated at 55 cents on the dollar, and by electing to potentially receive the other 45 cents on the dollar, either from:

   (i) the issuance by 420 Parent of such number of its shares having equivalent value to the differential; or

   (ii) future proceeds from a final judgment obtained in the Tilray Litigation, if any, in an amount equal to but not exceeding the differential;

c. Stoke Canada Finance Corp. (**Stoke**), the senior secured lender of OpCo, will have its claim paid in full;

d. the secured creditors of 420 Parent and 420 Dispensaries to be unaffected creditors;

e. the Tilray Litigation, including the High Park Counterclaim, is preserved and can continue unaffected following emergence from the *CCAA* proceedings;

f. the Applicants and their retail operations would continue for the benefit of all stakeholders.

[15] Under the Proposed Plan, two classes of affected creditors would be created, voting separately. If accepted in sufficient number and value, the Applicants will return to the Court to seek approval of the Proposed Plan and have reserved time on April 24, 2025 (**Sanction Hearing**).

[16] The Applicants also seek an order extending the *CCAA* stay to April 30, 2025.

[17] High Park opposes the applications and cross-applies for orders that enhance the Monitor's powers and direct the Monitor to resume the SISP.

III. Analysis

A. Should the Court Grant the Creditors' Meeting Order?

1. Legislative Authority and Decision-Making Framework

[18] The Court derives its authority to order a creditor meeting from sections 4 and 5 of the *CCAA*: ***Delta 9 Cannabis Inc (Re)***, 2024 ABKB 657 (***Delta 9***), para 9. The statutory provisions are permissive and require the exercise of judicial discretion in furtherance of the *CCAA's* remedial purpose (para 10-11).

[19] The *CCAA* is remedial and seeks to provide for timely, efficient and impartial resolution of a debtor's insolvency, preserving and maximizing the value of a debtor's assets, ensuring fair and equitable treatment of the claims against a debtor, protecting the public interest, and balancing the costs and benefits of restructuring or liquidating the company: ***9354-9186 Québec inc v Callidus Capital Corp***, 2020 SCC 10 (***Callidus***), paras 40-42; ***Delta 9***, para 11.

[20] Historically, proceedings under the *CCAA* typically involved an approach to "facilitate the reorganization and survival of the pre-filing debtor company" as "a going concern", failing which "the alternative course of action [is] a liquidation through either a receivership or under the *BIA*" (***Callidus*** para 41). Over time, the approach has evolved "to permit outcomes that do not result in the emergence of the pre-filing debtor company in a restructured state, but rather involve some form of liquidation" (***Callidus***, para 42).

[21] In ***Delta 9***, Marion J comprehensively surveys Canadian jurisprudence regarding the test as to whether a creditor meeting should be ordered. As he observes, the decision to order a meeting requires an assessment of whether it is in the best interests of the debtor and its stakeholders to hold such a meeting. The decision to order a meeting is performed on a low standard. Because an order directing a creditors' meeting is often uncontroversial, the decision-making process generally does not involve argument as to whether the proposed plan is fair and reasonable (paras 12-13).

[22] As in this case, where the application for a creditors' meeting is opposed, Marion J explains that the Court should more carefully examine the material filed and the issues or concerns raised. Moreover, "the Court may consider the equities as they relate to the debtor companies and its secured creditor" (***Delta 9***, para 14).

[23] Marion J provides a non-exhaustive list of circumstances where courts have refused to grant a creditors' meeting order (***Delta 9***, para 15):

a. the plan is not in the best interests of the debtor and its stakeholders;

b. where there is no reasonable chance the debtor will be able to continue in business;

c. where the plan "lacks economic reality";

d. where there is no hope creditors would approve the plan, but the Court should not impose too a heavy burden on the proponent to establish the likelihood of success or second guess the probability of success (except where doomed to fail);

e. where the Court would not approve the plan, including where the Court lacks jurisdiction to sanction it;

f. where the plan is inconsistent with court orders or the *CCAA* process did not unfold fairly and transparently.

[24] Of the instances enumerated above, High Park opposes the Creditors' Meeting Order under a, d, and f. In addition, High Park argues that the Plan should not be approved because it disregards and negatively and unfairly impacts High Park, a secured creditor of 420 Parent, and prohibits High Park from voting on the Proposed Plan.

2. What happened in the SISP?

[25] High Park's opposition to the Creditors' Meeting Order is largely shaped by its perspective on how the SISP unfolded. To provide context, I have outlined the parties' perspectives on what occurred in the SISP. In doing so, I have largely borrowed from their counsels' briefs. Accordingly, the reader should not interpret my reasons in this section as making findings or inferences of fact, except if specifically stated.

a) High Park's Perspective

[26] The SISP proceeded in two phases. In Phase 1, interested parties were required to provide non-binding letters of intent (LOI). The Monitor was tasked with determining whether an LOI qualified for participation in Phase 2; qualified parties would then provide binding offers in accordance with the SISP requirements and timelines. Following the Phase 2 bid deadline, the Monitor was tasked with assessing the bids and notifying bidders as to whether any of their respective bids constituted a Phase 2 Qualified bid.

[27] High Park states that it actively engaged in good faith with the SISP. It made an offer to 420 Parent, which could have been pursued by the Applicants in combination with any bid for their operating assets by another party. High Park also partnered with One Plant (Retail) Corp (**One Plant**), and together, they prepared and submitted an LOI in Phase 1. On November 22, 2024, the Monitor confirmed that High Park and One Plant were deemed qualified bidders for Phase 2 of the SISP, jointly in respect of their joint LOI, and High Park alone, in respect of its individual bid.

[28] High Park and One Plant assert that they prepared a detailed bid for Phase 2 of the SISP (**Joint Bid**) and confidentially provided it to the Monitor on December 20, 2024, in accordance with the timelines and requirements under the SISP. They say the Joint Bid followed the template subscription agreement provided by the Applicants and the Monitor. High Park and One Plant paid a cash deposit in trust to the Monitor in connection with the Joint Bid. In their view, the Joint Bid provided two options for the purchase price, which would be either a combination of cash and a credit bid of certain amounts outstanding under the Loan Agreement, or entirely cash consideration. The quantum of cash consideration is the subject of a sealing order.

[29] According to High Park, under either option, the cash consideration provided under the Joint Bid was sufficient to pay in full (a) all secured creditors of 420 OpCo and Green Rock, (b) all third-party unsecured creditors of 420 OpCo and Green Rock, and (c) all claims against 420 Parent which rank in priority to High Park's claim, including Nomos' secured claim. The reference to third-party unsecured claims is to distinguish from the intercompany claims owed by 420 OpCo and Green to 420 Parent, which would be assumed under the Joint Bid.

[30] In their view, the Joint Bid was not conditional on any due diligence or financing. The Joint Bid provided for a going concern sale. High Park and One Plant would assume leases in respect of nearly all of the Applicants' stores (save up to 3 identified before closing). Offers of

employment would be extended to at least 90% of the Applicants' employees at retail and head office levels.

[31] Neither the Applicants nor the Monitor provided any feedback or asked any questions of High Park after the Joint bid was submitted. According to High Park, it was prepared to engage in good-faith negotiations.

[32] On January 7, 2025, High Park received a letter from the Monitor confirming the Joint Bid was a Phase 2 Qualifying Bid, but that the Applicants had advised that no bid would be selected in the SISP and the Applicants had elected to advance a plan of arrangement "intended to provide realizations to creditors that are [in] excess of any potential realizations creditors may receive by advancing a Phase 2 Qualified Bid". According to High Park, this was the first time that High Park was informed that a plan of arrangement was substantially ready for acceptance.

[33] High Park asserts that the Proposed Plan does not provide realizations to creditors exceeding those available under the Joint Bid.

[34] High Park says that it became apparent that the Monitor and the Applicants may have misunderstood certain aspects of the Joint Bid. Through its counsel (not High Park's counsel on this application), High Park wrote to the Monitor's counsel to clarify the Joint Bid, reiterating that the Joint Bid would see all third-party creditors repaid in full, and indicating that High Park and One Plant remained ready and willing to progress the Joint Bid. Notwithstanding the clarifications provided, the Applicants proceeded to pursue the Proposed Plan, which High Parks says is a "materially less favourable Plan".

b) The Applicants' Perspective

[35] According to the Applicants, the SISP involved significant marketing efforts, and they, along with the Monitor, worked diligently with interested bidders to provide information, solicit bids in Phase I, and advance bids from Phase 1 to Phase 2. According to the Applicants, the SISP Order required bidders to put their best foot forward by the Phase 2 bid deadline, after which the Applicants and monitor would determine the best bid.

[36] Upon their review of the Joint Bid, the Applicants assert that they and the Monitor concluded that the Joint Bid was not the best bid as it not only did not offer full cash payout to unsecured creditors as High Park claims it does, but it also did not offer the best cash payout to unsecured creditors out of the bids received. Further, according to the Applicants, it did not appear that Stoke, 420 OpCo's secured creditor, would receive any payment under the Joint Bid.

c) The Monitor's Third Report

[37] The Monitor is the Court-appointed officer designated by the Initial Order to, among other things, report to the Court concerning matters relevant to the *CCAA* proceedings.

[38] In its Third Report, the Monitor confirms that the Applicants and the Monitor reviewed the Joint Bid. Contrary to High Park's assertion that the consideration under the Joint Bid would repay in full all of 420 OpCo's and Green Rock's third-party unsecured creditors and 420 Parent's senior secured creditor, at the time of reviewing the Joint Bid, the Monitor and the Applicants concluded that the Joint Bid, as structured, did not accomplish the payout of 420 OpCo's and Green Rock's third-party creditors. The Monitor's analysis is also detailed in a Confidential Annex to the Third Report, which is the subject of a restricted court access order.

[39] Moreover, the Monitor indicates that the Applicants were of the view that the offers received for the Tilray Litigation did not maximize value. The Third Report confirms that the Applicants rejected the Joint Bid and all other bids received in the SISP because the Applicants believed they could advance a plan that would result in an equal or greater outcome for stakeholders.

[40] In its Third Report, the Monitor confirmed receipt of the letter from High Park and Tilray's counsel (not its counsel in this proceeding) referenced earlier. Following its receipt, the Monitor responded, explaining and commenting on other matters that both the Monitor's and the Applicants' understanding of the mechanics of the Joint Bid was that it would not result in distributions to 420 OpCo's creditors. A further email was sent to High Park's counsel, further explaining the Monitor's views on the Joint Bid.

[41] Following receipt of the Monitor's letter and email, High Park's counsel on this application wrote to the Monitor further clarifying the Joint Bid, which, in their view, would provide for a full recovery for the creditors of 420 OpCo. However, High Park's counsel acknowledged that the allocation of the consideration in the Joint Bid was not clear, and that the lack of clarity was caused by the Applicants' deficient form of subscription agreement, which did not allow for the allocation of the consideration.

[42] At page 24 of the Third Report, the Monitor states:

> The Monitor is of the view that it now understands the intent of the Joint Bid with the subsequent clarifications, (the "Clarified Joint Bid"), however, it remains of the view that the initial Joint Bid did not achieve the intent of the Clarified Joint Bid.
>
> The Monitor understands the intent of the Resumed SISP would therefore allow High Park to clarify and resubmit its bid for consideration by the Applicants and their creditors. If the Clarified Joint Bid were advanced as clarified, it would result in the assumption of the Intercompany Claims and a full cash payment of the Affected Claims. However, the Monitor cannot guarantee that the Clarified Joint Bid would be advanced in the manner presented or that this Court would sanction a transaction arising from the Clarified Joint Bid.

[43] As expected in the case of a court-appointed officer, the Monitor confirms in its Third Report that it takes no position in these applications.

3. Should the Court make the Creditors' Meeting Order?

[44] In this section, I will assess whether the Creditors' Meeting Order should be granted by reference to the grounds upon which High Park says it should be refused.

a) Is the Proposed Plan not in the best interests of the Applicants' creditors?

[45] The thrust of High Park's argument can be summarized as follows: the Joint Bid immediately puts more money into the Applicants' creditors' hands than does the Proposed Plan; therefore, the Proposed Plan cannot be in the best interests of the Applicants' creditors, only the Joint Bid is in the best interests of the creditors, and their interests can only be best served by reopening the SISP. I reject High Park's argument for the following reasons.

[46] First, in the context of the *CCAA* proceedings, while the quantum of recovery is an important consideration in assessing the best interests of creditors, it is not the only one. Undoubtedly, unsecured creditors strive for the greatest recovery possible; however, as Counsel for RioCan pointed out, unsecured creditors, such as RioCan, which supports the Proposed Plan, are also interested in "certainty and finality in a speedy process". While not necessarily quantifiable in pecuniary terms, I agree that certainty and finality can provide a range of value to stakeholders, depending on their circumstances, and is an important consideration in the best interests analysis.

[47] Second, while the Proposed Plan does not offer immediate 100% recovery, it does offer a path to full recovery. As currently contemplated, affected creditors are expected to receive 55 cents on the dollar and can elect between two options that may make them whole in the future. One option involves the election to receive such number of 420 Parent shares equal in value to the differential. Some creditors, perhaps those having confidence in 420 Parent's management team and longer-term prospects, may find this option attractive as it represents an opportunity to invest and obtain considerably more than the differential. The other option, a future right to receive the differential via proceeds from the successful prosecution of and recovery from the Tilray Litigation, may be attractive to those affected creditors who value certainty and finality in a speedy process.

[48] Third, I find it essential to consider whose interests the Joint Bid *best* serves. I find the answer is evident: High Park.

[49] When the Applicants sought the SISP Order, they argued that the Tilray Litigation should not be included. High Park strenuously argued that it should be included. In deciding to include the Tilray Litigation in the SISP, Justice Jones posited that the best way to determine the value of the Applicants' assets was to include all of them in the SISP, including the Tilray Litigation, and that some useful information *may* emerge from the process. Based on my review of the information provided by the Monitor in the confidential appendices to its Second and Third Reports, it turns out that very little information regarding the valuation of the Tilray Litigation emerged.

[50] In my view, the fact that very little useful information about the value of the Tilray Litigation emerged is likely explained by the unique nature of this intangible asset. Some intangible assets are not only more easily valued than others, but they may also be more desirable to an investor. Take, for instance, an intangible asset, such as goodwill or a client list. A hypothetical investor may be inclined to acquire and ascribe value to that asset because it contributes positively to the underlying business's profit-making apparatus. Compare that scenario with an interest in a contractual breach lawsuit, which is also an intangible asset. In my view, there are several reasons why a hypothetical investor may be less inclined to acquire or value such an asset. Although potentially lucrative if successful, lawsuits generally do not significantly contribute to a business's profit-making apparatus. They generally don't increase revenue or attract a new business clientele. They require time and often divert management's attention from its focus on the business and its profitability. A hypothetical investor may not wish to retain those in the management group with the requisite information and knowledge to pursue the lawsuit successfully.

[51] Unlike the hypothetical investor, High Park is highly motivated to acquire the Tilray Litigation. By submitting the Joint Bid, which would have resulted in the acquisition of nearly all

the Applicants' assets, including the Tilray Litigation, for a price that results in full recovery to all creditors (which High Park says is the only bid in the stakeholders' best interests), not only can High Park set as low a price as possible for the Tilray Litigation but it can also argue that any arrangement or compromise plan put forward that does not offer full recovery is not in the stakeholders' best interests. It's a circular argument.

[52] I am not persuaded that the Creditors' Meeting Order should not be granted because it is not in the creditors' best interests.

b) Is there no hope that the creditors will approve the Proposed Plan?

[53] High Park submits that there is no hope that the creditors will approve the Proposed Plan as it appears unlikely that those creditors are aware of at least one alternative available that would see them immediately repaid in full: the Joint Bid. At least one unsecured creditor, with knowledge of the Joint Bid, indicated at the hearing of this application that it supported the Proposed Plan, preferring certainty and finality over recovery.

[54] I am not persuaded that the Creditors' Meeting Order should not be granted because there is no hope that the creditors will approve the Proposed Plan.

c) Did the process not evolve fairly or transparently?

[55] High Park submits that, in exercising its discretion whether to grant the Creditors' Meeting Order, I should examine the unique circumstances surrounding the SISP that was conducted and then "abruptly" abandoned. High Park points to the fact that the Applicants "plainly did not want to include the Litigation Asset in the SISP." While it is true that the Applicants argued against the inclusion of the Tilray Litigation in the SISP, they were also clear that they did not view their insolvency as a liquidation, nor were they obliged to put everything on the market, nor complete a sale under the SISP. That the Applicants did not proceed with a transaction under the SISP and instead are now proceeding with the Proposed Plan does not mean the process did not evolve fairly or transparently. I find no unfairness or lack of transparency in how the process evolved.

[56] High Park also advances arguments regarding the funding the Applicants have obtained to fund the Proposed Plan, which High Park says may impact its ability to recover amounts advanced under the Loan Agreement. According to High Park, the details of the proposed financing ought to be disclosed to creditors and the Court. Based on the record before me, I am unable to determine whether the new funding will adversely impact High Park's ability to eventually recover on the Bridge Loan. That said, as Feasby J determined, repayment of the Bridge Loan is contingent on the Court's determination of whether the Arrangement Agreement has been terminated. At this stage, I am not prepared to deny the Creditors' Meeting Order because of the potential impact the proposed financing may have on repayment of the Bridge Loan. Depending on the outcome of the Creditors' Meeting and the hearing in the Court of Appeal, this may be an issue better suited for the Sanction Hearing.

d) Should the Proposed Plan not be approved by the Court?

[57] In its brief, High Park argues that the Court should not approve the Proposed Plan for two main reasons: (i) it is an affected creditor entitled to vote on the Proposed Plan, and (ii) there is no reasonable chance that the applicants will be able to continue their business if the Proposed Plan is approved. I will address these issues in reverse order.

(1) Is there no reasonable chance that the applicants will be able to continue their business if the Proposed Plan is approved?

[58] High Park advances several arguments under this heading, which I find to be largely speculative.

[59] Regarding the appeal of the Feasby Decision, the Court of Appeal's disposition may render the Applicants unable to continue their business if repayment of the Bridge Loan becomes enforceable. However, that is not the current situation, and these *CCAA* proceedings should not be grounded to a halt awaiting the outcome. Nor should they be because the Applicants have not disclosed how they intend to fund the continued pursuit of the Tilray Litigation.

[60] Regarding High Park's submission that 420 Parent has no means to repay the Nomos debt and that that debt will be immediately due upon implementation of the Proposed Plan if approved by the creditors and sanctioned by the Court, I have no information regarding Nomos' intentions if the Proposed Plan is approved. Given that the Applicants were able to obtain financing to fund the Proposed Plan, I surmise that the Applicants and/or the proposal funder may have received some assurances regarding Nomos' intentions.

(2) Is High Park an affected creditor entitled to vote at the Creditors' Meeting?

[61] Although it is generally accepted that creditors with provable claims are usually entitled to vote on plans of arrangement, it is "subject to the proper exercise of discretion by the supervising judge to constrain or bar the creditor's right to vote" (***Callidus***, para 56; ***Delta 9***, para 19). Barring a creditor from voting at a plan approval meeting should only occur "where the circumstances demand such an outcome", which is "necessarily a discretionary, circumstance-specific inquiry" (***Callidus***, para 69). In addition (at para 70):

> ... The exercise of this discretion must further the remedial objectives of the *CCAA* and be guided by the baseline considerations of appropriateness, good faith, and due diligence. This means that, where a creditor is seeking to exercise its voting rights in a manner that frustrates, undermines, or runs counter to those objectives — that is, acting for an "improper purpose" — the supervising judge has the discretion to bar that creditor from voting.

See also: ***Canada v Canada North Group***, 2021 SCC 30, per Côté J at para 21; per Karakatsanis J at para 138.

[62] The Applicants argue that High Park's claim is contingent. They submit that the situation is analogous to that in ***Nalcor Energy v Grant Thornton Poirier Ltd***, 2015 NBQB 20. I agree with High Park that the facts of that case are very different. Importantly, the case did not, like here, involve an advance of money. In the High Park Counterclaim, the issue for determination is the timing of when the advance of money is repayable, an issue which Feasby J determined was not capable of being decided in a summary way. As matters stand, the Bridge Loan is not currently repayable and will not be until after a decision has been made at trial. Several years away.

[63] In my view, this case presents unique circumstances that necessitate denying High Park the right to vote on the Proposed Plan. Repayment of the Bridge Loan is currently not enforceable, and it is unlikely to become enforceable for some time. A trial decision favourable

to 420 Parent may result in the Bridge Loan being set off against damages awarded to 420 Parent. If High Park were allowed to vote at the creditors' meeting, the outcome would be a foregone conclusion. In my view, to allow High Park to vote would unduly prejudice the other creditors, particularly the unsecured creditors, who are not awaiting a trial judgment but are presently owed money, and who may be interested in certainty and finality in a speedy process.

[64] Moreover, a failed creditors' meeting would undoubtedly lead to the resumption of the SISP and the likely liquidation of the Applicants. It is not readily apparent to me that a liquidation of the Applicants is required. As the Applicants' CEO, Mr. Morrow, attests, the Applicants have been able to run on a cashflow positive basis in these proceedings without the need for DIP financing. It must also be recalled that the Applicants find themselves in these *CCAA* proceedings as a result of the High Park Summary Judgment and High Park's enforcement measures. Those measures have ceased in light of the Feasby Decision.

[65] For these reasons, I am exercising my discretion to deny High Park the right to vote on the Proposed Plan at the Creditors' Meeting.

e) Creditors' Meeting Order is granted

[66] For all these reasons, the application seeking an order permitting the filing of the Proposed Plan and calling the Creditors' Meeting is granted.

B. Should the *CCAA* Stay be Extended?

[67] The current *CCAA* Stay is set to expire on Monday. Given my decision to permit the filing of the Proposed Plan and calling the Creditors' Meeting, extending the stay is appropriate. I am satisfied that the Applicants have acted and continue to act in good faith and with due diligence.

[68] Although the Applicants had requested that the stay be extended to April 30, 2025, this may not provide sufficient time to finalize the Proposed Plan and hold the Creditors' Meeting. The Applicants also expressed some willingness to call the meeting for a date after the hearing of the appeal of the Feasby Decision. I express no opinion on the appropriateness of delaying the Creditors' Meeting. Given these considerations and the costs associated with a court application to merely extend the stay, I would order the stay be extended to Friday, May 23, 2025.

C. Resumption of SISP with Enhanced Powers to the Monitor

[69] Given my decision to permit the filing of the Proposed Plan and calling the Creditors' Meeting, I dismiss High Park's application seeking the resumption of the SISP and the granting of enhanced powers to the Monitor.

Heard on the 14th day of March, 2025.
Dated at the City of Calgary, Alberta this 27th day of March, 2025.

M.H. Bourque
J.C.K.B.A.

Appearances:

Karen Fellowes KC, Archer Bell, and Matti Lemmens, Stikeman Elliott LLP
for the Applicants, 420 Investments Ltd., 420 Premium Markets Ltd., Green Rock Cannabis (EC 1) Limited and 420 Dispensaries Ltd.

Kelly J. Bourassa, Jenna Willis and N. Huertas, Blake, Cassels & Graydon LLP
for the Respondents High Park Shops Inc.

S. Miller, JSS Barristers
Litigation Counsel for High Park Shops Inc.

Michael Selnes, Bennett Jones LLP
for the Monitor, KSV Restructuring Inc.

L. Galessiere, Camelino Galessiere LLP
for RioCan REIT

M. Fleming, Loopstra Nixon LLP
for Nomos Capital

G. Schacter for Stoke Inventory Partners Inc.

D. Segal, Justice Canada
for Canada Revenue Agency

CITATION: Laurentian University of Sudbury, 2022 ONSC 5645
COURT FILE NO.: CV-21-00656040
DATE: 2022-10-11

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF **LAURENTIAN UNIVERSITY OF SUDBURY**

BEFORE: Chief Justice G.B. Morawetz

COUNSEL: *D.J. Miller, Mitch Grossell and Derek Harland*, for the Applicant

Ashley Taylor and Elizabeth Pillon, for the Court-appointed Monitor Ernst & Young Inc.

Bradley Wiffen, for His Majesty the King in Right of Ontario as represented by the Minister of Colleges and Universities

Scott Rollwagen, for the Board of Governors

Natasha MacParland, Lender Counsel for the Applicant

Charles Sinclair, for Laurentian University Faculty Association

Brendan Scott, for Laurentian University Staff Union

Stuart Brotman and Dylan Chochla, Toronto-Dominion Bank

Laura Culleton, for Bank of Montreal

Joseph Bellissimo, for Huntington University

Andrew Hatnay, for Thorneloe University

André Claude, for University of Sudbury

Alex MacFarlane and Charlotte Chen, for NOSM

Stephen Gaudreau, for the Art Gallery of Sudbury

Roderic McLauchlan, Barry Stork and Colby Linthwaite, for the Canadian Universities Reciprocal Insurance Exchange

Mark G. Baker and Andre Luzhetskyy, for the Laurentian University Students' General Association

Heather Fisher, for the Auditor General of Ontario

Dawne Jubb, Interim General Counsel for Laurentian University

HEARD and DETERMINED: October 5, 2022

REASONS: October 11, 2022

ENDORSEMENT

[1] At the conclusion of the hearing, I granted the motion with reasons to follow. These are the reasons.

[2] Laurentian University of Sudbury ("LU") brings this motion for the following orders:

(a) the Sanction Order that sanctions the Plan pursuant to the *Companies' Creditors Arrangement Act* ("CCAA");

(b) the Unsealing Order that, at the Effective Time on the Plan Implementation Date, unseals the Sealed Exhibits to the Affidavit of Dr. Robert Haché sworn January 30, 2021; and

(c) the Stay Extension Order that extends the Stay Period up to and including November 30, 2022.

[3] The evidentiary support for the requested relief is set out in the affidavit of Dr. Robert Haché, sworn on September 28, 2022 and in the 16th Report of Ernst & Young Inc., in its capacity as Monitor of LU (the "Monitor") (the "Report").

[4] The motion was not opposed.

BACKGROUND

[5] LU commenced this CCAA proceeding on February 1, 2021. In granting the Initial Order I made a number of findings of fact, including:

(a) LU was a "debtor company" to which the CCAA applies;

(b) LU was "plainly insolvent and faces a severe liquidity crisis";

(c) absent additional financing, LU would be unable to meet payroll at the end of February, 2021;

(d) the financial crisis was “real and immediate”; and

(e) with the approval of the interim financing, LU would have liquidity for the duration of the Stay Period.

[6] Subsequent to the granting of the Initial Order, LU commenced a comprehensive operational, financial and academic restructuring to ensure that it could emerge from the CCAA Proceeding as a going concern and as a financially sustainable university.

[7] LU engaged in negotiations with the assistance of Justice Sean Dunphy, the Court-Appointed Mediator with respect to the various restructuring initiatives which LU felt were necessary in order to achieve financial sustainability, including, among other things: (a) a full review and restructuring of its academic programs; (b) reducing its faculty complement based upon the academic restructuring; and (c) negotiating an end to, or terminating, LU’s historic relationship with the former federated universities. LU achieved agreement with several of the key parties who participated in the Mediation, including Laurentian University Faculty Association (“LUFA”), Laurentian University Staff Union (“LUSA”) and Huntington University.

[8] In addition to entering into restructuring agreements with critical stakeholders, LU states that it achieved the following key milestones during the CCAA proceeding:

(a) academic Restructuring;

(b) LUFA Term Sheet;

(c) LUSA Term Sheet;

(d) disclaimer of Federation Agreements with Former Federated Universities;

(e) cost savings;

(f) pension plan amendments;

(g) completion of operational and governance reports;

(h) completion of the real estate review;

(i) resolution of grievances; and

(j) resolution of claims.

The Meeting

[9] On July 28, 2022, the Plan was accepted for filing and the Meeting Order was issued authorizing LU to call, hold and conduct the Meeting. No party objected to the granting of the Meeting Order authorizing the Plan to be presented to creditors.

[10] The meeting was held on September 14, 2022 and was attended in person or by proxy by 606 Affected Creditors and/or Unresolved Claimants holding an aggregate value of $178,893,641 in Proven Claims. A total of 597 Affected Creditors voted by proxy or in person at the Meeting, holding an aggregate value of $62,937,935.

[11] The Plan was approved by 87.4% in number representing 68.9% in value of Affected Claims of the Affected Creditors who voted in person or by proxy at the Meeting. The Monitor determined that the votes of Unresolved Claimants would not have impacted the outcome of the vote.

[12] The resolution to approve the Plan was carried by the Requisite Majority of Affected Creditors and the Plan was approved.

[13] The aim of the Plan is to: (a) complete LU's restructuring and provide the opportunity for LU to operate as a going concern bilingual and tri-cultural post-secondary university in the City of Sudbury; (b) provide for a compromise of, and consideration for Affected Claims that are Proven Claims; and (c) effect a release and discharge of all Affected Claims, Released Claims and the Huntington Released Claims.

[14] The salient terms of the Plan include:

(a) certain post-implementation steps that will be undertaken which are intended to better position LU from an operational and governance perspective;

(b) Unaffected Claims will remain unaffected by the Plan, subject to the treatment of the Unaffected Claims in the Plan;

(c) a Guaranteed Minimum Plan Consideration Amount of $45.5 million from the sale of the Designated Real Estate Assets will be received by LU within three years of the Plan Implementation Date;

(d) payment in full of all amounts owing to holders of CCAA Priority Claims, Secured Claims and Vacation Pay Compensation Pay Claims;

(e) a *pro rata* distribution of the Distribution Pool remaining after the payments referred to above and any reimbursement to LU for amounts pre-funded into the Distribution Pool;

(f) a full and final release of any Released Claims that may be made against the Released Parties, which is subject to a carve out for Non-Released Claims;

(g) an injunction against claims that may be asserted against any of the Released Parties, save and except as it relates to the Non-Released Claims; and

(h) a limited third-party release in favour of Huntington University regarding any claims that may be made against Huntington in respect of the discontinuance of

> the RHBP or the discontinuance of any academic programs or courses by Huntington.

[15] The Plan is also subject to certain conditions to implementation, including (a) the resolution of all grievances that are subject to the Grievance Resolution process, and (b) the renewal of two senior management positions at LU (the President and the Provost) prior to the Plan Implementation Date.

Plan Releases

[16] The Plan provides the Plan Releases in respect of the Released Claims in favour of LU, the Chief Redevelopment Officer, the Monitor, and each of their respective representatives.

[17] Released Claims include all claims, obligations or liabilities in respect of the Released Parties existing or taking place at or prior to the Effective Date.

[18] The Plan does not affect (a) Crown claims as described in s. 6(3) of the CCAA, (b) employee-related payments as described in s. 6(5) of the CCAA, or (c) pension claims as described in s. 6(6) of the CCAA.

Implementation of the Plan

[19] It is LU's expectation that the plan will be implemented by November 30, 2022. LU is currently negotiating with the Ministry of Colleges and Universities ("MCU") regarding the terms of the Exit Financing Documentation. Subject to receipt of the requisite government approvals, LU intends to seek an order on November 1, 2022 authorizing it to enter into the Exit Financing Documentation.

[20] The issues for consideration on this motion are:

1. should the Court sanction the Plan?
2. should the Court grant the Unsealing Order? and
3. should the Court grant the Stay Extension Order?

Issue One: Should the Court Sanction the Plan?

[21] Pursuant to s. 6(1) of the CCAA, the court has the discretion to sanction a plan if it has achieved the requisite "double majority" vote at any meeting of creditors held pursuant to s. 4 of the CCAA. Once a court sanctions a plan, it becomes binding on the debtor company and all of its creditors.

[22] The Plan was approved by the requisite double majority of Affected Creditors who voted. The Plan was approved by 87.4% in number and 68.9% in value of the Affected Claims.

[23] Having satisfied the voting criteria, the issue is whether the Court should exercise its discretion to approve and sanction the Plan. The test for court approval of a plan is well-established:

(a) there must be strict compliance with all statutory requirements;

(b) all material filed and procedures carried out must be examined to determine if anything has been done or purported to be done which is not authorized by the CCAA; and

(c) the plan must be fair and reasonable.

(see: *CanTrust Holdings Inc., et al. (Re)*, 2021 ONSC 4408 at para 13)

[24] When considering if the applicant has complied with all statutory requirements under the CCAA, the court will typically consider the following:

(a) if the applicant comes within the definition of a "debtor company" under section 2(1) of the CCAA:

(b) if the applicant has total claims in excess of $5 million;

(c) if the creditors were properly classified;

(d) if the notice of meeting was sent in accordance with the Meeting Order;

(e) if the meeting was properly constituted;

(f) if the voting was properly carried out; and

(g) if the plan was approved by the requisite majorities.

(see: *Canwest Global Communications Corp.*, 2010 ONSC 4209 at para. 15)

[25] Each of the foregoing factors are factual issues which have been established on the record.

[26] The Monitor has also stated in its Report that LU has strictly complied with all statutory requirements. I accept this statement.

[27] In addition, I am satisfied that the Plan complies with the statutory requirements set out in sections 6(3), 6(5) and 6(6) of the CCAA, which provides that the court may not sanction a plan unless it contains certain provisions concerning certain Crown claims, employee claims and pension claims.

[28] I conclude that LU has complied with all statutory requirements under the CCAA and this part of the test has been met.

Issue Two – Were Any Unauthorized Steps Taken?

[29] The Monitor has filed 16 Reports. These Reports have detailed the activities of LU and I am satisfied that LU has acted in good faith and with due diligence throughout the course of this proceeding, complying with the requirements of the CCAA and all orders of the court.

[30] I am satisfied that there is no basis for any assertion that LU has proceeded in a manner that is not authorized by the CCAA. In my view, the second part of the test has been met.

Issue Three: The Plan is Fair and Reasonable

[31] Courts have emphasized that "perfection is not required" when assessing whether a plan is fair and reasonable (See: *AbitibiBowater Inc.* (Re), 2010 QCCS 4450 para. 33). Instead, a court should consider the relative degrees of prejudice that would flow from granting or refusing to grant the relief sought and whether the plan represents a reasonable and fair balancing of interests, in light of the other commercial alternatives available (See: *(Re) Canadian Airlines Corp.*, 2000 ABQB 442 at para. 3). Counsel to LU submits that the discretion of the court should be guided by the objectives of the CCAA – namely to "enable compromises to be made for the common benefit of the creditors and of the company, particular to keep a company in financial difficulties alive and out of the hands of liquidators" (See: *Northlands Properties Ltd.* v. *Excelsior Life Ins. Co. of Canada* 1989 CanLii 2672 (BCCA) at para. 17).

[32] In assessing whether a plan is fair and reasonable the court will consider:

(a) whether the claims were properly classified and whether the requisite majorities of creditors approved the plan;

(b) what creditors would receive on bankruptcy or liquidation as compared to the plan;

(c) alternatives available to the plan and bankruptcy;

(d) oppression of the rights of creditors;

(e) unfairness to shareholders (inapplicable to LU); and

(f) the public interest.

(See: *Canwest Global*, *supra* at para. 21)

[33] With respect to classification, the Affected Creditors were classified in a single class. The classification of Affected Creditors was supported by the Monitor and approved in the Meeting Order without objection.

[34] As previously noted, the double majority test was satisfied and this level of support allows me to conclude that the assenting creditors believe that their interests are treated fairly and equitably under the Plan.

[35] With respect to alternatives, as set out in the 14th Report of the Monitor, the Monitor believes that if the Plan is not implemented, the most likely outcome is some form of liquidation of LU's assets which would produce an inferior result for the Affected Creditors than that provided for under the Plan. Under the Plan, the Monitor estimates the unsecured creditors will recover approximately 14.1% to 24.2%. In liquidation, the Monitor estimates a recovery of approximately 8.5% to 16.7%. I note that if the Plan is not sanctioned, LU will not be able to successfully complete its restructuring and likely would be required to cease operations and liquidate. A liquidation would give rise to additional claims and increase the likelihood of an inferior result.

[36] With respect to oppression of creditors, LU submits that creditor treatment must be equitable, however, "equitable treatment is not necessarily equal treatment". In this case, I am satisfied that the Plan treats all Affected Creditors equally in terms of treatment under the Plan and distributions under the Plan. The only persons that receive different treatment are the Unaffected Creditors. I am satisfied, due to the factual or legal nature of their claims, they must be treated differently than the Affected Creditors.

[37] The issue of unfairness to shareholders is not applicable in this case as LU is a not for profit corporation without share capital.

[38] Finally, with respect to whether the Plan is in the public interest, if the Plan is sanctioned, LU will continue as a going concern, as a bilingual and tri-cultural post-secondary university in Sudbury. As counsel to LU submits, the continuation of LU will provide the opportunity for thousands of students that attend LU each year to continue to attend LU and complete their degrees. Further, implementation of the Plan will preserve the employment of hundreds of faculty and staff members at LU. I am satisfied that sanctioning of the Plan is in the public interest.

Plan Releases

[39] Turning now to the Plan Releases and the Huntington Third-Party Release, counsel to LU submits that it is well established that courts have the jurisdiction to sanction plans of compromise and arrangement under the CCAA containing third-party releases. (See: *Pacific Exploration & Production Corporation (Re)*, 2016 ONSC 5429 at para. 30; and *Lydian International Limited (Re)*, 2020 ONSC 4006).

[40] The following list of factors has been considered in respect of the approval of releases in CCAA proceedings, including third-party releases:

(a) whether the released claims are rationally connected to the purpose of the plan;

(b) whether the plan can succeed without the releases;

(c) whether the parties being released contributed to the plan;

(d) whether the releases benefit the debtors as well as the creditors generally;

(e) whether the creditors voting on the plan have knowledge of the nature and the effect of the releases; and

(f) whether the releases are fair, reasonable and not overly-broad.

(See: *Lydian International Limited (Re)*, 2020 ONSC 4006 at para. 54)

[41] As submitted by counsel to LU it is not necessary for each of these factors to be satisfied in order for the release to be granted.

[42] Having reviewed the record and the submissions as set out in LU's factum at para. 46, I am satisfied that the Plan Releases are necessary and appropriate in these circumstances. The Plan Releases are rationally connected to the purpose of the plan. The object of the Plan Releases is to provide LU with a fresh start so that it may continue to provide university education to thousands of students and employment to hundreds of people in the Greater Sudbury region and northern Ontario. Further, I am satisfied that the Plan cannot succeed without the Plan Releases. For LU to continue operating and fulfilling the purpose of the Plan, it must have finality in respect of its obligations and liabilities moving forward. In addition, the Released Parties are, in my view, necessary and essential to the restructuring and they contributed to the Plan. Each of LU, the Monitor and the CRO played a part in advancing the restructuring and achieving approximately $40 million in annual savings. The Directors and Officers of LU were active and engaged in overseeing and making key strategic decisions leading to the Plan.

[43] I am also satisfied that the creditors were, at all relevant times, aware of the nature and effect of the Plan Releases. Full disclosure of the Plan Releases was made to Affected Creditors at the time that LU applied for the Meeting Order. Further, the Monitor provided the meeting materials to over 1,100 Affected Creditors and these materials included the Information Circular, which described the Plan Releases in detail. I have also taken into account that at no point did any creditor or other stakeholders make any submissions on the scope of the Plan Releases or express any objection to the Plan Releases, nor were any submissions made in opposition to the Plan Releases on this motion.

[44] On this issue, I am satisfied that the Plan Releases are fair, reasonable and rationally connected to the overall purpose of the Plan, such that they should be approved.

[45] I am also satisfied that the Huntington Third-Party Release is appropriate in the circumstances. The Huntington Transition Agreement was a significant step in the restructuring of LU and LU derived certain benefits from the Huntington Transition Agreement. I am also satisfied that Huntington contributed in a tangible way to LU's restructuring and the Plan and the release of the Huntington Released claims is consistent with the terms reached in the Huntington Transition Agreement, previously approved.

CONCLUSION

[46] In conclusion, I am satisfied that LU has complied with all requirements for the Court to sanction the Plan.

Issue 2: Unsealing Order

[47] LU has also requested that the Exhibits which were sealed on the Initial Order be unsealed. LUFA and LUSU requested that the Sealed Exhibits no longer be sealed at the appropriate time. LU has advised that all Affected Parties agreed that the appropriate time is at the Effective Time on the Plan Implementation Date, because the sensitivity associated with the correspondence that gave rise to the Sealing Order will no longer apply. Further, MCU has no objection to an unsealing of the Sealed Exhibits. In my view it is appropriate to grant the unsealing order.

Issue 3: Stay Extension Order

[48] Finally, LU seeks an extension of the Stay Period up to and including November 30, 2022.

[49] After the Plan has been sanctioned, the final step to conclude the restructuring is to satisfy the conditions precedent to implementation of the Plan. This will occur over the next few weeks. I am satisfied that LU continues to act in good faith and with due diligence as it moves towards Plan implementation. The required Cash Flow Forecast has been filed and LU will have sufficient liquidity to operate its business and meet its obligations to November 30, 2022. Further, the Monitor supports extending the Stay Period until November 30, 2022. In my view it is both reasonable and appropriate to extend the Stay Period to November 30, 2022.

DISPOSITION

[50] In the result, the motion is granted. Three orders - the Sanction Order, the Unsealing Order and the Stay Extension Order have been signed.

_____

Chief Justice G.B. Morawetz

Date: October 11, 2022

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Bul River Mineral Corporation (Re),* 2015 BCSC 113

Date: 20150127
Docket: S113459
Registry: Vancouver

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

And

In the Matter of the *Business Corporations Act,* S.B.C. 2002, c. 57 and the *Business Corporations Act*, R.S.A. 2000, c. B-9

And

In the Matter of
Bul River Mineral Corporation, Big Bear Metal Mining Corporation, Earth's Vital Extractors Limited, Fort Steele Mineral Corporation, Fort Steele Metals Corporation, Fused Heat Ltd., Gallowai Metal Mining Corporation, Giant Steeples Mineral Corporation, Grand Mineral Corporation, International Feldspar Ltd., Jao Mine Developers Ltd., Kutteni Diamonds Ltd., Stanfield Mining Group of Canada Ltd., Sullibin Mineral Corporation, Sullibin Multi Metal Corporation, Super Feldspars Corporation, White Cat Metal Mining Corporation, Zeus Metal Mining Corporation, Zeus Metals Corporation and Zeus Mineral Corporation and Purcell Basin Minerals Inc.

Petitioners

Before: The Honourable Madam Justice Fitzpatrick

Reasons for Judgment

Counsel for the Petitioners, except Purcell Basin Minerals Inc.:	Jonathan B. Ross
Counsel for the Monitor, Deloitte Restructuring Inc.:	Tevia R.M. Jeffries
Counsel for Purcell Basin Minerals Inc. and CuVeras LLC:	William C. Kaplan, Q.C. Helen M.E. Sevenoaks Peter Bychawski

Place and Date of Hearing:	Vancouver, B.C. November 18, 2014
Place and Date of Oral Order/Result Given:	Vancouver, B.C. November 18, 2014
Place and Date of Judgment	Vancouver, B.C. January 27, 2015

INTRODUCTION

[1] The application is brought pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "*CCAA*"). This long-standing restructuring has been ongoing for over three and a half years now and, after much effort, the petitioners prepared a plan of compromise and arrangement, dated September 25, 2014, which was subsequently amended by the amendment addendum no. 1, dated October 29, 2014 (as amended, the "Plan"). The Plan has received a positive response from the petitioners' creditors and shareholders.

[2] The petitioners, including the newly-added party, Purcell Basin Minerals Inc. ("Purcell"), now apply for an order sanctioning the Plan. The petitioners also apply for an order extending the stay of proceedings to December 12, 2014 in order to allow for the implementation of the Plan.

[3] At the conclusion of the hearing, the orders sought were granted with reasons to follow. These are those reasons.

BACKGROUND

[4] Much of the background of this matter has been described in earlier reasons for judgment: *Bul River Mineral Corporation (Re)*, 2014 BCSC 645 and 2014 BCSC 1732. For the purposes of today's application, I will briefly summarize the facts.

[5] Ross Stanfield, who has since died, was the driving force behind the Stanfield Mining Group (the "Group"), which comprised all of the petitioners, save for Purcell. The Group carried on the business of developing a mining property situated near the Bull River in British Columbia, known as the Gallowai Bul River Mine (the "Mine"). The principal ore at the Mine is copper, although gold, silver and possibly feldspar deposits are also located in the area.

[6] The Group was effectively controlled by Mr. Stanfield, and later his estate (the "Estate"), by reason of holding all, or virtually all, of the voting common shares in the Group's parent companies, the petitioners Zeus Mineral Corporation ("Zeus Mineral") and Fort Steele Mineral Corporation ("Fort Steele Mineral"). The two

principal companies involved in the development and operation of the Mine on behalf of the Group are the petitioners Bul River Mineral Corporation ("Bul River") and Gallowai Metal Mining Corporation ("Gallowai"). Zeus Mineral and Fort Steele Mineral own the common shares in Bul River and Gallowai.

[7] Mr. Stanfield's dream of developing the Mine gave rise to concerted efforts to obtain funding from a large number of individuals beginning around the mid-1990s. This sales program would ultimately prove to be successful in raising over $220 million from approximately 3,500 individual investors. Those investors participated in the Group by way of preferred and sometimes common shares issued by Bul River and Gallowai.

[8] On May 26, 2011, this Court granted an initial order pursuant to the *CCAA* (the "Initial Order"). The stay of proceedings granted in the Initial Order has been extended by this Court from time to time. The course of the restructuring has not been, at times, without difficulty. The fundamental problem faced by the Group at the outset was whether it could be shown that there were proven resources at the Mine that would support the conclusion that the Mine was viable. In order to continue minimal operations at the Mine and also proceed with this development work, interim financing was necessary. Ultimately, that financing was provided by CuVeras LLC ("CuVeras") and CuVeras continues to financially support the Group to this time.

[9] CuVeras' involvement went beyond interim financing. In November 2011, CuVeras and the original petitioners signed a letter of intent. That document was replaced by a further letter of intent in March 2012 which addressed a possible restructuring. Following the resolution of a dispute concerning these arrangements, a letter of agreement was signed between the parties on May 23, 2014 (the "Letter of Agreement").

THE CLAIMS PROCESS

[10] On August 19, 2011, the court approved a claims process order authorizing the petitioners to conduct a claims process for the determination of any and all claims against the Group. The details of the claims process were discussed in *Bul*

River Mineral Corporation (Re), 2014 BCSC 1732 at paras. 25-28. What is important for the purposes of this application is that the claims process was to identify claims of not only trade creditors, but also equity investors of the petitioners (save for Purcell) holding preferred or common shares.

[11] The claims bar date, as amended, being October 26, 2011, has long since passed. Only a small number of claims were disputed. Following the issuance of the court's reason in relation to two of those claims (*Bul River Mineral Corporation*, 2014 BCSC 1732 at paras. 58-167), I was advised by counsel that all remaining disputed claims were settled. No creditor or shareholder has objected to the claims now admitted, whether by settlement or otherwise.

THE PLAN

[12] On May 28, 2014, this Court approved the Letter of Agreement, which laid the foundation upon which the Plan was later drafted.

[13] On September 25, 2014, the Plan was filed. The Plan sets out that Purcell is the corporate vehicle by which the restructuring is to be implemented. Fundamental to the restructuring is a compromise, settlement and payment of the claims so that the Group can emerge from the *CCAA* proceedings and bring the Mine into commercial production.

[14] At present, the petitioners (save for Purcell) are controlled by the Estate through a numbered company holding 100% and 99.9%, respectively, of the Class A voting common shares in Zeus Mineral and Fort Steele Mineral. Mr. Stanfield's grandson and sole beneficiary, George Timothy Hewison, controls that company. In addition, Lilieu Stanfield is the holder of one Class A voting common share. As stated above, Bul River and Gallowai, separately or together, own the shares of many other petitioners.

[15] There are a number of corporate petitioners within the Group, referred to as the "Estate Companies", although their status is unclear. No one seems to know if they are operating entities or if they hold any assets. In any event, the Estate

Companies are owned and controlled by the Estate and have been included in the Plan out of an abundance of caution.

[16] The corporate steps toward implementation of the Plan are as follows:

a) the Class A voting common shares held by the Estate in Fort Steele Mineral, Zeus Mineral and the Estate Companies are to be transferred to Purcell for $1.00;

b) as a result of these transactions, Purcell will hold all of the Estate's Class A voting common shares in these entities and thereby control Fort Steele Mineral and Zeus Mineral (and thereby Bul River, Gallowai and their respective subsidiaries);

c) the only other Class A voting common share held by Lilieu Stanfield will be cancelled;

d) all other securities, including all Class C, D, F and G preferred shares issued by Bul River and Gallowai, will be exchanged for shares in Purcell and then such preferred shares will be cancelled. All Class B and E shares will also be cancelled. As a result, the only shareholder of the various petitioners in the Group will be Purcell; and

e) Fort Steele Mineral, Zeus Mineral and Purcell will be amalgamated.

[17] As a result of these steps, Purcell and its shareholders (i.e., holders of "Purcell Shares") will then have the sole interest in Bul River and Gallowai, their subsidiaries, and the Estate Companies.

[18] The Plan contemplates two classes of creditors voting on the Plan:

(a) trade creditors, holding debt claims (the "Trade Creditors"); and

(b) preferred share claimants, holding Class C, D, F and G preferred shares in Bul River and Gallowai (the "Preferred Share Claimants").

[19] The Plan involves the distribution of Purcell Shares in satisfaction of the claims of the Trade Creditors and the Preferred Share Claimants, as well as entitlements to other persons involved in the restructuring, being CuVeras, Highlands Pacific Partners LLP ("Highlands"), and the Lacey Group.

[20] The entitlements of these other persons arise from the Letter of Agreement as follows:

a) CuVeras

As interim lender in the *CCAA* proceedings and sponsor of the Plan, CuVeras is entitled to notes payable by Purcell, defined as "Purcell Notes", in payment of the financing amounts (principal, interest and fees). This avoids the need to raise cash on the closing, whether by new investment or otherwise. Accordingly, the interim financing will be paid out and discharged as a result of the issuance of these Purcell Notes. CuVeras is also entitled to additional compensation pursuant to the Letter of Agreement by way of Purcell Shares equal to the principal value of the interim financing loans outstanding as at closing of the Plan (presently anticipated to be approximately $9.5 million which will represent 48.7% of the equity).

b) Highlands

Highlands, the manager of CuVeras, as interim financier in the *CCAA* proceedings, is entitled to Purcell Notes representing 7% of the enterprise value of Purcell and 2% of the Purcell Shares (reduced from 7% as discussed below). Those entitlements are a fee to compensate Highlands for its administration of the interim financing loan, its sponsorship of the Plan, its role in raising the exit financing and for the services it has provided to the Group over the course of its involvement in these proceedings.

c) The Lacey Group

The Lacey Group has been involved in the proceedings since the fall of 2011 when it advanced funds to the Group to repay the first interim lender. In addition, the Lacey Group has organized the CuVeras investor group, retained Highlands and was instrumental in funding CuVeras' sponsorship of the Plan. The Lacey Group was also involved in negotiating the Letter of Agreement, negotiating the Plan with CuVeras and the petitioners and raising the exit financing. Pursuant to the Letter of Agreement, the Lacey Group is to receive 15% of the Purcell Shares.

[21] The Plan contemplates, as required by the *CCAA*, that the Trade Creditors will be "paid in full". I will discuss this issue in more detail below.

[22] As mentioned above, there are a large number of preferred shareholders. Each of the four classes of preferred shares has a different share value. The Plan has ascribed redemption values to the various classes of shares to create a "Preferred Share Exchange Ratio", as follows: (i) Class C - $40, (ii) Class D - $25, (iii) Class F - $50, and (iv) Class G - $75.

[23] The Plan contemplates that each Preferred Share Claimant will receive a share class entitlement by a *pro rata* share entitlement to the Purcell Shares issued through the implementation of the Plan. Once the distributions to the other stakeholders have been determined (variable upon the amount of principal outstanding as at the closing date on the CuVeras interim loan) the total equity entitlement of the Preferred Share Claimants will be determined. Thereafter, a calculation will be made to determine their respective *pro rata* entitlement to the Purcell Shares. At present, it is anticipated that the Preferred Share Claimants will receive 20.3% of the equity, which represents a recovery of 4-5 cents on the dollar of claims.

[24] The Plan also contemplates a particular treatment for the holders of Class B non-voting common shares. Many of the Class B shareholders subscribed to their

shares at a time prior to the issuance of preferred shares on the assumption that their investment would enjoy priority over subsequent equity issuances. However, the Class B shareholders rank subsequent in priority to the preferred shareholders in the distribution of the assets of the petitioners who issued such shares. Accordingly, on a liquidation basis, the Class B shareholders would receive nothing. Arising from this background, it was Mr. Hewison's view, on behalf of the Group, and the view of the court-appointed monitor, Deloitte Restructuring Inc. (the "Monitor"), that this warranted, on the basis of fairness, that some consideration be paid to the Class B shareholders under the Plan.

[25] In these circumstances, Highlands gratuitously agreed to contribute 3% of its equity entitlement to Purcell Shares (originally 7%) to be distributed to the Class B shareholders so that no other stakeholders would be prejudiced. Additionally, Class B shareholders can participate at a higher level if there are "Surplus Shares" available under the Plan.

[26] Notwithstanding the fact that the Class B shareholders are receiving this gratuitous consideration under the Plan, the Plan did not provide that Class B shareholders could vote on the Plan. No issues arise from this circumstance as it is readily conceded that the Class B shareholders have no monetary interest in the Group that is being transferred to Purcell under the Plan.

[27] The Plan addresses the mechanism by which it is to be implemented. One of the challenges identified early on in these proceedings was the state, or rather disarray, of the original petitioners' records with respect to their shareholders. It was readily apparent that many of the records were out of date and likely incomplete or inaccurate.

[28] Given that the Plan contemplates a restructuring of the shareholdings and the issuance of new shares in Purcell, it was necessary to ensure that accurate information was on hand to ensure entitlement to shares being cancelled and entitlement to Purcell Shares being distributed under the Plan.

[29] Under the Plan, the Trade Creditors and the Preferred Share Claimants are required to deliver to Purcell a duly completed and executed "Share Direction Form". These forms provide confirmation of each eligible claimant's name, address and other information required by Purcell to create and maintain a share registry. The form also indicates each claimant's debt or equity entitlement under the Plan. This information is to be checked as against the information in the creditor list, as confirmed through the claims process, to ensure proper distribution.

[30] The deadline for the Trade Creditors and the Preferred Share Claimants to provide their Share Direction Form to Purcell is January 5, 2015. I am satisfied that this deadline should provide ample opportunity for claimants to complete the Share Direction Form and deliver it as required. In addition, directions were given by the court at the time of the hearing for further advertisement and notice to the claimants in terms of the requirement to deliver the Share Direction Form by the deadline.

[31] Given the state of the records, the petitioners and Purcell rightly anticipate that a number of the claimants will not provide the Share Direction Form, for any number of reasons. Corporate claimants may have gone out of business and individuals may have died and estates wound up. Others may not be interested in pursuing their claims. In that event, the Plan provides for the transfer of such "Surplus Shares" as follows: firstly, to the Class B shareholders to a maximum of 10% of the equity of Purcell; and secondly, the balance of any Surplus Shares to be distributed to the Preferred Share Claimants *pro rata* based on their existing entitlements under the Plan.

THE MEETING

[32] On September 30, 2014, the court granted an order adding Purcell as a petitioner and also granted a further order authorizing the petitioners to file the Plan and convene, hold and conduct meetings of creditors to vote in respect of the Plan. Those meetings took place on October 29, 2014 in Richmond, BC.

[33] At the meetings, the Plan was considered by the Trade Creditors and the Preferred Share Claimants. At that time, minor amendments to the Plan were tabled,

after due notice was given of the amendments. These amendments were considered by the Monitor to not prejudice the interests of the stakeholders.

[34] The Plan was overwhelmingly approved by the Trade Creditors and the Preferred Share Claimants by the requisite double majority vote. Of the Preferred Share Claimants, 1,438 votes were cast in favour (value $114,412,897) and one voted against (value $213,519). Of the 93 eligible Trade Creditors, 34 votes were cast in favour (value $965,682) and no votes were cast against the Plan.

POST-MEETING MATTERS

[35] Originally, the amount of the Trade Creditors' claim was $1,439,492. The Plan contemplated that 9% of the Purcell Shares would be allocated to the Trade Creditors, which was anticipated to be a premium since that amount would have been notionally valued at 7% of the illustrative enterprise value of Purcell.

[36] After the meeting, Purcell became aware that the claim of one creditor, Sun Life Assurance Company, had been incorrectly calculated as $175,235, instead of approximately $605,950. To address this issue, Highlands has agreed to allocate 2% of its original allocation (7%) to the Trade Creditors, such that the Trade Creditors will now receive 11% of the Purcell Shares.

[37] At the time of the hearing, all indications were that the petitioners would have sufficient cash on closing (anticipated to be December 9, 2014) to fund requirements under the Plan. The funds available on closing were intended to be used to satisfy the professional charges under the Administration Charge (as defined in the Initial Order), what are described as "Unaffected Claims", and also post-closing debts. In addition, the evidence established that funds were available to support operations into early 2015 when the corporate transactions were to be completed.

[38] By the time of the hearing, Purcell had made progress in terms of raising the exit financing. As of November 15, 2014, Purcell had raised approximately $700,000 in equity financing with additional subscriptions in progress of approximately $500,000. These amounts were being raised by Purcell toward meeting the

requirement of confirming $1.7 million in exit financing. The amounts raised are being held pending closing and Purcell expects to satisfy that condition. If this target is not met, the agreements in place provide that the monies raised to date will be returned to investors but, more likely, the monies needed will be raised through the subscription of shares.

DISCUSSION

[39] The statutory authority upon which the Plan may be sanctioned is s. 6(1) of the *CCAA*:

> **6.** (1) If a majority in number representing two thirds in value of the creditors, or the class of creditors, as the case may be — other than, unless the court orders otherwise, a class of creditors having equity claims, — present and voting either in person or by proxy at the meeting or meetings of creditors respectively held under sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court and, if so sanctioned, is binding
>
> > (*a*) on all the creditors or the class of creditors, as the case may be, and on any trustee for that class of creditors, whether secured or unsecured, as the case may be, and on the company[.]

[40] Even if the requisite double majority vote is obtained, as it has been here, the court has discretion as to whether the plan of arrangement will be sanctioned. In *Canwest Global Communications Corp. (Re),* 2010 ONSC 4209 at para. 14, Pepall J. (as she then was) stated that the criteria to be satisfied are:

> (a) there must be strict compliance with all statutory requirements;
>
> (b) all material filed and procedures carried out must be examined to determine if anything has been done or purported to be done which is not authorized by the CCAA; and
>
> (c) the Plan must be fair and reasonable.

Has there been Compliance with Statutory Requirements?

[41] In previous court orders granted in these proceedings, this Court declared that the petitioners (other than Purcell) qualified as debtor companies under s. 2 of the *CCAA* and that the total claims against them exceeded $5 million.

[42] In addition, paragraph (d) of the definition of "Unaffected Claim" in the Plan is such that any claim arising under ss. 6(3), 6(5) and 6(6) of the *CCAA* is not affected by the Plan. All Unaffected Claims are intended to be paid on closing.

[43] The only substantial issue that arises from the Plan is whether it has been shown that the Trade Creditors' claims are being "paid in full" such that the equity claims of the Preferred Share Claimants can be paid also. This requirement arises from the *CCAA*, s. 6(8):

> No compromise or arrangement that provides for the payment of an equity claim is to be sanctioned by the court unless it provides that all claims that are not equity claims are to be paid in full before the equity claim is to be paid.

[44] The Trade Creditors are owed approximately $1.87 million. It seems straightforward that a cash payment to these creditors on closing would be sufficient to meet the requirements of s. 6(8) in respect of them being "paid in full". However, it is equally apparent here that there is no restructuring that can be achieved that would result in the generation of that amount of cash.

[45] The Plan is, as I have stated above, designed to deliver a percentage (11%) of shares in the new entity, Purcell, to the Trade Creditors in satisfaction of their claims.

[46] The preliminary question is whether issuance of shares to creditors can satisfy the requirement under s. 6(8).

[47] Counsel for the petitioners has indicated that they have been unable to find any case in which a court has considered the question as to whether the issuance of shares to creditors can satisfy the requirements of s. 6(8) of the *CCAA*. I have been referred to certain decisions that tangentially refer to plans being sanctioned in these circumstances: *Cheng v. Worldwide Pork Co.,* 2009 SKQB 186 at para. 19; *Scaffold Connection Corp. (Re)* (2000), 24 O.S.C.B. 106 at item 11 (Ont. Securities Comm.).

[48] The authorities suggest that shares can constitute the necessary payment to creditors. *Black's Law Dictionary*, 10th ed., does not provide a definition of the phrase "paid in full"; however, the word "pay" can support several definitions:

> pay, *n.* 1. Compensation for services performed, salary, wages, stipend, or other remuneration given for work done.
>
> …
>
> 2. The act of paying or being paid. 3. Someone considered from the viewpoint of reliability and promptness in meeting financial obligations. 4. Metaphorically, retribution or punishment.
>
> pay, *vb.* 1. To give money for a good or service that one buys; to make satisfaction <pay by credit card>. 2. To transfer money that one owes to a person, company, et <pay the utility bill>. 3. To give (someone) money for the job that he or she does; to compensate a person for his or her occupation; compensate <she gets paid twice a month>. 4. To give (money) to someone because one has been ordered by a court to do so <pay the damages>. 5. To be profitable; to bring in a return <the venture paid 9%>.
>
> [Emphasis added].

[49] In *People's Loan & Deposit Co. v. Grant* (1890), 18 S.C.R. 262 at 266, Ritchie C.J. (Strong, Fournier, Gwynne and Patterson JJ. concurring) discussed the (lack of) distinction between "paid", "fully paid" and "satisfied", indicating that if something is paid then it is necessarily satisfied:

> What possible difference is there between "until paid" and "until fully paid and satisfied?" If the money secured is "paid" is it not "fully paid?" And if the debt is" paid" is it not "satisfied?" The debt cannot be "paid" without being "fully paid and satisfied"; the terms "paid" and "fully paid and satisfied" are equivalent terms, the meaning being precisely the same, the only difference being that in the one case one word, and in the other four are used to express the same idea.

[50] Accordingly, if a debt is satisfied, it must be equally paid. As the Plan indicates, and as the Trade Creditors have agreed, they are to receive Purcell Shares in satisfaction of their debt, such that the debt is to be "paid in full".

[51] In the tax context, the court in *Johnson v. Canada*, 2010 TCC 321, citing *Gibson v. R.*, [1996] 1 C.T.C. 2105, held that the phrase "amount paid" in the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) means more than the transfer of money alone. The court in *Johnson* stated:

> [15] Therefore, the phrase "amount paid" would include payments made by means of a transfer of a right or thing where the value of the right or thing can be expressed in terms of an amount owing, and is not limited to a transfer or delivery of money alone.

[52] One might argue that, since the value of Purcell Shares will likely fluctuate over time, the court would not be in a position to say that the debt owing to the Trade Creditors will have been "paid in full" by the transfer of those Purcell Shares. However, the volatility, or potential volatility, of share prices is not determinative as to whether, at closing, the payment "in full" will have occurred.

[53] In *Creston Moly Corp. v. Sattva Capital Corp.*, 2014 SCC 53, the Court was dealing with the appropriate standard of review to be applied in commercial arbitrated decisions made under the *Arbitration Act*, R.S.B.C. 1996, c. 55. The initial agreement being disputed was an agreement providing for the payment of finder's fees in shares. The parties disagreed as to the date on which to price the shares for payment and entered arbitration to resolve the dispute. The Court commented on the basis upon which such fees were to be paid in shares:

> [117] … There is an inherent risk in accepting a fee paid in shares that is not present when accepting a fee paid in cash. A fee paid in cash has a specific predetermined value. By contrast, when a fee is paid in shares, the price of the shares (or mechanism to determine the price of the shares) is set in advance. However, the price of those shares on the market will change over time. The recipient of a fee paid in shares hopes the share price will rise resulting in shares with a market value greater than the value of the shares at the predetermined price. However, if the share price falls, the recipient will receive shares worth less than the value of the shares at the predetermined price. This risk is well known to those operating in the business sphere and both Creston and Sattva would have been aware of this as sophisticated business parties.
>
> [118] By accepting payment in shares, Sattva was accepting that it was subject to the volatility of the market. If Creston's share price had fallen, Sattva would still have been bound by the share price determined according to the Market Price definition resulting in it receiving a fee paid in shares with a market value of less than the maximum amount of US$1.5 million. It would make little sense to accept the risk of the share price decreasing without the possibility of benefitting from the share price increasing. As Justice Armstrong stated [in the appeal from the arbitration award indexed at 2011 BCSC 597 at para. 70]:

> It would be inconsistent with sound commercial principles to insulate the appellant from a rise in share prices that benefitted the respondent at the date that the fee became payable, when such a rise was foreseeable and ought to have been addressed by the appellant, just as it would be inconsistent with sound commercial principles, and the terms of the fee agreement, to increase the number of shares allocated to the respondent had their value decreased relative to the Market Price by the date that the fee became payable. Both parties accepted the possibility of a change in the value of the shares after the Market Price was determined when entering into the fee agreement.

[54] The petitioners concede, quite rightly, that Purcell's equity value on exiting the *CCAA* proceeding is difficult to quantify. In the future, the Purcell Shares will depend on a number of variables, including the price of copper that will apply over the operating life of the Mine.

[55] The petitioners have developed a number of studies including the Moose Mountain Scoping Study dated October 29, 2013 (the "Moose Mountain Study") which forecasts the pre- and post-tax value of the Mine based on certain projections of copper prices (US$3.70 per pound). The Plan provides an illustrative calculation of the way in which the Plan will operate and it imputes values based on the Moose Mountain Study. It was on this basis that the Plan originally provided for 9% of the Purcell Shares to be allocated to the Trade Creditors. Based on the copper price, an enterprise value of $19.5 million was established. This gave rise to a valuation for the Purcell Shares to be allocated to the Trade Creditors of $1,756,080 in respect of $1.43 million in debt. The premium was to compensate the Trade Creditors for the short-term illiquidity of the Purcell Shares to be allocated to them.

[56] That initial allocation has since required adjustment by reason of a change in the underlying assumption as to the price of copper. In addition, the amount of the Trade Creditors' claims has increased, as noted above, and is now approximately $1.87 million, rather than $1.43 million. This latter circumstance resulted in the Trade Creditors entitlement rising to 11% of the Purcell Shares, rather than 9%.

[57] It must be recognized at the outset that all valuations for the Mine, and hence the Purcell Shares, are conditional upon two fundamental events: firstly, Purcell's

access to funding to take the Mine to production; and secondly, a successful program that takes the Mine to permitting and production. Without those events occurring, all of the stakeholders who receive Purcell Shares will receive nothing and those holding Purcell Notes, being CuVeras and Highlands, will likely be the only parties to recover anything.

[58] It will be apparent that establishing value in the Purcell Shares will benefit both the Trade Creditors and the Preferred Share Claimants equally. At first blush, this would seem to offend the requirement that the Trade Creditors be paid *before* the Preferred Share Claimants. However, it remains the case that if full value for the Trade Creditors is established, then it is a reasonable conclusion that they will be paid. In short, if the plans for the Mine do not succeed, then none of the stakeholders benefit; conversely, if those plans succeed, then all benefit.

[59] Accordingly, I agree with the petitioners that satisfaction of the s. 6(8) requirement must be tied to the valuation of the Mine now such that the court must be able to reasonably conclude at this time that the valuation of the Purcell Shares to be received by the Trade Creditors will be sufficient to pay them "in full". This valuation or "enterprise value" is based on the Mine going into production such that a stream of income will be received over a seven year period (from 2016 to 2023) arising from the established or indicated ore reserves.

[60] The most current evidence as to the pricing of copper over the course of the project is found in the affidavit of Richard Goodwin, sworn November 15, 2014. Mr. Goodwin is a mining engineer and he reviewed a number of sources. At the outset, he acknowledged the difficulty in forecasting metal prices into the future, including variables arising from the fluctuation in the US/CDN dollar exchange rate. He indicates that the consensus is that copper will be priced in the range of US$3.20 per pound, and sometimes above, into the future. Mr. Goodwin also indicates that copper is predicted to improve over the present pricing of US$3.04 "for the near term" and "remain strong for the duration of the project."

[61] At US$3.20 per pound, Purcell would have an enterprise or equity value of $17.2 million after deducting the Purcell Notes. The Trade Creditors entitlement to the resulting equity value of $17.2 million would be 9.03%. Accordingly, the petitioners assert that the Trade Creditors' proposed 11% interest in the equity of Purcell maintains the cushion, based upon that calculation.

[62] There is no certainty in these projected values. However, after considering the evidence, in my view, there is a basis upon which to now reasonably conclude that there will be sufficient value in the Purcell Shares in the future with which to satisfy the debt owing to the Trade Creditors "in full". As the Court observed in *Creston Moly*, those values may increase or decrease based on actual events, but that does not detract from the valuation today for the purposes of satisfying the s. 6(8) requirement. It is of some importance that, knowing of this uncertainty, all of the Trade Creditors who voted on the Plan agreed to accept the Purcell Shares under the Plan and the inherent uncertainty that comes with them.

[63] Finally, the Monitor states that, to the best of its knowledge, the petitioners have complied with all requirements of the *CCAA*.

[64] Accordingly, I conclude that the petitioners have satisfied all statutory requirements arising under the *CCAA* for the sanctioning of the Plan.

Have the Petitioners Acted Contrary to the *CCAA*?

[65] Madam Justice Pepall observed in *Canwest* at para. 17 that, in making a determination as to whether any unauthorized steps have been taken by the petitioners, the court should rely on the evidence put forward by the parties and the reports of the monitor.

[66] Here, there is no suggestion by anyone that the petitioners have so acted. In its sixteenth report dated October 31, 2014, the Monitor confirms that the petitioners "have acted and continue to act in good faith and with due diligence." Further, the Monitor states that, to the best of its knowledge, the petitioners have not breached

any of the orders granted in these proceedings nor done or purported to do anything that is not authorized by the *CCAA*.

[67] I conclude that this requirement is satisfied.

Is the Plan Fair and Reasonable?

[68] The exercise of the court's discretion in this regard should be "informed by the objectives of the *CCAA*, namely to facilitate the reorganization of a debtor company for the benefit of the company, its creditors, shareholders, employees and in many instances, a much broader constituency of affected persons": *Canwest* at para. 20.

[69] Relevant factors to be considered are set out in *Canwest* at para. 21 and include:

a) whether the claims were properly classified and whether the requisite majority of creditors approved the plan;
b) what creditors would have received on bankruptcy or liquidation as compared to the plan;
c) alternatives available to the plan and bankruptcy;
d) oppression of the rights of creditors;
e) unfairness to shareholders; and
f) the public interest.

[70] I have already outlined the voting on the Plan which was overwhelmingly in favour of it. No creditor or other stakeholder now opposes the Plan.

[71] It is manifestly clear that if the petitioners' current assets and operations were liquidated through bankruptcy or receivership proceedings, the Trade Creditors would recover substantially less and likely none of the amounts owing to them.

[72] The Monitor states in its sixteenth report that, in the event of liquidation, it is not anticipated that stakeholders would receive a return on their debt or equity given the priority charge for the CuVeras interim financing and the Administration Charge granted in the Initial Order. Mr. Hewison agrees. Even in the unlikely event that the Trade Creditors recovered something after payment of realization costs, the

Preferred Share Claimants would receive nothing. The same can, of course, be said for the Class B shareholders who are anticipated to receive some Purcell Shares through the Plan.

[73] The Monitor states that the Plan is in the best interests of all of the petitioners' stakeholders.

[74] As I have outlined above, the Plan provides for distributions to CuVeras, Highlands and the Lacey Group. Brendan MacMillan, the president of CuVeras and managing director of Purcell swore an affidavit on November 18, 2014 providing evidence in support of those distributions, which supplements the already substantial evidence before the court as to the involvement of those entities in moving this proceeding along toward a successful restructuring. Mr. MacMillan outlines the substantial efforts of himself, Mike Moretti and Peter Lacey over the last three years in terms of negotiations, funding and fundraising, all of which has resulted in the petitioners being able to bring forth the Plan. Overall, I am satisfied with the level of compensation allocated to these entities for their efforts. Again, the positive vote by the stakeholders is reflective of their support for these payments.

[75] There is no suggestion that the original petitioners had any other commercially viable alternatives to the implementation of the Plan. Nor is there any evidence or suggestion that the implementation of the Plan would be oppressive or unfair to any of those petitioners' stakeholders.

[76] Finally, there is the matter of releases which are provided for in the Plan. Section 7.3 of the Plan provides for releases of certain claims: claims by the petitioners (other than Purcell) against legal counsel, financial advisors and the Monitor and its legal counsel; claims by various persons including those having an "Affected Claim" against the petitioners, the Monitor and CuVeras; and claims by the petitioners (other than Purcell) and stakeholders who benefit under the Plan against the Estate.

[77] The *CCAA* does not contain any express provisions either permitting or prohibiting the granting of releases, including third party releases, as part of a plan of compromise or arrangement. Nevertheless, there is authority to the effect that the court may approve releases found in a plan of arrangement while exercising its statutory jurisdiction under the *CCAA*. The leading decision is *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587, leave to appeal to S.C.C. refused (2008), 390 N.R. 393 (note). At paras. 40-52 of *Metcalfe*, a plan containing third party releases was sanctioned. At para. 46, the court stated that such jurisdiction may be exercised where the releases are "reasonably related to the proposed restructuring".

[78] The approach in *Metcalfe* was adopted in *Canwest* at paras. 28-30. The court in *Canwest* noted that third party releases should be the exception and not requested or granted as a matter of course: para. 29.

[79] In *Kitchener Frame Ltd. (Re)*, 2012 ONSC 234, although in the context of a proposal under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, the court summarized the requirements that would justify third party releases:

> [80] In *Metcalfe*, the Court of Appeal for Ontario held that the requirements that must be satisfied to justify third-party releases are:
>
> a) the parties to be released are necessary and essential to the restructuring of the debtor;
>
> b) the claims to be released are rationally related to the purpose of the Plan … and necessary for it;
>
> c) the Plan ... cannot succeed without the releases;
>
> d) the parties who are to have claims against them released are contributing in a tangible and realistic way to the Plan...; and
>
> e) the Plan … will benefit not only the debtor companies but creditors generally.

[80] *Metcalfe* has been applied in numerous decisions where third party releases have been approved: see, for example, *Sino-Forest Corp. (Re)*, 2012 ONSC 7050 at paras. 70-77; *SkyLink Aviation Inc. (Re)*, 2013 ONSC 2519 at paras. 30-33. In British Columbia, see *Angiotech Pharmaceuticals, Inc. (Re)*, 2011 BCSC 450 at

para. 12, where the court sanctioned a plan that included releases in favour of various persons, including the monitor, financial advisors and the interim lender.

[81] It remains the case that any person proposing releases in a plan of arrangement, and any party seeking a court order sanctioning or even supplementing such releases, must ensure, from the outset, that a proper rationale exists for them.

[82] After some discussion at the hearing, the scope of the releases sought was clarified and, in some instances, restricted, beyond what had been originally sought in the court order. In particular, the release in favour of CuVeras was restricted to claims arising from the repudiation of the second letter of intent, which was the only apparent issue that had arisen between the parties. In addition, the release was clarified to exclude matters relating to fraud, wilful misconduct or gross negligence.

[83] The releases in favour of the Monitor were also the subject of some discussion at the hearing, particularly arising from the reasoning of the court in *Aveos Fleet Performance Inc.*, 2013 QCCS 5924 at paras. 20-38. Here, the draft order was amended to remove (i.e., not restate) any protections that were already afforded to the Monitor under the Initial Order which continued to apply. Finally, the provision in the draft order by which leave is required before any action is commenced against the Monitor and which referenced the ability to seek and obtain security for costs in respect of any future lawsuit was amended. Access to justice issues arise in that respect and, in my view, such a provision should not fetter the discretion of the court in that regard in terms of requiring or not requiring that such security be posted in the event of such an application.

[84] The remaining release to be addressed is that in favour of the Estate. The Estate, either through Mr. Hewison or the numbered company, owns the Class A common voting shares in Fort Steele Mineral, Zeus Mineral and the Estate Companies, as noted above. The release in favour of the Estate is being provided under the Plan in consideration for its agreement to transfer the Class A voting common shares to Purcell for $1.00. The release applies to any claims, suits or

actions that could be commenced against them by the petitioners and the various stakeholders (including the Trade Creditors and the Preferred Share Claimants) who benefit under the Plan. The release relates to any matter relating to the business and affairs of the petitioners (save for Purcell), the *CCAA* restructuring or the claims arising in the restructuring that are being compromised.

[85] I am satisfied that this third party release in favour of the Estate is appropriate. Firstly, the Plan could not be implemented with the transfer of the Class A common voting shares. Failing the Estate's willingness to transfer these shares for $1.00 in consideration of such a transfer, the petitioners indicate that the alternatives to address this situation would be more lengthy, complex and, perhaps, not even viable. Further, the Estate is not looking to receive any compensation for this transfer of shares beyond the release, so all other stakeholders will benefit in Purcell as the restructured entity.

[86] This release in favour of the Estate will affect potential claims against the Estate for any breaches of fiduciary duty by Mr. Stanfield. These claims would include claims by the Preferred Share Claimants and others in respect to representations made by him and perhaps others as part of the share fundraising efforts. Only one action was commenced against the Group and Mr. Stanfield, and it was dismissed. Despite the many years since it was apparent that preferred shareholders claims were not being met, no other actions were commenced prior to the *CCAA* filing. Mr. Stanfield's estate received probate in 2011 and no other claims appear to have surfaced.

[87] In any event, no stakeholder has objected to the releases sought despite the Monitor having specifically notified the Trade Creditors and the Preferred Share Claimants of the nature of and reasons for granting the releases in a letter dated October 1, 2014. This notification was forwarded to persons on the service list and the materials were also subsequently posted on the Monitor's website.

[88] In my view, all the releases set out in the Plan, and as set out in the sanction order, now amended, are rationally connected to the Plan and are necessary to its

implementation. I conclude that an application of all of the *Metcalfe* criteria supports approval of the releases, including that in favour of the Estate.

[89] I conclude and find that the Plan is fair and reasonable.

CONCLUSION AND DISPOSITION

[90] In conclusion, I am satisfied that the petitioners are in compliance with the requirements of the *CCAA* and that they have not acted contrary to the *CCAA* or any court orders granted in these proceedings.

[91] Finally, I am satisfied that the Plan is fair and reasonable. It represents years of steady and persistent efforts by the various participants, including Mr. Hewison, Mr. MacMillan and Mr. Lacey, in what were sometimes difficult and uncertain circumstances. Even so, they persevered and have now delivered to the various stakeholders who benefit under the Plan a chance to recover value where otherwise no recovery would be made. The stakeholders have decidedly endorsed those efforts and are prepared to participate in this new venture in accordance with the Plan.

[92] The order is granted sanctioning the Plan on the terms discussed at the conclusion of the hearing. In addition, the stay of proceedings is extended, as requested.

"Fitzpatrick J."

CITATION: Re: Canwest Global Communications Corp. 2010 ONSC 4209
COURT FILE NO.: CV-09-8396-00CL
DATE: 20100728

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF SECTION 11 OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST GLOBAL COMMUNICATIONS AND THE OTHER APPLICANTS

BEFORE: Pepall J.

COUNSEL: *Lyndon Barnes, Jeremy Dacks and Shawn Irving* for the CMI Entities
David Byers and Marie Konyukhova for the Monitor
Robin B. Schwill and Vince Mercier for Shaw Communications Inc.
Derek Bell for the Canwest Shareholders Group (the "Existing Shareholders")
Mario Forte for the Special Committee of the Board of Directors
Robert Chadwick and Logan Willis for the Ad Hoc Committee of Noteholders
Amanda Darrach for Canwest Retirees
Peter Osborne for Management Directors
Steven Weisz for CIBC Asset-Based Lending Inc.

ORAL REASONS FOR DECISION

[1] This is the culmination of the *Companies' Creditors Arrangement Act*[1] restructuring of the CMI Entities. The proceeding started in court on October 6, 2009, experienced numerous peaks and valleys, and now has resulted in a request for an order sanctioning a plan of compromise, arrangement and reorganization (the "Plan"). It has been a short road in relative terms but not without its challenges and idiosyncrasies. To complicate matters, this restructuring

[1] R.S.C. 1985, c. C-36 as amended.

was hot on the heels of the amendments to the CCAA that were introduced on September 18, 2009. Nonetheless, the CMI Entities have now successfully concluded a Plan for which they seek a sanction order. They also request an order approving the Plan Emergence Agreement, and other related relief. Lastly, they seek a post-filing claims procedure order.

[2] The details of this restructuring have been outlined in numerous previous decisions rendered by me and I do not propose to repeat all of them.

The Plan and its Implementation

[3] The basis for the Plan is the amended Shaw transaction. It will see a wholly owned subsidiary of Shaw Communications Inc. ("Shaw") acquire all of the interests in the free-to-air television stations and subscription-based specialty television channels currently owned by Canwest Television Limited Partnership ("CTLP") and its subsidiaries and all of the interests in the specialty television stations currently owned by CW Investments and its subsidiaries, as well as certain other assets of the CMI Entities. Shaw will pay to CMI US $440 million in cash to be used by CMI to satisfy the claims of the 8% Senior Subordinated Noteholders (the "Noteholders") against the CMI Entities. In the event that the implementation of the Plan occurs after September 30, 2010, an additional cash amount of US $2.9 million per month will be paid to CMI by Shaw and allocated by CMI to the Noteholders. An additional $38 million will be paid by Shaw to the Monitor at the direction of CMI to be used to satisfy the claims of the Affected Creditors (as that term is defined in the Plan) other than the Noteholders, subject to a pro rata increase in that cash amount for certain restructuring period claims in certain circumstances.

[4] In accordance with the Meeting Order, the Plan separates Affected Creditors into two classes for voting purposes:

(a) the Noteholders; and

(b) the Ordinary Creditors. Convenience Class Creditors are deemed to be in, and to vote as, members of the Ordinary Creditors' Class.

[5] The Plan divides the Ordinary Creditors' pool into two sub-pools, namely the Ordinary CTLP Creditors' Sub-pool and the Ordinary CMI Creditors' Sub-pool. The former comprises two-thirds of the value and is for claims against the CTLP Plan Entities and the latter reflects one-third of the value and is used to satisfy claims against Plan Entities other than the CTLP Plan Entities. In its 16th Report, the Monitor performed an analysis of the relative value of the assets of the CMI Plan Entities and the CTLP Plan Entities and the possible recoveries on a going concern liquidation and based on that analysis, concluded that it was fair and reasonable that Affected Creditors of the CTLP Plan Entities share pro rata in two-thirds of the Ordinary Creditors' pool and Affected Creditors of the Plan Entities other than the CTLP Plan Entities share pro rata in one-third of the Ordinary Creditors' pool.

[6] It is contemplated that the Plan will be implemented by no later than September 30, 2010.

[7] The Existing Shareholders will not be entitled to any distributions under the Plan or other compensation from the CMI Entities on account of their equity interests in Canwest Global. All equity compensation plans of Canwest Global will be extinguished and any outstanding options, restricted share units and other equity-based awards outstanding thereunder will be terminated and cancelled and the participants therein shall not be entitled to any distributions under the Plan.

[8] On a distribution date to be determined by the Monitor following the Plan implementation date, all Affected Creditors with proven distribution claims against the Plan Entities will receive distributions from cash received by CMI (or the Monitor at CMI's direction) from Shaw, the Plan Sponsor, in accordance with the Plan. The directors and officers of the remaining CMI Entities and other subsidiaries of Canwest Global will resign on or about the Plan implementation date.

[9] Following the implementation of the Plan, CTLP and CW Investments will be indirect, wholly-owned subsidiaries of Shaw, and the multiple voting shares, subordinate voting shares and non-voting shares of Canwest Global will be delisted from the TSX Venture Exchange. It is anticipated that the remaining CMI Entities and certain other subsidiaries of Canwest Global will be liquidated, wound-up, dissolved, placed into bankruptcy or otherwise abandoned.

[10] In furtherance of the Minutes of Settlement that were entered into with the Existing Shareholders, the articles of Canwest Global will be amended under section 191 of the CBCA to facilitate the settlement. In particular, Canwest Global will reorganize the authorized capital of Canwest Global into (a) an unlimited number of new multiple voting shares, new subordinated voting shares and new non-voting shares; and (b) an unlimited number of new non-voting preferred shares. The terms of the new non-voting preferred shares will provide for the mandatory transfer of the new preferred shares held by the Existing Shareholders to a designated entity affiliated with Shaw for an aggregate amount of $11 million to be paid upon delivery by Canwest Global of the transfer notice to the transfer agent. Following delivery of the transfer notice, the Shaw designated entity will donate and surrender the new preferred shares acquired by it to Canwest Global for cancellation.

[11] Canwest Global, CMI, CTLP, New Canwest, Shaw, 7316712 and the Monitor entered into the Plan Emergence Agreement dated June 25, 2010 detailing certain steps that will be taken before, upon and after the implementation of the plan. These steps primarily relate to the funding of various costs that are payable by the CMI Entities on emergence from the CCAA proceeding. This includes payments that will be made or may be made by the Monitor to satisfy post-filing amounts owing by the CMI Entities. The schedule of costs has not yet been finalized.

Creditor Meetings

[12] Creditor meetings were held on July 19, 2010 in Toronto, Ontario. Support for the Plan was overwhelming. 100% in number representing 100% in value of the beneficial owners of the 8% senior subordinated notes who provided instructions for voting at the Noteholder meeting approved the resolution. Beneficial Noteholders holding approximately 95% of the principal amount of the outstanding notes validly voted at the Noteholder meeting.

[13] The Ordinary Creditors with proven voting claims who submitted voting instructions in person or by proxy represented approximately 83% of their number and 92% of the value of such claims. In excess of 99% in number representing in excess of 99% in value of the Ordinary Creditors holding proven voting claims that were present in person or by proxy at the meeting voted or were deemed to vote in favour of the resolution.

Sanction Test

[14] Section 6(1) of the CCAA provides that the court has discretion to sanction a plan of compromise or arrangement if it has achieved the requisite double majority vote. The criteria that a debtor company must satisfy in seeking the court's approval are:

(a) there must be strict compliance with all statutory requirements;

(b) all material filed and procedures carried out must be examined to determine if anything has been done or purported to be done which is not authorized by the CCAA; and

(c) the Plan must be fair and reasonable.

See *Re: Canadian Airlines Corp.*[2]

(a) Statutory Requirements

[15] I am satisfied that all statutory requirements have been met. I already determined that the Applicants qualified as debtor companies under section 2 of the CCAA and that they had total claims against them exceeding $5 million. The notice of meeting was sent in accordance with the Meeting Order. Similarly, the classification of Affected Creditors for voting purposes was addressed in the Meeting Order which was unopposed and not appealed. The meetings were both properly constituted and voting in each was properly carried out. Clearly the Plan was approved by the requisite majorities.

[16] Section 6(3), 6(5) and 6(6) of the CCAA provide that the court may not sanction a plan unless the plan contains certain specified provisions concerning crown claims, employee claims and pension claims. Section 4.6 of Plan provides that the claims listed in paragraph (l) of the definition of "Unaffected Claims" shall be paid in full from a fund known as the Plan

[2] 2000 A.B.Q.B. 442 at para. 60, leave to appeal denied 2000 A.B.C.A 238, aff'd 2001 A.B.C.A 9, leave to appeal to S.C.C. refused July 12, 2001.

Implementation Fund within six months of the sanction order. The Fund consists of cash, certain other assets and further contributions from Shaw. Paragraph (l) of the definition of "Unaffected Claims" includes any Claims in respect of any payments referred to in section 6(3), 6(5) and 6(6) of the CCAA. I am satisfied that these provisions of section 6 of the CCAA have been satisfied.

(b) Unauthorized Steps

[17] In considering whether any unauthorized steps have been taken by a debtor company, it has been held that in making such a determination, the court should rely on the parties and their stakeholders and the reports of the Monitor: *Re Canadian Airlines*[3].

[18] The CMI Entities have regularly filed affidavits addressing key developments in this restructuring. In addition, the Monitor has provided regular reports (17 at last count) and has opined that the CMI Entities have acted and continue to act in good faith and with due diligence and have not breached any requirements under the CCAA or any order of this court. If it was not obvious from the hearing on June 23, 2010, it should be stressed that there is no payment of any equity claim pursuant to section 6(8) of the CCAA. As noted by the Monitor in its 16th Report, settlement with the Existing Shareholders did not and does not in any way impact the anticipated recovery to the Affected Creditors of the CMI Entities. Indeed I referenced the inapplicability of section 6(8) of the CCAA in my Reasons of June 23, 2010. The second criterion relating to unauthorized steps has been met.

(c) Fair and Reasonable

[19] The third criterion to consider is the requirement to demonstrate that a plan is fair and reasonable. As Paperny J. (as she then was) stated in *Re Canadian Airlines*:

> The court's role on a sanction hearing is to consider whether the plan fairly balances the interests of all stakeholders. Faced with an

[3] Ibid,at para. 64 citing *Olympia and York Developments Ltd. v. Royal Trust Co*. [1993] O.J. No. 545 (Gen. Div.) and *Re: Cadillac Fairview Inc*. [1995] O.J. No. 274 (Gen. Div.).

> insolvent organization, its role is to look forward and ask: does this plan represent a fair and reasonable compromise that will permit a viable commercial entity to emerge? It is also an exercise in assessing current reality by comparing available commercial alternatives to what is offered in the proposed plan.[4]

[20] My discretion should be informed by the objectives of the CCAA, namely to facilitate the reorganization of a debtor company for the benefit of the company, its creditors, shareholders, employees and in many instances, a much broader constituency of affected persons.

[21] In assessing whether a proposed plan is fair and reasonable, considerations include the following:

(a) whether the claims were properly classified and whether the requisite majority of creditors approved the plan;

(b) what creditors would have received on bankruptcy or liquidation as compared to the plan;

(c) alternatives available to the plan and bankruptcy;

(d) oppression of the rights of creditors;

(e) unfairness to shareholders; and

(f) the public interest.

[22] I have already addressed the issue of classification and the vote. Obviously there is an unequal distribution amongst the creditors of the CMI Entities. Distribution to the Noteholders is expected to result in recovery of principal, pre-filing interest and a portion of post-filing

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[4] Ibid, at para. 3.

accrued and default interest. The range of recoveries for Ordinary Creditors is much less. The recovery of the Noteholders is substantially more attractive than that of Ordinary Creditors. This is not unheard of. In *Re Armbro Enterprises Inc.*[5] Blair J. (as he then was) approved a plan which included an uneven allocation in favour of a single major creditor, the Royal Bank, over the objection of other creditors. Blair J. wrote:

> "I am not persuaded that there is a sufficient tilt in the allocation of these new common shares in favour of RBC to justify the court in interfering with the business decision made by the creditor class in approving the proposed Plan, as they have done. RBC's cooperation is a sine qua non for the Plan, or any Plan, to work and it is the only creditor continuing to advance funds to the applicants to finance the proposed re-organization."[6]

[23] Similarly, in *Re: Uniforêt Inc.*[7] a plan provided for payment in full to an unsecured creditor. This treatment was much more generous than that received by other creditors. There, the Québec Superior Court sanctioned the plan and noted that a plan can be more generous to some creditors and still fair to all creditors. The creditor in question had stepped into the breach on several occasions to keep the company afloat in the four years preceding the filing of the plan and the court was of the view that the conduct merited special treatment. See also Romaine J.'s orders dated October 26, 2009 in *SemCanada Crude Company et al.*

[24] I am prepared to accept that the recovery for the Noteholders is fair and reasonable in the circumstances. The size of the Noteholder debt was substantial. CMI's obligations under the notes were guaranteed by several of the CMI Entities. No issue has been taken with the

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[5] (1993), 22 C.B.R. (3rd) 80 (Ont. Gen. Div.).

[6] *Ibid*, at para. 6.

[7] (2003), 43 C.B.R. (4th) 254 (QEUE. S.C.).

guarantees. As stated before and as observed by the Monitor, the Noteholders held a blocking position in any restructuring. Furthermore, the liquidity and continued support provided by the Ad Hoc Committee both prior to and during these proceedings gave the CMI Entities the opportunity to pursue a going concern restructuring of their businesses. A description of the role of the Noteholders is found in Mr. Strike's affidavit sworn July 20, 2010, filed on this motion.

[25] Turning to alternatives, the CMI Entities have been exploring strategic alternatives since February, 2009. Between November, 2009 and February, 2010, RBC Capital Markets conducted the equity investment solicitation process of which I have already commented. While there is always a theoretical possibility that a more advantageous plan could be developed than the Plan proposed, the Monitor has concluded that there is no reason to believe that restarting the equity investment solicitation process or marketing 100% of the CMI Entities assets would result in a better or equally desirable outcome. Furthermore, restarting the process could lead to operational difficulties including issues relating to the CMI Entities' large studio suppliers and advertisers. The Monitor has also confirmed that it is unlikely that the recovery for a going concern liquidation sale of the assets of the CMI Entities would result in greater recovery to the creditors of the CMI Entities. I am not satisfied that there is any other alternative transaction that would provide greater recovery than the recoveries contemplated in the Plan. Additionally, I am not persuaded that there is any oppression of creditor rights or unfairness to shareholders.

[26] The last consideration I wish to address is the public interest. If the Plan is implemented, the CMI Entities will have achieved a going concern outcome for the business of the CTLP Plan Entities that fully and finally deals with the Goldman Sachs Parties, the Shareholders Agreement and the defaulted 8% senior subordinated notes. It will ensure the continuation of employment for substantially all of the employees of the Plan Entities and will provide stability for the CMI Entities, pensioners, suppliers, customers and other stakeholders. In addition, the Plan will maintain for the general public broad access to and choice of news, public and other information and entertainment programming. Broadcasting of news, public and entertainment programming is an important public service, and the bankruptcy and liquidation of the CMI Entities would have a negative impact on the Canadian public.

[27] I should also mention section 36 of the CCAA which was added by the recent amendments to the Act which came into force on September 18, 2009. This section provides that a debtor company may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. The section goes on to address factors a court is to consider. In my view, section 36 does not apply to transfers contemplated by a Plan. These transfers are merely steps that are required to implement the Plan and to facilitate the restructuring of the Plan Entities' businesses. Furthermore, as the CMI Entities are seeking approval of the Plan itself, there is no risk of any abuse. There is a further safeguard in that the Plan including the asset transfers contemplated therein has been voted on and approved by Affected Creditors.

[28] The Plan does include broad releases including some third party releases. In *Metcalfe v. Mansfield Alternative Investments II Corp.*[8], the Ontario Court of Appeal held that the CCAA court has jurisdiction to approve a plan of compromise or arrangement that includes third party releases. The *Metcalfe* case was extraordinary and exceptional in nature. It responded to dire circumstances and had a plan that included releases that were fundamental to the restructuring. The Court held that the releases in question had to be justified as part of the compromise or arrangement between the debtor and its creditors. There must be a reasonable connection between the third party claim being compromised in the plan and the restructuring achieved by the plan to warrant inclusion of the third party release in the plan.

[29] In the *Metcalfe* decision, Blair J.A. discussed in detail the issue of releases of third parties. I do not propose to revisit this issue, save and except to stress that in my view, third party releases should be the exception and should not be requested or granted as a matter of course.

[30] In this case, the releases are broad and extend to include the Noteholders, the Ad Hoc Committee and others. Fraud, wilful misconduct and gross negligence are excluded. I have

[8] (2008), 92 O.R. (3rd) 513 (C.A.).

already addressed, on numerous occasions, the role of the Noteholders and the Ad Hoc Committee. I am satisfied that the CMI Entities would not have been able to restructure without materially addressing the notes and developing a plan satisfactory to the Ad Hoc Committee and the Noteholders. The release of claims is rationally connected to the overall purpose of the Plan and full disclosure of the releases was made in the Plan, the information circular, the motion material served in connection with the Meeting Order and on this motion. No one has appeared to oppose the sanction of the Plan that contains these releases and they are considered by the Monitor to be fair and reasonable. Under the circumstances, I am prepared to sanction the Plan containing these releases.

[31] Lastly, the Monitor is of the view that the Plan is advantageous to Affected Creditors, is fair and reasonable and recommends its sanction. The board, the senior management of the CMI Entities, the Ad Hoc Committee, and the CMI CRA all support sanction of the Plan as do all those appearing today.

[32] In my view, the Plan is fair and reasonable and I am granting the sanction order requested. [9]

[33] The Applicants also seek approval of the Plan Emergence Agreement. The Plan Emergence Agreement outlines steps that will be taken prior to, upon, or following implementation of the Plan and is a necessary corollary of the Plan. It does not confiscate the rights of any creditors and is necessarily incidental to the Plan. I have the jurisdiction to approve such an agreement: *Re Air Canada*[10] and *Re Calpine Canada Energy Ltd.*[11] I am satisfied that the agreement is fair and reasonable and should be approved.

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[9] The Sanction Order is extraordinarily long and in large measure repeats the Plan provisions. In future, counsel should attempt to simplify and shorten these sorts of orders.

[10] (2004), 47 C.B.R. (4th) 169 (Ont. S.C.J.).

[11] (2007), 35 C.B.R. (5th) 1.

[34] It is proposed that on the Plan implementation date the articles of Canwest Global will be amended to facilitate the settlement reached with the Existing Shareholders. Section 191 of the CBCA permits the court to order necessary amendments to the articles of a corporation without shareholder approval or a dissent right. In particular, section 191(1)(c) provides that reorganization means a court order made under any other Act of Parliament that affects the rights among the corporation, its shareholders and creditors. The CCAA is such an Act: *Beatrice Foods v. Merrill Lynch Capital Partners Inc.*[12] and *Re Laidlaw Inc*[13]. Pursuant to section 191(2), if a corporation is subject to a subsection (1) order, its articles may be amended to effect any change that might lawfully be made by an amendment under section 173. Section 173(1)(e) and (h) of the CBCA provides that:

> (1) Subject to sections 176 and 177, the articles of a corporation may by special resolution be amended to
>
> (e) create new classes of shares;
>
> (h) change the shares of any class or series, whether issued or unissued, into a different number of shares of the same class or series or into the same or a different number of shares of other classes or series.

[35] Section 6(2) of the CCAA provides that if a court sanctions a compromise or arrangement, it may order that the debtor's constating instrument be amended in accordance with the compromise or arrangement to reflect any change that may lawfully be made under federal or provincial law.

[36] In exercising its discretion to approve a reorganization under section 191 of the CBCA, the court must be satisfied that: (a) there has been compliance with all statutory requirements;

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[12] (1996), 43 CBR (4th) 10.

[13] (2003), 39 CBR (4th) 239.

(b) the debtor company is acting in good faith; and (c) the capital restructuring is fair and reasonable: *Re: A & M Cookie Co. Canada*[14] and *Mei Computer Technology Group Inc.*[15]

[37] I am satisfied that the statutory requirements have been met as the contemplated reorganization falls within the conditions provided for in sections 191 and 173 of the CBCA. I am also satisfied that Canwest Global and the other CMI Entities were acting in good faith in attempting to resolve the Existing Shareholder dispute. Furthermore, the reorganization is a necessary step in the implementation of the Plan in that it facilitates agreement reached on June 23, 2010 with the Existing Shareholders. In my view, the reorganization is fair and reasonable and was a vital step in addressing a significant impediment to a satisfactory resolution of outstanding issues.

[38] A post-filing claims procedure order is also sought. The procedure is designed to solicit, identify and quantify post-filing claims. The Monitor who participated in the negotiation of the proposed order is satisfied that its terms are fair and reasonable as am I.

[39] In closing, I would like to say that generally speaking, the quality of oral argument and the materials filed in this CCAA proceeding has been very high throughout. I would like to express my appreciation to all counsel and the Monitor in that regard. The sanction order and the post-filing claims procedure order are granted.

Pepall J.

Released: July 28, 2010

[14] [2009] O.J. No. 2427 (S.C.J.) at para. 8/

[15] [2005] Q.J. No. 2293 at para. 9.

Re Canadian Airlines Corporation, 2000 ABQB 442

Date: 20000627

Action No. 0001-05071

IN THE COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL DISTRICT OF CALGARY

IN THE MATTER OF IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED;

AND IN THE MATTER OF THE *BUSINESS CORPORATIONS ACT* (ALBERTA) S.A. 1981, c. B-15, AS AMENDED, SECTION 185

AND IN THE MATTER OF CANADIAN AIRLINES CORPORATION AND CANADIAN AIRLINES INTERNATIONAL LTD.

REASONS FOR DECISION

of the

HONOURABLE MADAM JUSTICE M. S. PAPERNY

I. INTRODUCTION

[1] After a decade of searching for a permanent solution to its ongoing, significant financial problems, Canadian Airlines Corporation ("CAC") and Canadian Airlines International Ltd. ("CAIL") seek the court's sanction to a plan of arrangement filed under the ***Companies' Creditors Arrangement Act*** ("CCAA") and sponsored by its historic rival, Air Canada Corporation ("Air Canada"). To Canadian, this represents its last choice and its only chance for survival. To Air Canada, it is an opportunity to lead the restructuring of the Canadian airline industry, an exercise many suggest is long overdue. To over 16,000 employees of Canadian, it means continued employment. Canadian Airlines will operate as a separate entity and continue to provide domestic and international air service to Canadians. Tickets of the flying public will be honoured and their frequent flyer points maintained. Long term business relationships with trade creditors and suppliers will continue.

[2] The proposed restructuring comes at a cost. Secured and unsecured creditors are being asked to accept significant compromises and shareholders of CAC are being asked to accept that their shares have no value. Certain unsecured creditors oppose the plan, alleging it is oppressive and unfair. They assert that Air Canada has appropriated the key assets of Canadian to itself. Minority shareholders of CAC, on the other hand, argue that Air Canada's financial support to Canadian, before and during this restructuring process, has increased the value of Canadian and in turn their shares. These two positions are irreconcilable, but do reflect the perception by some that this plan asks them to sacrifice too much.

[3] Canadian has asked this court to sanction its plan under s. 6 of the CCAA. The court's role on a sanction hearing is to consider whether the plan fairly balances the interests of all the stakeholders. Faced with an insolvent organization, its role is to look forward and ask: does this plan represent a fair and reasonable compromise that will permit a viable commercial entity to emerge? It is also an exercise in assessing current reality by comparing available commercial alternatives to what is offered in the proposed plan.

II. BACKGROUND

Canadian Airlines and its Subsidiaries

[4] CAC and CAIL are corporations incorporated or continued under the ***Business Corporations Act*** of Alberta, S.A. 1981, c. B-15 ("ABCA"). 82% of CAC's shares are held by 853350 Alberta Ltd.("853350") and the remaining 18% are held publicly. CAC, directly or indirectly, owns the majority of voting shares in and controls the other Petitioner, CAIL and these shares represent CAC's principal asset. CAIL owns or has an interest in a number of other corporations directly engaged in the airline industry or other businesses related to the airline industry, including Canadian Regional Airlines Limited ("CRAL"). Where the context requires, I will refer to CAC and CAIL jointly as "Canadian" in these reasons.

[5] In the past fifteen years, CAIL has grown from a regional carrier operating under the name Pacific Western Airlines ("PWA") to one of Canada's two major airlines. By mid-1986, Canadian Pacific Air Lines Limited ("CP Air"), had acquired the regional carriers Nordair Inc. ("Nordair") and Eastern Provincial Airways ("Eastern"). In February, 1987, PWA completed its purchase of CP Air from Canadian Pacific Limited. PWA then merged the four predecessor carriers (CP Air, Eastern, Nordair, and PWA) to form one airline, "Canadian Airlines International Ltd.", which was launched in April, 1987.

[6] By April, 1989, CAIL had acquired substantially all of the common shares of Wardair Inc. and completed the integration of CAIL and Wardair Inc. in 1990.

[7] CAIL and its subsidiaries provide international and domestic scheduled and charter air transportation for passengers and cargo. CAIL provides scheduled services to approximately 30 destinations in 11 countries. Its subsidiary, Canadian Regional Airlines (1998) Ltd. (“CRAL 98") provides scheduled services to approximately 35 destinations in Canada and the United States. Through code share agreements and marketing alliances with leading carriers, CAIL and its subsidiaries provide service to approximately 225 destinations worldwide. CAIL is also engaged in charter and cargo services and the provision of services to third parties, including aircraft overhaul and maintenance, passenger and cargo handling, flight simulator and equipment rentals, employee training programs and the sale of Canadian Plus frequent flyer points. As at December 31, 1999, CAIL operated approximately 79 aircraft.

[8] CAIL directly and indirectly employs over 16,000 persons, substantially all of whom are located in Canada. The balance of the employees are located in the United States, Europe, Asia, Australia, South America and Mexico. Approximately 88% of the active employees of CAIL are subject to collective bargaining agreements.

Events Leading up to the CCAA Proceedings

[9] Canadian’s financial difficulties significantly predate these proceedings.

[10] In the early 1990s, Canadian experienced significant losses from operations and deteriorating liquidity. It completed a financial restructuring in 1994 (the "1994 Restructuring") which involved employees contributing $200,000,000 in new equity in return for receipt of entitlements to common shares. In addition, Aurora Airline Investments, Inc. ("Aurora"), a subsidiary of AMR Corporation ("AMR"), subscribed for $246,000,000 in preferred shares of CAIL. Other AMR subsidiaries entered into comprehensive services and marketing arrangements with CAIL. The governments of Canada, British Columbia and Alberta provided an aggregate of $120,000,000 in loan guarantees. Senior creditors, junior creditors and shareholders of CAC and CAIL and its subsidiaries converted approximately $712,000,000 of obligations into common shares of CAC or convertible notes issued jointly by CAC and CAIL and/or received warrants entitling the holder to purchase common shares.

[11] In the latter half of 1994, Canadian built on the improved balance sheet provided by the 1994 Restructuring, focussing on strict cost controls, capacity management and aircraft utilization. The initial results were encouraging. However, a number of factors including higher than expected fuel costs, rising interest rates, decline of the Canadian dollar, a strike by

pilots of Time Air and the temporary grounding of Inter-Canadien's ATR-42 fleet undermined this improved operational performance. In 1995, in response to additional capacity added by emerging charter carriers and Air Canada on key transcontinental routes, CAIL added additional aircraft to its fleet in an effort to regain market share. However, the addition of capacity coincided with the slow-down in the Canadian economy leading to traffic levels that were significantly below expectations. Additionally, key international routes of CAIL failed to produce anticipated results. The cumulative losses of CAIL from 1994 to 1999 totalled $771 million and from January 31, 1995 to August 12, 1999, the day prior to the issuance by the Government of Canada of an Order under Section 47 of the *Canada Transportation Act* (relaxing certain rules under the *Competition Act* to facilitate a restructuring of the airline industry and described further below), the trading price of Canadian's common shares declined from $7.90 to $1.55.

[12] Canadian's losses incurred since the 1994 Restructuring severely eroded its liquidity position. In 1996, Canadian faced an environment where the domestic air travel market saw increased capacity and aggressive price competition by two new discount carriers based in western Canada. While Canadian's traffic and load factor increased indicating a positive response to Canadian's post-restructuring business plan, yields declined. Attempts by Canadian to reduce domestic capacity were offset by additional capacity being introduced by the new discount carriers and Air Canada.

[13] The continued lack of sufficient funds from operations made it evident by late fall of 1996 that Canadian needed to take action to avoid a cash shortfall in the spring of 1997. In November 1996, Canadian announced an operational restructuring plan (the "1996 Restructuring") aimed at returning Canadian to profitability and subsequently implemented a payment deferral plan which involved a temporary moratorium on payments to certain lenders and aircraft operating lessors to provide a cash bridge until the benefits of the operational restructuring were fully implemented. Canadian was able successfully to obtain the support of its lenders and operating lessors such that the moratorium and payment deferral plan was able to proceed on a consensual basis without the requirement for any court proceedings.

[14] The objective of the 1996 Restructuring was to transform Canadian into a sustainable entity by focussing on controllable factors which targeted earnings improvements over four years. Three major initiatives were adopted: network enhancements, wage concessions as supplemented by fuel tax reductions/rebates, and overhead cost reductions.

[15] The benefits of the 1996 Restructuring were reflected in Canadian's 1997 financial results when Canadian and its subsidiaries reported a consolidated net income of $5.4 million, the best results in 9 years.

[16] In early 1998, building on its 1997 results, Canadian took advantage of a strong market for U.S. public debt financing in the first half of 1998 by issuing U.S. $175,000,000 of senior secured notes in April, 1998 (“Senior Secured Notes”) and U.S. $100,000,000 of unsecured notes in August, 1998 (“Unsecured Notes”).

[17] The benefits of the 1996 Restructuring continued in 1998 but were not sufficient to offset a number of new factors which had a significant negative impact on financial

performance, particularly in the fourth quarter. Canadian's eroded capital base gave it limited capacity to withstand negative effects on traffic and revenue. These factors included lower than expected operating revenues resulting from a continued weakness of the Asian economies, vigorous competition in Canadian's key western Canada and the western U.S. transborder markets, significant price discounting in most domestic markets following a labour disruption at Air Canada and CAIL's temporary loss of the ability to code-share with American Airlines on certain transborder flights due to a pilot dispute at American Airlines. Canadian also had increased operating expenses primarily due to the deterioration of the value of the Canadian dollar and additional airport and navigational fees imposed by NAV Canada which were not recoverable by Canadian through fare increases because of competitive pressures. This resulted in Canadian and its subsidiaries reporting a consolidated loss of $137.6 million for 1998.

[18] As a result of these continuing weak financial results, Canadian undertook a number of additional strategic initiatives including entering the **oneworldTM** Alliance, the introduction of its new "Proud Wings" corporate image, a restructuring of CAIL 's Vancouver hub, the sale and leaseback of certain aircraft, expanded code sharing arrangements and the implementation of a service charge in an effort to recover a portion of the costs relating to NAV Canada fees.

[19] Beginning in late 1998 and continuing into 1999, Canadian tried to access equity markets to strengthen its balance sheet. In January, 1999, the Board of Directors of CAC determined that while Canadian needed to obtain additional equity capital, an equity infusion alone would not address the fundamental structural problems in the domestic air transportation market.

[20] Canadian believes that its financial performance was and is reflective of structural problems in the Canadian airline industry, most significantly, over capacity in the domestic air transportation market. It is the view of Canadian and Air Canada that Canada's relatively small population and the geographic distribution of that population is unable to support the overlapping networks of two full service national carriers. As described further below, the Government of Canada has recognized this fundamental problem and has been instrumental in attempts to develop a solution.

Initial Discussions with Air Canada

[21] Accordingly, in January, 1999, CAC's Board of Directors directed management to explore all strategic alternatives available to Canadian, including discussions regarding a possible merger or other transaction involving Air Canada.

[22] Canadian had discussions with Air Canada in early 1999. AMR also participated in those discussions. While several alternative merger transactions were considered in the course of these discussions, Canadian, AMR and Air Canada were unable to reach agreement.

[23] Following the termination of merger discussions between Canadian and Air Canada, senior management of Canadian, at the direction of the Board and with the support of AMR, renewed its efforts to secure financial partners with the objective of obtaining either an equity

investment and support for an eventual merger with Air Canada or immediate financial support for a merger with Air Canada.

Offer by Onex

[24] In early May, the discussions with Air Canada having failed, Canadian focussed its efforts on discussions with Onex Corporation ("Onex") and AMR concerning the basis upon which a merger of Canadian and Air Canada could be accomplished.

[25] On August 23, 1999, Canadian entered into an Arrangement Agreement with Onex, AMR and Airline Industry Revitalization Co. Inc. ("AirCo") (a company owned jointly by Onex and AMR and controlled by Onex). The Arrangement Agreement set out the terms of a Plan of Arrangement providing for the purchase by AirCo of all of the outstanding common and non-voting shares of CAC. The Arrangement Agreement was conditional upon, among other things, the successful completion of a simultaneous offer by AirCo for all of the voting and non-voting shares of Air Canada. On August 24, 1999, AirCo announced its offers to purchase the shares of both CAC and Air Canada and to subsequently merge the operations of the two airlines to create one international carrier in Canada.

[26] On or about September 20, 1999 the Board of Directors of Air Canada recommended against the AirCo offer. On or about October 19, 1999, Air Canada announced its own proposal to its shareholders to repurchase shares of Air Canada. Air Canada's announcement also indicated Air Canada's intention to make a bid for CAC and to proceed to complete a merger with Canadian subject to a restructuring of Canadian's debt.

[27] There were several rounds of offers and counter-offers between AirCo and Air Canada. On November 5, 1999, the Quebec Superior Court ruled that the AirCo offer for Air Canada violated the provisions of the *Air Canada Public Participation Act*. AirCo immediately withdrew its offers. At that time, Air Canada indicated its intention to proceed with its offer for CAC.

[28] Following the withdrawal of the AirCo offer to purchase CAC, and notwithstanding Air Canada's stated intention to proceed with its offer, there was a renewed uncertainty about Canadian's future which adversely affected operations. As described further below, Canadian lost significant forward bookings which further reduced the company's remaining liquidity.

Offer by 853350

[29] On November 11, 1999, 853350 (a corporation financed by Air Canada and owned as to 10% by Air Canada) made a formal offer for all of the common and non-voting shares of CAC. Air Canada indicated that the involvement of 853350 in the take-over bid was necessary in order to protect Air Canada from the potential adverse effects of a restructuring of Canadian's debt and that Air Canada would only complete a merger with Canadian after the completion of a debt restructuring transaction. The offer by 853350 was conditional upon, among other things, a satisfactory resolution of AMR's claims in respect of Canadian and a satisfactory resolution of certain regulatory issues arising from the announcement made on

October 26, 1999 by the Government of Canada regarding its intentions to alter the regime governing the airline industry.

[30] As noted above, AMR and its subsidiaries and affiliates had certain agreements with Canadian arising from AMR's investment (through its wholly owned subsidiary, Aurora Airline Investments, Inc.) in CAIL during the 1994 Restructuring. In particular, the Services Agreement by which AMR and its subsidiaries and affiliates provided certain reservations, scheduling and other airline related services to Canadian provided for a termination fee of approximately $500 million (as at December 31, 1999) while the terms governing the preferred shares issued to Aurora provided for exchange rights which were only retractable by Canadian upon payment of a redemption fee in excess of $500 million (as at December 31, 1999). Unless such provisions were amended or waived, it was practically impossible for Canadian to complete a merger with Air Canada since the cost of proceeding without AMR's consent was simply too high.

[31] Canadian had continued its efforts to seek out all possible solutions to its structural problems following the withdrawal of the AirCo offer on November 5, 1999. While AMR indicated its willingness to provide a measure of support by allowing a deferral of some of the fees payable to AMR under the Services Agreement, Canadian was unable to find any investor willing to provide the liquidity necessary to keep Canadian operating while alternative solutions were sought.

[32] After 853350 made its offer, 853350 and Air Canada entered into discussions with AMR regarding the purchase by 853350 of AMR's shareholding in CAIL as well as other matters regarding code sharing agreements and various services provided to Canadian by AMR and its subsidiaries and affiliates. The parties reached an agreement on November 22, 1999 pursuant to which AMR agreed to reduce its potential damages claim for termination of the Services Agreement by approximately 88%.

[33] On December 4, 1999, CAC's Board recommended acceptance of 853350's offer to its shareholders and on December 21, 1999, two days before the offer closed, 853350 received approval for the offer from the Competition Bureau as well as clarification from the Government of Canada on the proposed regulatory framework for the Canadian airline industry.

[34] As noted above, Canadian's financial condition deteriorated further after the collapse of the AirCo Arrangement transaction. In particular:

> a) the doubts which were publicly raised as to Canadian's ability to survive made Canadian's efforts to secure additional financing through various sale-leaseback transactions more difficult;
> b) sales for future air travel were down by approximately 10% compared to 1998;
> c) CAIL's liquidity position, which stood at approximately $84 million (consolidated cash and available credit) as at September 30, 1999, reached a critical point in late December, 1999 when it was about to go negative.

[35] In late December, 1999, Air Canada agreed to enter into certain transactions designed to ensure that Canadian would have enough liquidity to continue operating until the scheduled completion of the 853350 take-over bid on January 4, 2000. Air Canada agreed to purchase rights to the Toronto-Tokyo route for $25 million and to a sale-leaseback arrangement involving certain unencumbered aircraft and a flight simulator for total proceeds of approximately $20 million. These transactions gave Canadian sufficient liquidity to continue operations through the holiday period.

[36] If Air Canada had not provided the approximate $45 million injection in December 1999, Canadian would likely have had to file for bankruptcy and cease all operations before the end of the holiday travel season.

[37] On January 4, 2000, with all conditions of its offer having been satisfied or waived, 853350 purchased approximately 82% of the outstanding shares of CAC. On January 5, 1999, 853350 completed the purchase of the preferred shares of CAIL owned by Aurora. In connection with that acquisition, Canadian agreed to certain amendments to the Services Agreement reducing the amounts payable to AMR in the event of a termination of such agreement and, in addition, the unanimous shareholders agreement which gave AMR the right to require Canadian to purchase the CAIL preferred shares under certain circumstances was terminated. These arrangements had the effect of substantially reducing the obstacles to a restructuring of Canadian's debt and lease obligations and also significantly reduced the claims that AMR would be entitled to advance in such a restructuring.

[38] Despite the $45 million provided by Air Canada, Canadian's liquidity position remained poor. With January being a traditionally slow month in the airline industry, further bridge financing was required in order to ensure that Canadian would be able to operate while a debt restructuring transaction was being negotiated with creditors. Air Canada negotiated an arrangement with the Royal Bank of Canada ("Royal Bank") to purchase a participation interest in the operating credit facility made available to Canadian. As a result of this agreement, Royal Bank agreed to extend Canadian's operating credit facility from $70 million to $120 million in January, 2000 and then to $145 million in March, 2000. Canadian agreed to supplement the assignment of accounts receivable security originally securing Royal's $70 million facility with a further Security Agreement securing certain unencumbered assets of Canadian in consideration for this increased credit availability. Without the support of Air Canada or another financially sound entity, this increase in credit would not have been possible.

[39] Air Canada has stated publicly that it ultimately wishes to merge the operations of Canadian and Air Canada, subject to Canadian completing a financial restructuring so as to permit Air Canada to complete the acquisition on a financially sound basis. This pre-condition has been emphasized by Air Canada since the fall of 1999.

[40] Prior to the acquisition of majority control of CAC by 853350, Canadian's management, Board of Directors and financial advisors had considered every possible alternative for restoring Canadian to a sound financial footing. Based upon Canadian's extensive efforts over the past year in particular, but also the efforts since 1992 described

above, Canadian came to the conclusion that it must complete a debt restructuring to permit the completion of a full merger between Canadian and Air Canada.

[41] On February 1, 2000, Canadian announced a moratorium on payments to lessors and lenders. As a result of this moratorium Canadian defaulted on the payments due under its various credit facilities and aircraft leases. Absent the assistance provided by this moratorium, in addition to Air Canada's support, Canadian would not have had sufficient liquidity to continue operating until the completion of a debt restructuring.

[42] Following implementation of the moratorium, Canadian with Air Canada embarked on efforts to restructure significant obligations by consent. The further damage to public confidence which a CCAA filing could produce required Canadian to secure a substantial measure of creditor support in advance of any public filing for court protection.

[43] Before the Petitioners started these CCAA proceedings, Air Canada, CAIL and lessors of 59 aircraft in its fleet had reached agreement in principle on the restructuring plan.

[44] Canadian and Air Canada have also been able to reach agreement with the remaining affected secured creditors, being the holders of the U.S. $175 million Senior Secured Notes, due 2005, (the "Senior Secured Noteholders") and with several major unsecured creditors in addition to AMR, such as Loyalty Management Group Canada Inc.

[45] On March 24, 2000, faced with threatened proceedings by secured creditors, Canadian petitioned under the CCAA and obtained a stay of proceedings and related interim relief by Order of the Honourable Chief Justice Moore on that same date. Pursuant to that Order, PricewaterhouseCoopers, Inc. was appointed as the Monitor, and companion proceedings in the United States were authorized to be commenced.

[46] Since that time, due to the assistance of Air Canada, Canadian has been able to complete the restructuring of the remaining financial obligations governing all aircraft to be retained by Canadian for future operations. These arrangements were approved by this Honourable Court in its Orders dated April 14, 2000 and May 10, 2000, as described in further detail below under the heading "The Restructuring Plan".

[47] On April 7, 2000, this court granted an Order giving directions with respect to the filing of the plan, the calling and holding of meetings of affected creditors and related matters.

[48] On April 25, 2000 in accordance with the said Order, Canadian filed and served the plan (in its original form) and the related notices and materials.

[49] The plan was amended, in accordance with its terms, on several occasions, the form of Plan voted upon at the Creditors' Meetings on May 26, 2000 having been filed and served on May 25, 2000 (the "Plan").

The Restructuring Plan

[50] The Plan has three principal aims described by Canadian:

(a) provide near term liquidity so that Canadian can sustain operations;
(b) allow for the return of aircraft not required by Canadian; and
(c) permanently adjust Canadian's debt structure and lease facilities to reflect the current market for asset values and carrying costs in return for Air Canada providing a guarantee of the restructured obligations.

[51] The proposed treatment of stakeholders is as follows:

1. Unaffected Secured Creditors- Royal Bank, CAIL's operating lender, is an unaffected creditor with respect to its operating credit facility. Royal Bank holds security over CAIL's accounts receivable and most of CAIL's operating assets not specifically secured by aircraft financiers or the Senior Secured Noteholders. As noted above, arrangements entered into between Air Canada and Royal Bank have provided CAIL with liquidity necessary for it to continue operations since January 2000.

Also unaffected by the Plan are those aircraft lessors, conditional vendors and secured creditors holding security over CAIL's aircraft who have entered into agreements with CAIL and/or Air Canada with respect to the restructuring of CAIL's obligations. A number of such agreements, which were initially contained in the form of letters of intent ("LOIs"), were entered into prior to the commencement of the CCAA proceedings, while a total of 17 LOIs were completed after that date. In its Second and Fourth Reports the Monitor reported to the court on these agreements. The LOIs entered into after the proceedings commenced were reviewed and approved by the court on April 14, 2000 and May 10, 2000.

The basis of the LOIs with aircraft lessors was that the operating lease rates were reduced to fair market lease rates or less, and the obligations of CAIL under the leases were either assumed or guaranteed by Air Canada. Where the aircraft was subject to conditional sale agreements or other secured indebtedness, the value of the secured debt was reduced to the fair market value of the aircraft, and the interest rate payable was reduced to current market rates reflecting Air Canada's credit. CAIL's obligations under those agreements have also been assumed or guaranteed by Air Canada. The claims of these creditors for reduced principal and interest amounts, or reduced lease payments, are Affected Unsecured Claims under the Plan. In a number of cases these claims have been assigned to Air Canada and Air Canada disclosed that it would vote those claims in favour of the Plan.

2. Affected Secured Creditors- The Affected Secured Creditors under the Plan are the Senior Secured Noteholders with a claim in the amount of US$175,000,000. The Senior Secured Noteholders are secured by a diverse package of Canadian's assets, including its inventory of aircraft spare parts, ground equipment, spare engines, flight simulators, leasehold interests at Toronto, Vancouver and Calgary airports, the shares in CRAL 98 and a $53 million note payable by CRAL to CAIL.

The Plan offers the Senior Secured Noteholders payment of 97 cents on the dollar. The deficiency is included in the Affected Unsecured Creditor class and the Senior Secured Noteholders advised the court they would be voting the deficiency in favour of the Plan.

3. Unaffected Unsecured Creditors-In the circular accompanying the November 11, 1999 853350 offer it was stated that:

> The Offeror intends to conduct the Debt Restructuring in such a manner as to seek to ensure that the unionized employees of Canadian, the suppliers of new credit (including trade credit) and the members of the flying public are left unaffected.
> The Offeror is of the view that the pursuit of these three principles is essential in order to ensure that the long term value of Canadian is preserved.

Canadian's employees, customers and suppliers of goods and services are unaffected by the CCAA Order and Plan.
Also unaffected are parties to those contracts or agreements with Canadian which are not being terminated by Canadian pursuant to the terms of the March 24, 2000 Order.

4. Affected Unsecured Creditors- CAIL has identified unsecured creditors who do not fall into the above three groups and listed these as Affected Unsecured Creditors under the Plan. They are offered 14 cents on the dollar on their claims. Air Canada would fund this payment.

The Affected Unsecured Creditors fall into the following categories:

a. Claims of holders of or related to the Unsecured Notes (the "Unsecured Noteholders");
b. Claims in respect of certain outstanding or threatened litigation involving Canadian;
c. Claims arising from the termination, breach or repudiation of certain contracts, leases or agreements to which Canadian is a party other than aircraft financing or lease arrangements;
d. Claims in respect of deficiencies arising from the termination or re-negotiation of aircraft financing or lease arrangements;
e. Claims of tax authorities against Canadian; and
f. Claims in respect of the under-secured or unsecured portion of amounts due to the Senior Secured Noteholders.

[52] There are over $700 million of proven unsecured claims. Some unsecured creditors have disputed the amounts of their claims for distribution purposes. These are in the process of determination by the court-appointed Claims Officer and subject to further appeal to the court. If the Claims Officer were to allow all of the disputed claims in full and this were confirmed by the court, the aggregate of unsecured claims would be approximately $1.059 million.

[53] The Monitor has concluded that if the Plan is not approved and implemented, Canadian will not be able to continue as a going concern and in that event, the only foreseeable

alternative would be a liquidation of Canadian's assets by a receiver and/or a trustee in bankruptcy. Under the Plan, Canadian's obligations to parties essential to ongoing operations, including employees, customers, travel agents, fuel, maintenance and equipment suppliers, and airport authorities are in most cases to be treated as unaffected and paid in full. In the event of a liquidation, those parties would not, in most cases, be paid in full and, except for specific lien rights and statutory priorities, would rank as ordinary unsecured creditors. The Monitor estimates that the additional unsecured claims which would arise if Canadian were to cease operations as a going concern and be forced into liquidation would be in excess of $1.1 billion.

[54] In connection with its assessment of the Plan, the Monitor performed a liquidation analysis of CAIL as at March 31, 2000 in order to estimate the amounts that might be recovered by CAIL's creditors and shareholders in the event of disposition of CAIL's assets by a receiver or trustee. The Monitor concluded that a liquidation would result in a shortfall to certain secured creditors, including the Senior Secured Noteholders, a recovery by ordinary unsecured creditors of between one cent and three cents on the dollar, and no recovery by shareholders.

[55] There are two vociferous opponents of the Plan, Resurgence Asset Management LLC ("Resurgence") who acts on behalf of its and/or its affiliate client accounts and four shareholders of CAC. Resurgence is incorporated pursuant to the laws of New York, U.S.A. and has its head office in White Plains, New York. It conducts an investment business specializing in high yield distressed debt. Through a series of purchases of the Unsecured Notes commencing in April 1999, Resurgence clients hold $58,200,000 of the face value of or 58.2% of the notes issued. Resurgence purchased 7.9 million units in April 1999. From November 3, 1999 to December 9, 1999 it purchased an additional 20,850,000 units. From January 4, 2000 to February 3, 2000 Resurgence purchased an additional 29,450,000 units.

[56] Resurgence seeks declarations that: the actions of Canadian, Air Canada and 853350 constitute an amalgamation, consolidation or merger with or into Air Canada or a conveyance or transfer of all or substantially all of Canadian's assets to Air Canada; that any plan of arrangement involving Canadian will not affect Resurgence and directing the repurchase of their notes pursuant to the provisions of their trust indenture and that the actions of Canadian, Air Canada and 853350 are oppressive and unfairly prejudicial to it pursuant to section 234 of the Business Corporations Act.

[57] Four shareholders of CAC also oppose the plan. Neil Baker, a Toronto resident, acquired 132,500 common shares at a cost of $83,475.00 on or about May 5, 2000. Mr. Baker sought to commence proceedings to "remedy an injustice to the minority holders of the common shares". Roger Midiaty, Michael Salter and Hal Metheral are individual shareholders who were added as parties at their request during the proceedings. Mr. Midiaty resides in Calgary, Alberta and holds 827 CAC shares which he has held since 1994. Mr. Metheral is also a Calgary resident and holds approximately 14,900 CAC shares in his RRSP and has held them since approximately 1994 or 1995. Mr. Salter is a resident of Scottsdale, Arizona and is the beneficial owner of 250 shares of CAC and is a joint beneficial owner of 250 shares with his wife. These shareholders will be referred in the Decision throughout as the "Minority Shareholders".

[58] The Minority Shareholders oppose the portion of the Plan that relates to the reorganization of CAIL, pursuant to section 185 of the ***Alberta Business Corporations Act*** ("ABCA"). They characterize the transaction as a cancellation of issued shares unauthorized by section 167 of the ABCA or alternatively is a violation of section 183 of the ABCA. They submit the application for the order of reorganization should be denied as being unlawful, unfair and not supported by the evidence.

III. ANALYSIS

[59] Section 6 of the CCAA provides that:

> 6. Where a majority in number representing two-thirds in value of the creditors, or class of creditors, as the case may be, present and voting either in person or by proxy at the meeting or meetings thereof respectively held pursuant to sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court, and if so sanctioned is binding
>
> (a) on all the creditors or the class of creditors, as the case may be, and on any trustee for any such class of creditors, whether secured or unsecured, as the case may be, and on the company; and
> (b) in the case of a company that has made an authorized assignment or against which a receiving order has been made under the Bankruptcy and Insolvency Act or is in the course of being wound up under the Winding-up and Restructuring Act, on the trustee in bankruptcy or liquidator and contributories of the company.

[60] Prior to sanctioning a plan under the CCAA, the court must be satisfied in regard to each of the following criteria:

> (1) there must be compliance with all statutory requirements;
> (2) all material filed and procedures carried out must be examined to determine if anything has been done or purported to be done which is not authorized by the CCAA; and
> (3) the plan must be fair and reasonable.

[61] A leading articulation of this three-part test appears in ***Re Northland Properties Ltd.*** (1988), 73 C.B.R. (N.S.) 175 (B.C.S.C.) at 182-3, aff'd (1989), 73 C.B.R. (N.S.) 195 (B.C.C.A.) and has been regularly followed, see for example ***Re Sammi Atlas Inc***. (1998), 3 C.B.R. (4th) 171 (Ont. Gen. Div.) at 172 and ***Re T. Eaton Co.***, [1999] O.J. No. 5322 (Ont. Sup. Ct.) at paragraph 7. Each of these criteria are reviewed in turn below.

1. Statutory Requirements

[62] Some of the matters that may be considered by the court on an application for approval of a plan of compromise and arrangement include:

> (a) the applicant comes within the definition of "debtor company" in section 2 of the CCAA;

(b) the applicant or affiliated debtor companies have total claims within the meaning of section 12 of the CCAA in excess of $5,000,000;
(c) the notice calling the meeting was sent in accordance with the order of the court;
(d) the creditors were properly classified;
(e) the meetings of creditors were properly constituted;
(f) the voting was properly carried out; and
(g) the plan was approved by the requisite double majority or majorities.

[63] I find that the Petitioners have complied with all applicable statutory requirements. Specifically:

(a) CAC and CAIL are insolvent and thus each is a "debtor company" within the meaning of section 2 of the CCAA. This was established in the affidavit evidence of Douglas Carty, Senior Vice President and Chief Financial Officer of Canadian, and so declared in the March 24, 2000 Order in these proceedings and confirmed in the testimony given by Mr. Carty at this hearing.

(b) CAC and CAIL have total claims that would be claims provable in bankruptcy within the meaning of section 12 of the CCAA in excess of $5,000,000.

(c) In accordance with the April 7, 2000 Order of this court, a Notice of Meeting and a disclosure statement (which included copies of the Plan and the March 24th and April 7th Orders of this court) were sent to the Affected Creditors, the directors and officers of the Petitioners, the Monitor and persons who had served a Notice of Appearance, on April 25, 2000.

(d) As confirmed by the May 12, 2000 ruling of this court (leave to appeal denied May 29, 2000), the creditors have been properly classified.

(e) Further, as detailed in the Monitor's Fifth Report to the Court and confirmed by the June 14, 2000 decision of this court in respect of a challenge by Resurgence Asset Management LLC (“Resurgence”), the meetings of creditors were properly constituted, the voting was properly carried out and the Plan was approved by the requisite double majorities in each class. The composition of the majority of the unsecured creditor class is addressed below under the heading “Fair and Reasonable”.

2. Matters Unauthorized

[64] This criterion has not been widely discussed in the reported cases. As recognized by Blair J. in ***Olympia & York Developments Ltd.* v. *Royal Trust Co.*** (1993), 17 C.B.R. (3d) 1 (Ont. Gen. Div.) and Farley J. in ***Cadillac Fairview (Re)*** (1995), 53 A.C.W.S. (3d) 305 (Ont. Gen. Div.), within the CCAA process the court must rely on the reports of the Monitor as well as the parties in ensuring nothing contrary to the CCAA has occurred or is contemplated by the plan.

[65] In this proceeding, the dissenting groups have raised two matters which in their view are unauthorized by the CCAA: firstly, the Minority Shareholders of CAC suggested the proposed share capital reorganization of CAIL is illegal under the ABCA and Ontario

Securities Commission Policy 9.1, and as such cannot be authorized under the CCAA and secondly, certain unsecured creditors suggested that the form of release contained in the Plan goes beyond the scope of release permitted under the CCAA.

a. Legality of proposed share capital reorganization

[66] Subsection 185(2) of the ABCA provides:

> (2) If a corporation is subject to an order for reorganization, its articles may be amended by the order to effect any change that might lawfully be made by an amendment under section 167.

[67] Sections 6.1(2)(d) and (e) and Schedule "D" of the Plan contemplate that:

> a. All CAIL common shares held by CAC will be converted into a single retractable share, which will then be retracted by CAIL for $1.00; and
> b. All CAIL preferred shares held by 853350 will be converted into CAIL common shares.

[68] The Articles of Reorganization in Schedule "D" to the Plan provide for the following amendments to CAIL's Articles of Incorporation to effect the proposed reorganization:

> (a) consolidating all of the issued and outstanding common shares into one common share;
> (b) redesignating the existing common shares as "Retractable Shares" and changing the rights, privileges, restrictions and conditions attaching to the Retractable Shares so that the Retractable Shares shall have attached thereto the rights, privileges, restrictions and conditions as set out in the Schedule of Share Capital;
> (c) cancelling the Non-Voting Shares in the capital of the corporation, none of which are currently issued and outstanding, so that the corporation is no longer authorized to issue Non-Voting Shares;
> (d) changing all of the issued and outstanding Class B Preferred Shares of the corporation into Class A Preferred Shares, on the basis of one (1) Class A Preferred Share for each one (1) Class B Preferred Share presently issued and outstanding;
> (e) redesignating the existing Class A Preferred Shares as "Common Shares" and changing the rights, privileges, restrictions and conditions attaching to the Common Shares so that the Common Shares shall have attached thereto the rights, privileges, restrictions and conditions as set out in the Schedule of Share Capital; and
> (f) cancelling the Class B Preferred Shares in the capital of the corporation, none of which are issued and outstanding after the change in paragraph (d) above, so that the corporation is no longer authorized to issue Class B Preferred Shares;

Section 167 of the ABCA

[69] Reorganizations under section 185 of the ABCA are subject to two preconditions:
a. The corporation must be "subject to an order for re-organization"; and
b. The proposed amendments must otherwise be permitted under section 167 of the ABCA.

[70] The parties agreed that an order of this court sanctioning the Plan would satisfy the first condition.

[71] The relevant portions of section 167 provide as follows:

> 167(1) Subject to sections 170 and 171, the articles of a corporation may by special resolution be amended to
> (e) change the designation of all or any of its shares, and add, change or remove any rights, privileges, restrictions and conditions, including rights to accrued dividends, in respect of all or any of its shares, whether issued or unissued,
> (f) change the shares of any class or series, whether issued or unissued, into a different number of shares of the same class or series into the same or a different number of shares of other classes or series,
> (g.1) cancel a class or series of shares where there are no issued or outstanding shares of that class or series,

[72] Each change in the proposed CAIL Articles of Reorganization corresponds to changes permitted under s. 167(1) of the ABCA, as follows:

Proposed Amendment in Schedule "D"	Subsection 167(1), ABCA
(a) – consolidation of Common Shares	167(1)(f)
(b) – change of designation and rights	167(1)(e)
(c) – cancellation	167(1)(g.1)
(d) – change in shares	167(1)(f)
(e) – change of designation and rights	167(1)(e)
(f) – cancellation	167(1)(g.1)

[73] The Minority Shareholders suggested that the proposed reorganization effectively cancels their shares in CAC. As the above review of the proposed reorganization demonstrates, that is not the case. Rather, the shares of CAIL are being consolidated, altered and then retracted, as permitted under section 167 of the ABCA. I find the proposed reorganization of CAIL's share capital under the Plan does not violate section 167.

[74] In R. Dickerson et al, ***Proposals for a New Business Corporation Law for Canada***, Vol.1: Commentary (the "Dickerson Report") regarding the then proposed Canada Business Corporations Act, the identical section to section 185 is described as having been inserted with the object of enabling the "court to effect any necessary amendment of the articles of the corporation in order to achieve the objective of the reorganization without having to comply with the formalities of the Draft Act, particularly shareholder approval of the proposed amendment".

[75] The architects of the business corporation act model which the ABCA follows, expressly contemplated reorganizations in which the insolvent corporation would eliminate the interest of common shareholders. The example given in the Dickerson Report of a reorganization is very similar to that proposed in the Plan:

> For example, the reorganization of an insolvent corporation may require the following steps: first, reduction or even elimination of the interest of the common shareholders; second, relegation of the preferred shareholders to the status of common shareholders; and third, relegation of the secured debenture holders to the status of either unsecured Noteholders or preferred shareholders.

[76] The rationale for allowing such a reorganization appears plain; the corporation is insolvent, which means that on liquidation the shareholders would get nothing. In those circumstances, as described further below under the heading "Fair and Reasonable", there is nothing unfair or unreasonable in the court effecting changes in such situations without shareholder approval. Indeed, it would be unfair to the creditors and other stakeholders to permit the shareholders (whose interest has the lowest priority) to have any ability to block a reorganization.

[77] The Petitioners were unable to provide any case law addressing the use of section 185 as proposed under the Plan. They relied upon the decisions of ***Royal Oak Mines Inc.***, [1999] O.J. No. 4848 and ***Re T Eaton Co.,*** *supra* in which Farley J.of the Ontario Superior Court of Justice emphasized that shareholders are at the bottom of the hierarchy of interests in liquidation or liquidation related scenarios.

[78] Section 185 provides for amendment to articles by court order. I see no requirement in that section for a meeting or vote of shareholders of CAIL, quite apart from shareholders of CAC. Further, dissent and appraisal rights are expressly removed in subsection (7). To require a meeting and vote of shareholders and to grant dissent and appraisal rights in circumstances of insolvency would frustrate the object of section 185 as described in the Dickerson Report.

[79] In the circumstances of this case, where the majority shareholder holds 82% of the shares, the requirement of a special resolution is meaningless. To require a vote suggests the shares have value. They do not. The formalities of the ABCA serve no useful purpose other than to frustrate the reorganization to the detriment of all stakeholders, contrary to the CCAA.

Section 183 of the ABCA

[80] The Minority Shareholders argued in the alternative that if the proposed share reorganization of CAIL were not a cancellation of their shares in CAC and therefore allowed under section 167 of the ABCA, it constituted a "sale, lease, or exchange of substantially all the property" of CAC and thus required the approval of CAC shareholders pursuant to section 183 of the ABCA. The Minority Shareholders suggested that the common shares in CAIL were substantially all of the assets of CAC and that all of those shares were being "exchanged" for $1.00.

[81] I disagree with this creative characterization. The proposed transaction is a reorganization as contemplated by section 185 of the ABCA. As recognized in ***Savage v.***

Amoco Acquisition Company Ltd, [1988] A.J. No. 68 (Q.B.), aff'd, 68 C.B.R. (3d) 154 (Alta. C.A.), the fact that the same end might be achieved under another section does not exclude the section to be relied on. A statute may well offer several alternatives to achieve a similar end.

Ontario Securities Commission Policy 9.1

[82] The Minority Shareholders also submitted the proposed reorganization constitutes a "related party transaction" under Policy 9.1 of the Ontario Securities Commission. Under the Policy, transactions are subject to disclosure, minority approval and formal valuation requirements which have not been followed here. The Minority Shareholders suggested that the Petitioners were therefore in breach of the Policy unless and until such time as the court is advised of the relevant requirements of the Policy and grants its approval as provided by the Policy.

[83] These shareholders asserted that in the absence of evidence of the going concern value of CAIL so as to determine whether that value exceeds the rights of the Preferred Shares of CAIL, the Court should not waive compliance with the Policy.

[84] To the extent that this reorganization can be considered a "related party transaction", I have found, for the reasons discussed below under the heading "Fair and Reasonable", that the Plan, including the proposed reorganization, is fair and reasonable and accordingly I would waive the requirements of Policy 9.1.

b. Release

[85] Resurgence argued that the release of directors and other third parties contained in the Plan does not comply with the provisions of the CCAA.

[86] The release is contained in section 6.2(2)(ii) of the Plan and states as follows:

> As of the Effective Date, each of the Affected Creditors will be deemed to forever release, waive and discharge all claims, obligations, suits, judgments, damages, demands, debts, rights, causes of action and liabilities...that are based in whole or in part on any act, omission, transaction, event or other occurrence taking place on or prior to the Effective Date in any way relating to the Applicants and Subsidiaries, the CCAA Proceedings, or the Plan against:(i) The Applicants and Subsidiaries; (ii) The Directors, Officers and employees of the Applicants or Subsidiaries in each case as of the date of filing (and in addition, those who became Officers and/or Directors thereafter but prior to the Effective Date); (iii) The former Directors, Officers and employees of the Applicants or Subsidiaries, or (iv) the respective current and former professionals of the entities in subclauses (1) to (3) of this s.6.2(2) (including, for greater certainty, the Monitor, its counsel and its current Officers and Directors, and current and former Officers, Directors, employees, shareholders and professionals of the released parties) acting in such capacity.

[87] Prior to 1997, the CCAA did not provide for compromises of claims against anyone other than the petitioning company. In 1997, section 5.1 was added to the CCAA. Section 5.1 states:

> 5.1 (1) A compromise or arrangement made in respect of a debtor company may include in its terms provision for the compromise of claims against directors of the company that arose before the commencement of proceedings under this Act and relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations.
>
> (2) A provision for the compromise of claims against directors may not include claims that:
>
> (a) relate to contractual rights of one or more creditors; or
>
> (b) are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.
>
> (3) The Court may declare that a claim against directors shall not be compromised if it is satisfied that the compromise would not be fair and reasonable in the circumstances.

[88] Resurgence argued that the form of release does not comply with section 5.1 of the CCAA insofar as it applies to individuals beyond directors and to a broad spectrum of claims beyond obligations of the Petitioners for which their directors are "by law liable". Resurgence submitted that the addition of section 5.1 to the CCAA constituted an exception to a long standing principle and urged the court to therefore interpret s. 5.1 cautiously, if not narrowly. Resurgence relied on ***Barrette v. Crabtree Estate,*** [1993], 1 S.C.R. 1027 at 1044 and ***Bruce Agra Foods Limited v. Proposal of Everfresh Beverages Inc. (Receiver of)*** (1996), 45 C.B.R. (3d) 169 (Ont. Gen. Div.) at para. 5 in this regard.

[89] With respect to Resurgence's complaint regarding the breadth of the claims covered by the release, the Petitioners asserted that the release is not intended to override section 5.1(2). Canadian suggested this can be expressly incorporated into the form of release by adding the words **"excluding the claims excepted by s. 5.1(2) of the CCAA"** immediately prior to subsection (iii) and clarifying the language in Section 5.1 of the Plan. Canadian also acknowledged, in response to a concern raised by Canada Customs and Revenue Agency, that in accordance with s. 5.1(1) of the CCAA, directors of CAC and CAIL could only be released from liability arising before March 24, 2000, the date these proceedings commenced. Canadian suggested this was also addressed in the proposed amendment. Canadian did not address the propriety of including individuals in addition to directors in the form of release.

[90] In my view it is appropriate to amend the proposed release to expressly comply with section 5. 1(2) of the CCAA and to clarify Section 5.1 of the Plan as Canadian suggested in its brief. The additional language suggested by Canadian to achieve this result shall be included in the form of order. Canada Customs and Revenue Agency is apparently satisfied with the Petitioners' acknowledgement that claims against directors can only be released to the date of commencement of proceedings under the CCAA, having appeared at this hearing to strongly support the sanctioning of the Plan, so I will not address this concern further.

[91] Resurgence argued that its claims fell within the categories of excepted claims in section 5.1(2) of the CCAA and accordingly, its concern in this regard is removed by this amendment. Unsecured creditors JHHD Aircraft Leasing No. 1 and No. 2 suggested there may be possible wrongdoing in the acts of the directors during the restructuring process which should not be immune from scrutiny and in my view this complaint would also be caught by the exception captured in the amendment.

[92] While it is true that section 5.2 of the CCAA does not authorize a release of claims against third parties other than directors, it does not prohibit such releases either. The amended terms of the release will not prevent claims from which the CCAA expressly prohibits release. Aside from the complaints of Resurgence, which by their own submissions are addressed in the amendment I have directed, and the complaints of JHHD Aircraft Leasing No. 1 and No. 2, which would also be addressed in the amendment, the terms of the release have been accepted by the requisite majority of creditors and I am loathe to further disturb the terms of the Plan, with one exception.

[93] Amex Bank of Canada submitted that the form of release appeared overly broad and might compromise unaffected claims of affected creditors. For further clarification, Amex Bank of Canada's potential claim for defamation is unaffected by the Plan and I am prepared to order Section 6.2(2)(ii) be amended to reflect this specific exception.

3. Fair and Reasonable

[94] In determining whether to sanction a plan of arrangement under the CCAA, the court is guided by two fundamental concepts: "fairness" and "reasonableness". While these concepts are always at the heart of the court's exercise of its discretion, their meanings are necessarily shaped by the unique circumstances of each case, within the context of the Act and accordingly can be difficult to distill and challenging to apply. Blair J. described these concepts in ***Olympia and York Dev. Ltd. v. Royal Trust Co.***, *supra*, at page 9:

> "Fairness" and "reasonableness" are, in my opinion, the two keynote concepts underscoring the philosophy and workings of the Companies' Creditors Arrangement Act. Fairness is the quintessential expression of the court's equitable jurisdiction - although the jurisdiction is statutory, the broad discretionary powers given to the judiciary by the legislation which make its exercise an exercise in equity - and "reasonableness" is what lends objectivity to the process.

[95] The legislation, while conferring broad discretion on the court, offers little guidance. However, the court is assisted in the exercise of its discretion by the purpose of the CCAA: to facilitate the reorganization of a debtor company for the benefit of the company, its creditors, shareholders, employees and, in many instances, a much broader constituency of affected persons. Parliament has recognized that reorganization, if commercially feasible, is in most cases preferable, economically and socially, to liquidation: ***Norcen Energy Resources Ltd.* v. *Oakwood Petroleums Ltd.***, [1989] 2 W.W.R. 566 at 574 (Alta.Q.B.); ***Northland Properties Ltd.* v. *Excelsior Life Insurance Co. of Canada***, [1989] 3 W.W.R. 363 at 368 (B.C.C.A.).

[96] The sanction of the court of a creditor-approved plan is not to be considered as a rubber stamp process. Although the majority vote that brings the plan to a sanction hearing plays a significant role in the court's assessment, the court will consider other matters as are appropriate in light of its discretion. In the unique circumstances of this case, it is appropriate to consider a number of additional matters:

a. The composition of the unsecured vote;
b. What creditors would receive on liquidation or bankruptcy as compared to the Plan;
c. Alternatives available to the Plan and bankruptcy;
d. Oppression;
e. Unfairness to Shareholders of CAC; and
f. The public interest.

a. Composition of the unsecured vote

[97] As noted above, an important measure of whether a plan is fair and reasonable is the parties' approval and the degree to which it has been given. Creditor support creates an inference that the plan is fair and reasonable because the assenting creditors believe that their interests are treated equitably under the plan. Moreover, it creates an inference that the arrangement is economically feasible and therefore reasonable because the creditors are in a better position then the courts to gauge business risk. As stated by Blair J. at page 11 of ***Olympia & York Developments Ltd.,*** *supra**:***

> As other courts have done, I observe that it is not my function to second guess the business people with respect to the "business" aspect of the Plan or descending into the negotiating arena or substituting my own view of what is a fair and reasonable compromise or arrangement for that of the business judgment of the participants. The parties themselves know best what is in their interests in those areas.

[98] However, given the manner of voting under the CCAA, the court must be cognizant of the treatment of minorities within a class: see for example ***Quintette Coal Ltd.,*** (1992) 13 C.B.R. (3rd) 14 (B.C.S.C) and ***Re Alabama, New Orleans, Texas and Pacific Junction Railway Co.*** (1890) 60 L.J. Ch. 221 (C.A.). The court can address this by ensuring creditors' claims are properly classified. As well, it is sometimes appropriate to tabulate the vote of a particular class so the results can be assessed from a fairness perspective. In this case, the classification was challenged by Resurgence and I dismissed that application. The vote was also tabulated in this case and the results demonstrate that the votes of Air Canada and the Senior Secured Noteholders, who voted their deficiency in the unsecured class, were decisive.

[99] The results of the unsecured vote, as reported by the Monitor, are:

1. For the resolution to approve the Plan: 73 votes (65% in number) representing $494,762,304 in claims (76% in value);
2. Against the resolution: 39 votes (35% in number) representing $156,360,363 in claims (24% in value); and
3. Abstentions: 15 representing $968,036 in value.

[100] The voting results as reported by the Monitor were challenged by Resurgence. That application was dismissed.

[101] The members of each class that vote in favour of a plan must do so in good faith and the majority within a class must act without coercion in their conduct toward the minority. When asked to assess fairness of an approved plan, the court will not countenance secret agreements to vote in favour of a plan secured by advantages to the creditor: see for example, ***Hochberger* v. *Rittenberg*** (1916), 36 D.L.R. 450 (S.C.C.)

[102] ***In Northland Properties Ltd. (Re)*** (1988), 73 C.B.R. (N.S.) 175 at 192-3 (B.C.S.C) aff'd 73 C.B.R. (N.S.) 195 (B.C.C.A.), dissenting priority mortgagees argued the plan violated the principle of equality due to an agreement between the debtor company and another priority mortgagee which essentially amounted to a preference in exchange for voting in favour of the plan. Trainor J. found that the agreement was freely disclosed and commercially reasonable and went on to approve the plan, using the three part test. The British Columbia Court of Appeal upheld this result and in commenting on the minority complaint McEachern J.A. stated at page 206:

> In my view, the obvious benefits of settling rights and keeping the enterprise together as a going concern far outweigh the deprivation of the appellants' wholly illusory rights. In this connection, the learned chambers judge said at p.29:
>
> > I turn to the question of the right to hold the property after an order absolute and whether or not this is a denial of something of that significance that it should affect these proceedings. There is in the material before me some evidence of values. There are the principles to which I have referred, as well as to the rights of majorities and the rights of minorities.
> > Certainly, those minority rights are there, but it would seem to me that in view of the overall plan, in view of the speculative nature of holding property in the light of appraisals which have been given as to value, that this right is something which should be subsumed to the benefit of the majority.

[103] Resurgence submitted that Air Canada manipulated the indebtedness of CAIL to assure itself of an affirmative vote. I disagree. I previously ruled on the validity of the deficiency when approving the LOIs and found the deficiency to be valid. I found there was consideration for the assignment of the deficiency claims of the various aircraft financiers to Air Canada, namely the provision of an Air Canada guarantee which would otherwise not have been available until plan sanction. The Monitor reviewed the calculations of the deficiencies and determined they were calculated in a reasonable manner. As such, the court approved those transactions. If the deficiency had instead remained with the aircraft financiers, it is reasonable to assume those claims would have been voted in favour of the plan. Further, it would have been entirely appropriate under the circumstances for the aircraft financiers to have retained the deficiency and agreed to vote in favour of the Plan, with the same result to Resurgence. That the financiers did not choose this method was explained by the testimony of Mr. Carty and Robert Peterson, Chief Financial Officer for Air Canada; quite simply it amounted to a desire on behalf of these creditors to shift the "deal risk" associated with the Plan to Air Canada. The agreement reached with the Senior Secured Noteholders was also disclosed and the challenge by Resurgence regarding their vote in the unsecured class was dismissed There

is nothing inappropriate in the voting of the deficiency claims of Air Canada or the Senior Secured Noteholders in the unsecured class. There is no evidence of secret vote buying such as discussed in ***Northland Properties Ltd. (Re)***.

[104] If the Plan is approved, Air Canada stands to profit in its operation. I do not accept that the deficiency claims were devised to dominate the vote of the unsecured creditor class, however, Air Canada, as funder of the Plan is more motivated than Resurgence to support it. This divergence of views on its own does not amount to bad faith on the part of Air Canada. Resurgence submitted that only the Unsecured Noteholders received 14 cents on the dollar. That is not accurate, as demonstrated by the list of affected unsecured creditors included earlier in these Reasons. The Senior Secured Noteholders did receive other consideration under the Plan, but to suggest they were differently motivated suggests that those creditors did not ascribe any value to their unsecured claims. There is no evidence to support this submission.

[105] The good faith of Resurgence in its vote must also be considered. Resurgence acquired a substantial amount of its claim after the failure of the Onex bid, when it was aware that Canadian's financial condition was rapidly deteriorating. Thereafter, Resurgence continued to purchase a substantial amount of this highly distressed debt. While Mr. Symington maintained that he bought because he thought the bonds were a good investment, he also acknowledged that one basis for purchasing was the hope of obtaining a blocking position sufficient to veto a plan in the proposed debt restructuring. This was an obvious ploy for leverage with the Plan proponents

[106] The authorities which address minority creditors' complaints speak of "substantial injustice" (***Keddy Motor Inns Ltd. (Re)*** (1992) 13 C.B.R. (3d) 245 (N.S.C.A.), "confiscation" of rights (***Campeau Corp. (Re)*** (1992), 10 C.B.R. (3d) 104 (Ont. Ct. (Gen.Div.); ***Skydome Corp. (Re)*** (1999), 87 A.C.W.S (3d) 421 (Ont. Ct. Gen. Div.)) and majorities "feasting upon" the rights of the minority (***Quintette Coal Ltd. (Re)***, (1992), 13 C.B.R.(3d) 146 (B.C.S.C.). Although it cannot be disputed that the group of Unsecured Noteholders represented by Resurgence are being asked to accept a significant reduction of their claims, as are all of the affected unsecured creditors, I do not see a "substantial injustice", nor view their rights as having been "confiscated" or "feasted upon" by being required to succumb to the wishes of the majority in their class. No bad faith has been demonstrated in this case. Rather, the treatment of Resurgence, along with all other affected unsecured creditors, represents a reasonable balancing of interests. While the court is directed to consider whether there is an injustice being worked within a class, it must also determine whether there is an injustice with respect the stakeholders as a whole. Even if a plan might at first blush appear to have that effect, when viewed in relation to all other parties, it may nonetheless be considered appropriate and be approved: ***Algoma Steel Corp.* v. *Royal Bank*** (1992), 11 C.B.R. (3d) 1 (Ont. Gen. Div.)and ***Northland Properties (Re)***, *supra* at 9.

[107] Further, to the extent that greater or discrete motivation to support a Plan may be seen as a conflict, the Court should take this same approach and look at the creditors as a whole and to the objecting creditors specifically and determine if their rights are compromised in an attempt to balance interests and have the pain of compromise borne equally.

[108] Resurgence represents 58.2% of the Unsecured Noteholders or $96 million in claims. The total claim of the Unsecured Noteholders ranges from $146 million to $161 million. The

affected unsecured class, excluding aircraft financing, tax claims, the noteholders and claims under $50,000, ranges from $116.3 million to $449.7 million depending on the resolutions of certain claims by the Claims Officer. Resurgence represents between 15.7% - 35% of that portion of the class.

[109] The total affected unsecured claims, excluding tax claims, but including aircraft financing and noteholder claims including the unsecured portion of the Senior Secured Notes, ranges from $673 million to $1,007 million. Resurgence represents between 9.5% - 14.3% of the total affected unsecured creditor pool. These percentages indicate that at its very highest in a class excluding Air Canada's assigned claims and Senior Secured's deficiency, Resurgence would only represent a maximum of 35% of the class. In the larger class of affected unsecured it is significantly less. Viewed in relation to the class as a whole, there is no injustice being worked against Resurgence.

[110] The thrust of the Resurgence submissions suggests a mistaken belief that they will get more than 14 cents on liquidation. This is not borne out by the evidence and is not reasonable in the context of the overall Plan.

b. Receipts on liquidation or bankruptcy

[111] As noted above, the Monitor prepared and circulated a report on the Plan which contained a summary of a liquidation analysis outlining the Monitor's projected realizations upon a liquidation of CAIL ("Liquidation Analysis").

[112] The Liquidation Analysis was based on: (1) the draft unaudited financial statements of Canadian at March 31, 2000; (2) the distress values reported in independent appraisals of aircraft and aircraft related assets obtained by CAIL in January, 2000; (3) a review of CAIL's aircraft leasing and financing documents; and (4) discussions with CAIL Management.

[113] Prior to and during the application for sanction, the Monitor responded to various requests for information by parties involved. In particular, the Monitor provided a copy of the Liquidation Analysis to those who requested it. Certain of the parties involved requested the opportunity to question the Monitor further, particularly in respect to the Liquidation Analysis and this court directed a process for the posing of those questions.

[114] While there were numerous questions to which the Monitor was asked to respond, there were several areas in which Resurgence and the Minority Shareholders took particular issue: pension plan surplus, CRAL, international routes and tax pools. The dissenting groups asserted that these assets represented overlooked value to the company on a liquidation basis or on a going concern basis.

Pension Plan Surplus

[115] The Monitor did not attribute any value to pension plan surplus when it prepared the Liquidation Analysis, for the following reasons:

1) The summaries of the solvency surplus/deficit positions indicated a cumulative net deficit position for the seven registered plans, after consideration of contingent liabilities;
2) The possibility, based on the previous splitting out of the seven plans from a single plan in 1988, that the plans could be held to be consolidated for financial purposes, which would remove any potential solvency surplus since the total estimated contingent liabilities exceeded the total estimated solvency surplus;
3) The actual calculations were prepared by CAIL's actuaries and actuaries representing the unions could conclude liabilities were greater; and
4) CAIL did not have a legal opinion confirming that surpluses belonged to CAIL.

[116] The Monitor concluded that the entitlement question would most probably have to be settled by negotiation and/or litigation by the parties. For those reasons, the Monitor took a conservative view and did not attribute an asset value to pension plans in the Liquidation Analysis. The Monitor also did not include in the Liquidation Analysis any amount in respect of the claim that could be made by members of the plan where there is an apparent deficit after deducting contingent liabilities.

[117] The issues in connection with possible pension surplus are: (1) the true amount of any of the available surplus; and (2) the entitlement of Canadian to any such amount.

[118] It is acknowledged that surplus prior to termination can be accessed through employer contribution holidays, which Canadian has taken to the full extent permitted. However, there is no basis that has been established for any surplus being available to be withdrawn from an ongoing pension plan. On a pension plan termination, the amount available as a solvency surplus would first have to be further reduced by various amounts to determine whether there was in fact any true surplus available for distribution. Such reductions include contingent benefits payable in accordance with the provisions of each respective pension plan, any extraordinary plan wind up cost, the amounts of any contribution holidays taken which have not been reflected, and any litigation costs.

[119] Counsel for all of Canadian's unionized employees confirmed on the record that the respective union representatives can be expected to dispute all of these calculations as well as to dispute entitlement.

[120] There is a suggestion that there might be a total of $40 million of surplus remaining from all pension plans after such reductions are taken into account. Apart from the issue of entitlement, this assumes that the plans can be treated separately, that a surplus could in fact be realized on liquidation and that the Towers Perrin calculations are not challenged. With total pension plan assets of over $2 billion, a surplus of $40 million could quickly disappear with relatively minor changes in the market value of the securities held or calculation of liabilities. In the circumstances, given all the variables, I find that the existence of any surplus is doubtful at best and I am satisfied that the Monitor's Liquidation Analysis ascribing it zero value is reasonable in this circumstances.

CRAL

[121] The Monitor's liquidation analysis as at March 31, 2000 of CRAL determined that in a distress situation, after payments were made to its creditors, there would be a deficiency of approximately $30 million to pay Canadian Regional's unsecured creditors, which include a claim of approximately $56.5 million due to Canadian. In arriving at this conclusion, the Monitor reviewed internally prepared unaudited financial statements of CRAL as of March 31, 2000, the Houlihan Lokey Howard and Zukin, distress valuation dated January 21, 2000 and the Simat Helliesen and Eichner valuation of selected CAIL assets dated January 31, 2000 for certain aircraft related materials and engines, rotables and spares. The Avitas Inc., and Avmark Inc. reports were used for the distress values on CRAL's aircraft and the CRAL aircraft lease documentation. The Monitor also performed its own analysis of CRAL's liquidation value, which involved analysis of the reports provided and details of its analysis were outlined in the Liquidation Analysis.

[122] For the purpose of the Liquidation Analysis, the Monitor did not consider other airlines as comparable for evaluation purposes, as the Monitor's valuation was performed on a distressed sale basis. The Monitor further assumed that without CAIL's national and international network to feed traffic into and a source of standby financing, and considering the inevitable negative publicity which a failure of CAIL would produce, CRAL would immediately stop operations as well.

[123] Mr. Peterson testified that CRAL was worth $260 million to Air Canada, based on Air Canada being a special buyer who could integrate CRAL, on a going concern basis, into its network. The Liquidation Analysis assumed the windup of each of CRAL and CAIL, a completely different scenario.

[124] There is no evidence that there was a potential purchaser for CRAL who would be prepared to acquire CRAL or the operations of CRAL 98 for any significant sum or at all. CRAL has value to CAIL, and in turn, could provide value to Air Canada, but this value is attributable to its ability to feed traffic to and take traffic from the national and international service operated by CAIL. In my view, the Monitor was aware of these features and properly considered these factors in assessing the value of CRAL on a liquidation of CAIL.

[125] If CAIL were to cease operations, the evidence is clear that CRAL would be obliged to do so as well immediately. The travelling public, shippers, trade suppliers, and others would make no distinction between CAIL and CRAL and there would be no going concern for Air Canada to acquire.

International Routes

[126] The Monitor ascribed no value to Canadian's international routes in the Liquidation Analysis. In discussions with CAIL management and experts available in its aviation group, the Monitor was advised that international routes are unassignable licenses and not property rights. They do not appear as assets in CAIL's financials. Mr. Carty and Mr. Peterson explained that routes and slots are <u>not</u> treated as assets by airlines, but rather as rights in the control of the Government of Canada. In the event of bankruptcy/receivership of CAIL, CAIL's trustee/receiver could not sell them and accordingly they are of no value to CAIL.

[127] Evidence was led that on June 23, 1999 Air Canada made an offer to purchase CAIL's international routes for $400 million cash plus $125 million for aircraft spares and inventory, along with the assumption of certain debt and lease obligations for the aircraft required for the international routes. CAIL evaluated the Air Canada offer and concluded that the proposed purchase price was insufficient to permit it to continue carrying on business in the absence of its international routes. Mr. Carty testified that something in the range of $2 billion would be required.

[128] CAIL was in desperate need of cash in mid December, 1999. CAIL agreed to sell its Toronto - Tokyo route for $25 million. The evidence, however, indicated that the price for the Toronto - Tokyo route was not derived from a valuation, but rather was what CAIL asked for, based on its then-current cash flow requirements. Air Canada and CAIL obtained Government approval for the transfer on December 21, 2000.

[129] Resurgence complained that despite this evidence of offers for purchase and actual sales of international routes and other evidence of sales of slots, the Monitor did not include Canadian's international routes in the Liquidation Analysis and only attributed a total of $66 million for all intangibles of Canadian. There is some evidence that slots at some foreign airports may be bought or sold in some fashion. However, there is insufficient evidence to attribute any value to other slots which CAIL has at foreign airports. It would appear given the regulation of the airline industry, in particular, the ***Aeronautics Act*** and the ***Canada Transportation Act***, that international routes for a Canadian air carrier only have full value to the extent of federal government support for the transfer or sale, and its preparedness to allow the then-current license holder to sell rather than act unilaterally to change the designation. The federal government was prepared to allow CAIL to sell its Toronto - Tokyo route to Air Canada in light of CAIL's severe financial difficulty and the certainty of cessation of operations during the Christmas holiday season in the absence of such a sale.

[130] Further, statements made by CAIL in mid-1999 as to the value of its international routes and operations in response to an offer by Air Canada, reflected the amount CAIL needed to sustain liquidity without its international routes and was not a representation of market value of what could realistically be obtained from an arms length purchaser. The Monitor concluded on its investigation that CAIL's Narida and Heathrow slots had a realizable value of $66 million , which it included in the Liquidation Analysis. I find that this conclusion is supportable and that the Monitor properly concluded that there were no other rights which ought to have been assigned value.

Tax Pools

[131] There are four tax pools identified by Resurgence and the Minority Shareholders that are material: capital losses at the CAC level, undepreciated capital cost pools, operating losses incurred by Canadian and potential for losses to be reinstated upon repayment of fuel tax rebates by CAIL.

Capital Loss Pools

[132] The capital loss pools at CAC will not be available to Air Canada since CAC is to be left out of the corporate reorganization and will be severed from CAIL. Those capital losses

can essentially only be used to absorb a portion of the debt forgiveness liability associated with the restructuring. CAC, who has virtually all of its senior debt compromised in the plan, receives compensation for this small advantage, which cost them nothing.

Undepreciated capital cost ("UCC")

[133] There is no benefit to Air Canada in the pools of UCC unless it were established that the UCC pools are in excess of the fair market value of the relevant assets, since Air Canada could create the same pools by simply buying the assets on a liquidation at fair market value. Mr. Peterson understood this pool of UCC to be approximately $700 million . There is no evidence that the UCC pool, however, could be considered to be a source of benefit. There is no evidence that this amount is any greater than fair market value.

Operating Losses

[134] The third tax pool complained of is the operating losses. The debt forgiven as a result of the Plan will erase any operating losses from prior years to the extent of such forgiven debt.

Fuel tax rebates

[135] The fourth tax pool relates to the fuel tax rebates system taken advantage of by CAIL in past years. The evidence is that on a consolidated basis the total potential amount of this pool is $297 million. According to Mr. Carty's testimony, CAIL has not been taxable in his ten years as Chief Financial Officer. The losses which it has generated for tax purposes have been sold on a 10 - 1 basis to the government in order to receive rebates of excise tax paid for fuel. The losses can be restored retroactively if the rebates are repaid, but the losses can only be carried forward for a maximum of seven years. The evidence of Mr. Peterson indicates that Air Canada has no plan to use those alleged losses and in order for them to be useful to Air Canada, Air Canada would have to complete a legal merger with CAIL, which is not provided for in the plan and is not contemplated by Air Canada until some uncertain future date. In my view, the Monitor's conclusion that there was no value to any tax pools in the Liquidation Analysis is sound.

[136] Those opposed to the Plan have raised the spectre that there may be value unaccounted for in this liquidation analysis or otherwise. Given the findings above, this is merely speculation and is unsupported by any concrete evidence.

c. Alternatives to the Plan

[137] When presented with a plan, affected stakeholders must weigh their options in the light of commercial reality. Those options are typically liquidation measured against the plan proposed. If not put forward, a hope for a different or more favourable plan is not an option and no basis upon which to assess fairness. On a purposive approach to the CCAA, what is fair and reasonable must be assessed against the effect of the Plan on the creditors and their various claims, in the context of their response to the plan. Stakeholders are expected to decide their fate based on realistic, commercially viable alternatives (generally seen as the prime motivating factor in any business decision) and not on speculative desires or hope for the

future. As Farley J. stated in ***Re T. Eaton Co.*** (1999) O.J. No. 4216 (Ont. Sup. Ct.) at paragraph 6:

> One has to be cognizant of the function of a balancing of their prejudices. Positions must be realistically assessed and weighed, all in the light of what an alternative to a successful plan would be. Wishes are not a firm foundation on which to build a plan; nor are ransom demands.

[138] The evidence is overwhelming that all other options have been exhausted and have resulted in failure. The concern of those opposed suggests that there is a better plan that Air Canada can put forward. I note that significant enhancements were made to the plan during the process. In any case, this is the Plan that has been voted on. The evidence makes it clear that there is not another plan forthcoming. As noted by Farley J. in ***T. Eaton Co,*** *supra*, "no one presented an alternative plan for the interested parties to vote on" (para. 8).

d. Oppression

Oppression and the CCAA

[139] Resurgence and the Minority Shareholders originally claimed that the Plan proponents, CAC and CAIL and the Plan supporters 853350 and Air Canada had oppressed, unfairly disregarded or unfairly prejudiced their interests, under Section 234 of the ABCA. The Minority Shareholders (for reasons that will appear obvious) have abandoned that position.

[140] Section 234 gives the court wide discretion to remedy corporate conduct that is unfair. As remedial legislation, it attempts to balance the interests of shareholders, creditors and management to ensure adequate investor protection and maximum management flexibility. The Act requires the court to judge the conduct of the company and the majority in the context of equity and fairness: ***First Edmonton Place Ltd. v. 315888 Alberta Ltd.***, (1988) 40 B.L.R.28 (Alta. Q.B.). Equity and fairness are measured against or considered in the context of the rights, interests or reasonable expectations of the complainants: ***Re Diligenti v. RWMD Operations Kelowna*** (1976), 1 B.C.L.R. 36 (S.C).

[141] The starting point in any determination of oppression requires an understanding as to what the rights, interests, and reasonable expectations are and what the damaging or detrimental effect is on them. MacDonald J. stated in ***First Edmonton Place,*** *supra* at 57***:***

> In deciding what is unfair, the history and nature of the corporation, the essential nature of the relationship between the corporation and the creditor, the type of rights affected in general commercial practice should all be material. More concretely, the test of unfair prejudice or unfair disregard should encompass the following considerations: The protection of the underlying expectation of a creditor in the arrangement with the corporation, the extent to which the acts complained of were unforeseeable where the creditor could not reasonably have protected itself from such acts and the detriment to the interests of the creditor.

[142] While expectations vary considerably with the size, structure, and value of the corporation, all expectations must be reasonably and objectively assessed: ***Pente Investment Management Ltd. v. Schneider Corp.*** (1998), 42 O.R. (3d) 177 (C.A.).

[143] Where a company is insolvent, only the creditors maintain a meaningful stake in its assets. Through the mechanism of liquidation or insolvency legislation, the interests of shareholders are pushed to the bottom rung of the priority ladder. The expectations of creditors and shareholders must be viewed and measured against an altered financial and legal landscape. Shareholders cannot reasonably expect to maintain a financial interest in an insolvent company where creditors' claims are not being paid in full. It is through the lens of insolvency that the court must consider whether the acts of the company are in fact oppressive, unfairly prejudicial or unfairly disregarded. CCAA proceedings have recognized that shareholders may not have "a true interest to be protected" because there is no reasonable prospect of economic value to be realized by the shareholders given the existing financial misfortunes of the company: ***Re Royal Oak Mines Ltd.***, *supra*, para. 4., ***Re Cadillac Fairview***, [1995] O.J. 707 (Ont. Sup. Ct), and ***Re T. Eaton Company,*** *supra*.

[144] To avail itself of the protection of the CCAA, a company must be insolvent. The CCAA considers the hierarchy of interests and assesses fairness and reasonableness in that context. The court's mandate not to sanction a plan in the absence of fairness necessitates the determination as to whether the complaints of dissenting creditors and shareholders are legitimate, bearing in mind the company's financial state. The articulated purpose of the Act and the jurisprudence interpreting it, "widens the lens" to balance a broader range of interests that includes creditors and shareholders and beyond to the company, the employees and the public, and tests the fairness of the plan with reference to its impact on all of the constituents.

[145] It is through the lens of insolvency legislation that the rights and interests of both shareholders and creditors must be considered. The reduction or elimination of rights of both groups is a function of the insolvency and not of oppressive conduct in the operation of the CCAA. The antithesis of oppression is fairness, the guiding test for judicial sanction. If a plan unfairly disregards or is unfairly prejudicial it will not be approved. However, the court retains the power to compromise or prejudice rights to effect a broader purpose, the restructuring of an insolvent company, provided that the plan does so in a fair manner.

Oppression allegations by Resurgence

[146] Resurgence alleges that it has been oppressed or had its rights disregarded because the Petitioners and Air Canada disregarded the specific provisions of their trust indenture, that Air Canada and 853350 dealt with other creditors outside of the CCAA, refusing to negotiate with Resurgence and that they are generally being treated inequitably under the Plan.

[147] The trust indenture under which the Unsecured Notes were issued required that upon a "change of control", 101% of the principal owing thereunder, plus interest would be immediately due and payable. Resurgence alleges that Air Canada, through 853350, caused CAC and CAIL to purposely fail to honour this term. Canadian acknowledges that the trust indenture was breached. On February 1, 2000, Canadian announced a moratorium on payments to lessors and lenders, including the Unsecured Noteholders. As a result of this

moratorium, Canadian defaulted on the payments due under its various credit facilities and aircraft leases.

[148] The moratorium was not directed solely at the Unsecured Noteholders. It had the same impact on other creditors, secured and unsecured. Canadian, as a result of the moratorium, breached other contractual relationships with various creditors. The breach of contract is not sufficient to found a claim for oppression in this case. Given Canadian's insolvency, which Resurgence recognized, it cannot be said that there was a reasonable expectation that it would be paid in full under the terms of the trust indenture, particularly when Canadian had ceased making payments to other creditors as well.

[149] It is asserted that because the Plan proponents engaged in a restructuring of Canadian's debt before the filing under the CCAA, that its use of the Act for only a small group of creditors, which includes Resurgence is somehow oppressive.

[150] At the outset, it cannot be overlooked that the CCAA does not require that a compromise be proposed to all creditors of an insolvent company. The CCAA is a flexible, remedial statute which recognizes the unique circumstances that lead to and away from insolvency.

[151] Next, Air Canada made it clear beginning in the fall of 1999 that Canadian would have to complete a financial restructuring so as to permit Air Canada to acquire CAIL on a financially sound basis and as a wholly owned subsidiary. Following the implementation of the moratorium, absent which Canadian could not have continued to operate, Canadian and Air Canada commenced efforts to restructure significant obligations by consent. They perceived that further damage to public confidence that a CCAA filing could produce, required Canadian to secure a substantial measure of creditor support in advance of any public filing for court protection. Before the Petitioners started the CCAA proceedings on March 24, 2000, Air Canada, CAIL and lessors of 59 aircraft in its fleet had reached agreement in principle on the restructuring plan.

[152] The purpose of the CCAA is to create an environment for negotiations and compromise. Often it is the stay of proceedings that creates the necessary stability for that process to unfold. Negotiations with certain key creditors in advance of the CCAA filing, rather than being oppressive or conspiratorial, are to be encouraged as a matter of principle if their impact is to provide a firm foundation for a restructuring. Certainly in this case, they were of critical importance, staving off liquidation, preserving cash flow and allowing the Plan to proceed. Rather than being detrimental or prejudicial to the interests of the other stakeholders, including Resurgence, it was beneficial to Canadian and all of its stakeholders.

[153] Resurgence complained that certain transfers of assets to Air Canada and its actions in consolidating the operations of the two entities prior to the initiation of the CCAA proceedings were unfairly prejudicial to it.

[154] The evidence demonstrates that the sales of the Toronto - Tokyo route, the Dash 8s and the simulators were at the suggestion of Canadian, who was in desperate need of operating cash. Air Canada paid what Canadian asked, based on its cash flow requirements. The

evidence established that absent the injection of cash at that critical juncture, Canadian would have ceased operations. It is for that reason that the Government of Canada willingly provided the approval for the transfer on December 21, 2000.

[155] Similarly, the renegotiation of CAIL's aircraft leases to reflect market rates supported by Air Canada covenant or guarantee has been previously dealt with by this court and found to have been in the best interest of Canadian, not to its detriment. The evidence establishes that the financial support and corporate integration that has been provided by Air Canada was not only in Canadian's best interest, but its only option for survival. The suggestion that the renegotiations of these leases, various sales and the operational realignment represents an assumption of a benefit by Air Canada to the detriment of Canadian is not supported by the evidence.

[156] I find the transactions predating the CCAA proceedings, were in fact Canadian's life blood in ensuring some degree of liquidity and stability within which to conduct an orderly restructuring of its debt. There was no detriment to Canadian or to its creditors, including its unsecured creditors. That Air Canada and Canadian were so successful in negotiating agreements with their major creditors, including aircraft financiers, without resorting to a stay under the CCAA underscores the serious distress Canadian was in and its lenders recognition of the viability of the proposed Plan.

[157] Resurgence complained that other significant groups held negotiations with Canadian. The evidence indicates that a meeting was held with Mr. Symington, Managing Director of Resurgence, in Toronto in March 2000. It was made clear to Resurgence that the pool of unsecured creditors would be somewhere between $500 and $700 million and that Resurgence would be included within that class. To the extent that the versions of this meeting differ, I prefer and accept the evidence of Mr. Carty. Resurgence wished to play a significant role in the debt restructuring and indicated it was prepared to utilize the litigation process to achieve a satisfactory result for itself. It is therefore understandable that no further negotiations took place. Nevertheless, the original offer to affected unsecured creditors has been enhanced since the filing of the plan on April 25, 2000. The enhancements to unsecured claims involved the removal of the cap on the unsecured pool and an increase from 12 to 14 cents on the dollar.

[158] The findings of the Commissioner of Competition establishes beyond doubt that absent the financial support provided by Air Canada, Canadian would have failed in December 1999. I am unable to find on the evidence that Resurgence has been oppressed. The complaint that Air Canada has plundered Canadian and robbed it of its assets is not supported but contradicted by the evidence. As described above, the alternative is liquidation and in that event the Unsecured Noteholders would receive between one and three cents on the dollar. The Monitor's conclusions in this regard are supportable and I accept them.

e. Unfairness to Shareholders

[159] The Minority Shareholders essentially complained that they were being unfairly stripped of their only asset in CAC - the shares of CAIL. They suggested they were being squeezed out by the new CAC majority shareholder 853350, without any compensation or any

vote. When the reorganization is completed as contemplated by the Plan , their shares will remain in CAC but CAC will be a bare shell.

[160] They further submitted that Air Canada's cash infusion, the covenants and guarantees it has offered to aircraft financiers, and the operational changes (including integration of schedules, "quick win" strategies, and code sharing) have all added significant value to CAIL to the benefit of its stakeholders, including the Minority Shareholders. They argued that they should be entitled to continue to participate into the future and that such an expectation is legitimate and consistent with the statements and actions of Air Canada in regard to integration. By acting to realign the airlines before a corporate reorganization, the Minority Shareholders asserted that Air Canada has created the expectation that it is prepared to consolidate the airlines with the participation of a minority. The Minority Shareholders take no position with respect to the debt restructuring under the CCAA, but ask the court to sever the corporate reorganization provisions contained in the Plan.

[161] Finally, they asserted that CAIL has increased in value due to Air Canada's financial contributions and operational changes and that accordingly, before authorizing the transfer of the CAIL shares to 853350, the current holders of the CAIL Preferred Shares, the court must have evidence before it to justify a transfer of 100% of the equity of CAIL to the Preferred Shares.

[162] That CAC will have its shareholding in CAIL extinguished and emerge a bare shell is acknowledged. However, the evidence makes it abundantly clear that those shares, CAC's "only asset", have no value. That the Minority Shareholders are content to have the debt restructuring proceed suggests by implication that they do not dispute the insolvency of both Petitioners, CAC and CAIL.

[163] The Minority Shareholders base their expectation to remain as shareholders on the actions of Air Canada in acquiring only 82% of the CAC shares before integrating certain of the airlines' operations. Mr. Baker (who purchased <u>after</u> the Plan was filed with the Court and almost six months after the take over bid by Air Canada) suggested that the contents of the bid circular misrepresented Air Canada's future intentions to its shareholders. The two dollar price offered and paid per share in the bid must be viewed somewhat skeptically and in the context in which the bid arose. It does not support the speculative view that some shareholders hold, that somehow, despite insolvency, their shares have some value on a going concern basis. In any event, any claim for misrepresentation that Minority Shareholders might have arising from the take over bid circular against Air Canada or 853350 , if any, is unaffected by the Plan and may be pursued after the stay is lifted.

[164] In considering Resurgence's claim of oppression I have already found that the financial support of Air Canada during this restructuring period has benefited Canadian and its stakeholders. Air Canada's financial support and the integration of the two airlines has been critical to keeping Canadian afloat. The evidence makes it abundantly clear that without this support Canadian would have ceased operations. However it has not transformed CAIL or CAC into solvent companies.

[165] The Minority Shareholders raise concerns about assets that are ascribed limited or no value in the Monitor's report as does Resurgence (although to support an opposite proposition). Considerable argument was directed to the future operational savings and profitability forecasted for Air Canada, its subsidiaries and CAIL and its subsidiaries. Mr. Peterson estimated it to be in the order of $650 to $800 million on an annual basis, commencing in 2001. The Minority Shareholders point to the tax pools of a restructured company that they submit will be of great value once CAIL becomes profitable as anticipated. They point to a pension surplus that at the very least has value by virtue of the contribution holidays that it affords. They also look to the value of the compromised claims of the restructuring itself which they submit are in the order of $449 million. They submit these cumulative benefits add value, currently or at least realizable in the future. In sharp contrast to the Resurgence position that these acts constitute oppressive behaviour, the Minority Shareholders view them as enhancing the value of their shares. They go so far as to suggest that there may well be a current going concern value of the CAC shares that has been conveniently ignored or unquantified and that the Petitioners must put evidence before the court as to what that value is.

[166] These arguments overlook several important facts, the most significant being that CAC and CAIL are insolvent and will remain insolvent until the debt restructuring is fully implemented. These companies are not just technically or temporarily insolvent, they are massively insolvent. Air Canada will have invested upward of $3 billion to complete the restructuring, while the Minority Shareholders have contributed nothing. Further, it was a fundamental condition of Air Canada's support of this Plan that it become the sole owner of CAIL. It has been suggested by some that Air Canada's share purchase at two dollars per share in December 1999 was unfairly prejudicial to CAC and CAIL's creditors. Objectively, any expectation by Minority Shareholders that they should be able to participate in a restructured CAIL is not reasonable.

[167] The Minority Shareholders asserted the plan is unfair because the effect of the reorganization is to extinguish the common shares of CAIL held by CAC and to convert the voting and non-voting Preferred Shares of CAIL into common shares of CAIL. They submit there is no expert valuation or other evidence to justify the transfer of CAIL's equity to the Preferred Shares. There is no equity in the CAIL shares to transfer. The year end financials show CAIL's shareholder equity at a deficit of $790 million. The Preferred Shares have a liquidation preference of $347 million. There is no evidence to suggest that Air Canada's interim support has rendered either of these companies solvent, it has simply permitted operations to continue. In fact, the unaudited consolidated financial statements of CAC for the quarter ended March 31, 2000 show total shareholders equity went from a deficit of $790 million to a deficit of $1.214 million, an erosion of $424 million.

[168] The Minority Shareholders' submission attempts to compare and contrast the rights and expectations of the CAIL preferred shares as against the CAC common shares. This is not a meaningful exercise; the Petitioners are not submitting that the Preferred Shares have value and the evidence demonstrates unequivocally that they do not. The Preferred Shares are merely being utilized as a corporate vehicle to allow CAIL to become a wholly owned subsidiary of Air Canada. For example, the same result could have been achieved by issuing new shares rather than changing the designation of 853350's Preferred Shares in CAIL.

[169] The Minority Shareholders have asked the court to sever the reorganization from the debt restructuring, to permit them to participate in whatever future benefit might be derived from the restructured CAIL. However, a fundamental condition of this Plan and the expressed intention of Air Canada on numerous occasions is that CAIL become a wholly owned subsidiary. To suggest the court ought to sever this reorganization from the debt restructuring fails to account for the fact that it is not two plans but an integral part of a single plan. To accede to this request would create an injustice to creditors whose claims are being seriously compromised, and doom the entire Plan to failure. Quite simply, the Plan's funder will not support a severed plan.

[170] Finally, the future profits to be derived by Air Canada are not a relevant consideration. While the object of any plan under the CCAA is to create a viable emerging entity, the germane issue is what a prospective purchaser is prepared to pay in the circumstances. Here, we have the one and only offer on the table, Canadian's last and only chance. The evidence demonstrates this offer is preferable to those who have a remaining interest to a liquidation. Where secured creditors have compromised their claims and unsecured creditors are accepting 14 cents on the dollar in a potential pool of unsecured claims totalling possibly in excess of $1 billion , it is not unfair that shareholders receive nothing.

e. The Public Interest

[171] In this case, the court cannot limit its assessment of fairness to how the Plan affects the direct participants. The business of the Petitioners as a national and international airline employing over 16,000 people must be taken into account.

[172] In his often cited article, ***Reorganizations Under the Companies' Creditors Arrangement Act*** (1947), 25 Can.Bar R.ev. 587 at 593 Stanley Edwards stated:

> Another reason which is usually operative in favour of reorganization is the interest of the public in the continuation of the enterprise, particularly if the company supplies commodities or services that are necessary or desirable to large numbers of consumers, or if it employs large numbers of workers who would be thrown out of employment by its liquidation. This public interest may be reflected in the decisions of the creditors and shareholders of the company and is undoubtedly a factor which a court would wish to consider in deciding whether to sanction an arrangement under the C.C.A.A.

[173] In ***Re Repap British Columbia Inc.*** (1998), 1 C.B.R. 449 (B.C.S.C.) the court noted that the fairness of the plan must be measured against the overall economic and business environment and against the interests of the citizens of British Columbia who are affected as "shareholders" of the company, and creditors, of suppliers, employees and competitors of the company. The court approved the plan even though it was unable to conclude that it was necessarily fair and reasonable. In ***Re Quintette Coal Ltd.,*** *supra,* Thackray J. acknowledged the significance of the coal mine to the British Columbia economy, its importance to the people who lived and worked in the region and to the employees of the company and their families. Other cases in which the court considered the public interest in determining whether to sanction a plan under the CCAA include ***Canadian Red Cross Society (Re)***, (1998),5

C.B.R.(4th) (Ont. Gen. Div.) and ***Algoma Steel Corp. v. Royal Bank of Canada (Trustee of***), [1992] O.J. No. 795 (Ont. Gen. Div.)

[174] The economic and social impacts of a plan are important and legitimate considerations. Even in insolvency, companies are more than just assets and liabilities. The fate of a company is inextricably tied to those who depend on it in various ways. It is difficult to imagine a case where the economic and social impacts of a liquidation could be more catastrophic. It would undoubtedly be felt by Canadian air travellers across the country. The effect would not be a mere ripple, but more akin to a tidal wave from coast to coast that would result in chaos to the Canadian transportation system.

[175] More than sixteen thousand unionized employees of CAIL and CRAL appeared through counsel. The unions and their membership strongly support the Plan. The unions represented included the Airline Pilots Association International, the International Association of Machinists and Aerospace Workers, Transportation District 104, Canadian Union of Public Employees, and the Canadian Auto Workers Union. They represent pilots, ground workers and cabin personnel. The unions submit that it is essential that the employee protections arising from the current restructuring of Canadian not be jeopardized by a bankruptcy, receivership or other liquidation. Liquidation would be devastating to the employees and also to the local and national economies. The unions emphasize that the Plan safeguards the employment and job dignity protection negotiated by the unions for their members. Further, the court was reminded that the unions and their members have played a key role over the last fifteen years or more in working with Canadian and responsible governments to ensure that Canadian survived and jobs were maintained.

[176] The Calgary and Edmonton Airport authorities, which are not for profit corporations, also supported the Plan. CAIL's obligations to the airport authorities are not being compromised under the Plan. However, in a liquidation scenario, the airport authorities submitted that a liquidation would have severe financial consequences to them and have potential for severe disruption in the operation of the airports.

[177] The representations of the Government of Canada are also compelling. Approximately one year ago, CAIL approached the Transport Department to inquire as to what solution could be found to salvage their ailing company. The Government saw fit to issue an order in council, pursuant to section 47 of the ***Transportation Act*** , which allowed an opportunity for CAIL to approach other entities to see if a permanent solution could be found. A standing committee in the House of Commons reviewed a framework for the restructuring of the airline industry, recommendations were made and undertakings were given by Air Canada. The Government was driven by a mandate to protect consumers and promote competition. It submitted that the Plan is a major component of the industry restructuring. Bill C-26, which addresses the restructuring of the industry, has passed through the House of Commons and is presently before the Senate. The Competition Bureau has accepted that Air Canada has the only offer on the table and has worked very closely with the parties to ensure that the interests of consumers, employees, small carriers, and smaller communities will be protected.

[178] In summary, in assessing whether a plan is fair and reasonable, courts have emphasized that perfection is not required: see for example ***Wandlyn Inns Ltd. (Re)*** (1992), 15 C.B.R. (3d)

316 (N.BQ.B), ***Quintette Coal***, *supra* and ***Repap***, *supra*. Rather, various rights and remedies must be sacrificed to varying degrees to result in a reasonable, viable compromise for all concerned. The court is required to view the "big picture" of the plan and assess its impact as a whole. I return to ***Algoma Steel v. Royal Bank of Canada***., *supra* at 9 in which Farley J. endorsed this approach:

> What might appear on the surface to be unfair to one party when viewed in relation to all other parties may be considered to be quite appropriate.

[179] Fairness and reasonableness are not abstract notions, but must be measured against the available commercial alternatives. The triggering of the statute, namely insolvency, recognizes a fundamental flaw within the company. In these imperfect circumstances there can never be a perfect plan, but rather only one that is supportable. As stated in ***Re Sammi Atlas Inc***., (1998), 3C.B.R. (4th) 171 at 173 (Ont. Sup. Ct.) at 173:

> A plan under the CCAA is a compromise; it cannot be expected to be perfect. It should be approved if it is fair, reasonable and equitable. Equitable treatment is not necessarily equal treatment. Equal treatment may be contrary to equitable treatment.

[180] I find that in all the circumstances, the Plan is fair and reasonable.

IV. CONCLUSION

[181] The Plan has obtained the support of many affected creditors, including virtually all aircraft financiers, holders of executory contracts, AMR, Loyalty Group and the Senior Secured Noteholders.

[182] Use of these proceedings has avoided triggering more than $1.2 billion of incremental claims. These include claims of passengers with pre-paid tickets, employees, landlords and other parties with ongoing executory contracts, trade creditors and suppliers.

[183] This Plan represents a solid chance for the continued existence of Canadian. It preserves CAIL as a business entity. It maintains over 16,000 jobs. Suppliers and trade creditors are kept whole. It protects consumers and preserves the integrity of our national transportation system while we move towards a new regulatory framework. The extensive efforts by Canadian and Air Canada, the compromises made by stakeholders both within and without the proceedings and the commitment of the Government of Canada inspire confidence in a positive result.

[184] I agree with the opposing parties that the Plan is not perfect, but it is neither illegal nor oppressive. Beyond its fair and reasonable balancing of interests, the Plan is a result of bona fide efforts by all concerned and indeed is the only alternative to bankruptcy as ten years of struggle and creative attempts at restructuring by Canadian clearly demonstrate. This Plan is one step toward a new era of airline profitability that hopefully will protect consumers by promoting affordable and accessible air travel to all Canadians.

[185] The Plan deserves the sanction of this court and it is hereby granted. The application pursuant to section 185 of the ABCA is granted. The application for declarations sought by Resurgence are dismissed. The application of the Minority Shareholders is dismissed.

HEARD on the 5th day of June to the 19th day of June, 2000.
DATED at Calgary, Alberta this 27th day of June, 2000.

_____

J.C.Q.B.A.

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Metcalfe & Mansfield Alternative Investments II Corp. (Re)

92 O.R. (3d) 513

Court of Appeal for Ontario,
Laskin, Cronk and Blair JJ.A.
August 18, 2008

Debtor and creditor -- Companies' Creditors Arrangement Act -- Companies' Creditors Arrangement Act permitting inclusion of third-party releases in plan of compromise or arrangement to be sanctioned by court where those releases are reasonably connected to proposed restructuring -- Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

In response to a liquidity crisis which threatened the Canadian market in Asset Backed Commercial Paper ("ABCP"), a creditor-initiated Plan of Compromise and Arrangement was crafted. The Plan called for the release of third parties from any liability associated with ABCP, including, with certain narrow exceptions, liability for claims relating to fraud. The "double majority" required by s. 6 of the Companies' Creditors Arrangement Act ("CCAA") approved the Plan. The respondents sought court approval of the Plan under s. 6 of the CCAA. The application judge made the following findings: (a) the parties to be released were necessary and essential to the restructuring; (b) the claims to be released were rationally related to the purpose of the Plan and necessary for it; (c) the Plan could not succeed without the releases; (d) the parties who were to have claims against them released were contributing in a tangible and realistic way to the Plan; and (e) the Plan would benefit not only the debtor companies but creditor noteholders generally. The application judge sanctioned the Plan. The appellants were holders of ABCP notes who opposed the Plan. On appeal, they argued that the CCAA does

not permit a release of claims against third parties and that the releases constitute an unconstitutional confiscation of private property that is within the exclusive domain of the provinces under s. 92 of the Constitution Act, 1867.

Held, the appeal should be dismissed.

On a proper interpretation, the CCAA permits the inclusion of third-party releases in a plan of compromise or arrangement to be sanctioned by the court where those releases are reasonably connected to the proposed restructuring. That conclusion is supported by (a) the open-ended, flexible character of the CCAA itself; (b) the broad nature of the term "compromise or arrangement" as used in the CCAA; and (c) the express statutory effect of the "double majority" vote and court sanction which render the plan binding on all creditors, including those unwilling to accept certain portions of it. The first of these signals a flexible approach to the application of the CCAA in new and evolving situations, an active judicial role in its application and interpretation, and a liberal approach to interpretation. The second provides the entre to negotiations between the parties [page514] affected in the restructuring and furnishes them with the ability to apply the broad scope of their ingenuity to fashioning the proposal. The latter afford necessary protection to unwilling creditors who may be deprived of certain of their civil and property rights as a result of the process.

While the principle that legislation must not be construed so as to interfere with or prejudice established contractual or proprietary rights -- including the right to bring an action -- in the absence of a clear indication of legislative intention to that effect is an important one, Parliament's intention to clothe the court with authority to consider and sanction a plan that contains third-party releases is expressed with sufficient clarity in the "compromise or arrangement" language of the CCAA coupled with the statutory voting and sanctioning mechanism making the provisions of the plan binding on all creditors. This is not a situation of impermissible "gap-filling" in the case of legislation severely affecting property rights; it is a question of finding meaning in the language of the Act itself.

Interpreting the CCAA as permitting the inclusion of third-party releases in a plan of compromise or arrangement is not unconstitutional under the division-of-powers doctrine and does not contravene the rules of public order pursuant to the Civil Code of Quebec. The CCAA is valid federal legislation under the federal insolvency power, and the power to sanction a plan of compromise or arrangement that contains third-party releases is embedded in the wording of the CCAA. The fact that this may interfere with a claimant's right to pursue a civil action or trump Quebec rules of public order is constitutionally immaterial. To the extent that the provisions of the CCAA are inconsistent with provincial legislation, the federal legislation is paramount.

The application judge's findings of fact were supported by the evidence. His conclusion that the benefits of the Plan to the creditors as a whole and to the debtor companies outweighed the negative aspects of compelling the unwilling appellants to execute the releases was reasonable.

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House of Commons Debates (Hansard), (20 April 1933) at 4091 (Hon. C.H. Cahan)

APPEAL from the sanction order of C.L. Campbell J., [2008] O.J. No. 2265, 43 C.B.R. (5th) 269 (S.C.J.) under the Companies' Creditors Arrangement Act.

See Schedule "C" -- Counsel for list of counsel.

The judgment of the court was delivered by

BLAIR J.A.: --

A. Introduction

[1] In August 2007, a liquidity crisis suddenly threatened the Canadian market in Asset Backed Commercial Paper ("ABCP"). The crisis was triggered by a loss of confidence amongst investors stemming from the news of widespread defaults on U.S. sub-prime mortgages. The loss of confidence placed the Canadian financial market at risk generally and was reflective of an economic volatility worldwide.

[2] By agreement amongst the major Canadian participants, the $32 billion Canadian market in third-party ABCP was frozen on August 13, 2007, pending an attempt to resolve the crisis

through a restructuring of that market. The Pan-Canadian Investors Committee, chaired by Purdy Crawford, C.C., Q.C., was formed and ultimately put forward the creditor-initiated Plan of Compromise and Arrangement that forms the subject-matter of these proceedings. The Plan was sanctioned by Colin L. Campbell J. on June 5, 2008.

[3] Certain creditors who opposed the Plan seek leave to appeal and, if leave is granted, appeal from that decision. They raise an important point regarding the permissible scope of a restructuring under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 as amended ("CCAA"): can the court sanction a Plan that calls for creditors to provide releases to third parties who are themselves solvent and not creditors of the debtor company? They also argue that, if the answer to this question is yes, the [page517] application judge erred in holding that this Plan, with its particular releases (which bar some claims even in fraud), was fair and reasonable and therefore in sanctioning it under the CCAA.

Leave to appeal

[4] Because of the particular circumstances and urgency of these proceedings, the court agreed to collapse an oral hearing for leave to appeal with the hearing of the appeal itself. At the outset of argument, we encouraged counsel to combine their submissions on both matters.

[5] The proposed appeal raises issues of considerable importance to restructuring proceedings under the CCAA Canada-wide. There are serious and arguable grounds of appeal and -- given the expedited timetable -- the appeal will not unduly delay the progress of the proceedings. I am satisfied that the criteria for granting leave to appeal in CCAA proceedings, set out in such cases as Cineplex Odeon Corp. (Re) (2001), 24 C.B.R. (4th) 201 (Ont. C.A.) and Re Country Style Food Services, [2002] O.J. No. 1377, 158 O.A.C. 30 (C.A.) are met. I would grant leave to appeal.

Appeal

[6] For the reasons that follow, however, I would dismiss the appeal.

B. Facts

The parties

[7] The appellants are holders of ABCP Notes who oppose the Plan. They do so principally on the basis that it requires them to grant releases to third-party financial institutions against whom they say they have claims for relief arising out of their purchase of ABCP Notes. Amongst them are an airline, a tour operator, a mining company, a wireless provider, a pharmaceuticals retailer and several holding companies and energy companies.

[8] Each of the appellants has large sums invested in ABCP -- in some cases, hundreds of millions of dollars. Nonetheless, the collective holdings of the appellants -- slightly over $1 billion -- represent only a small fraction of the more than $32 billion of ABCP involved in the restructuring.

[9] The lead respondent is the Pan-Canadian Investors Committee which was responsible for the creation and negotiation of the Plan on behalf of the creditors. Other respondents include various major international financial institutions, the five largest Canadian banks, several trust companies and some smaller holders of ABCP product. They participated in the market in a number of different ways. [page518]

The ABCP market

[10] Asset Backed Commercial Paper is a sophisticated and hitherto well-accepted financial instrument. It is primarily a form of short-term investment -- usually 30 to 90 days -- typically with a low-interest yield only slightly better than that available through other short-term paper from a government or bank. It is said to be "asset backed" because the cash that is used to purchase an ABCP Note is converted into a portfolio of financial assets or other asset interests that in turn provide security for the repayment of the notes.

[11] ABCP was often presented by those selling it as a safe investment, somewhat like a guaranteed investment certificate.

[12] The Canadian market for ABCP is significant and administratively complex. As of August 2007, investors had placed over $116 billion in Canadian ABCP. Investors range from individual pensioners to large institutional bodies. On the selling and distribution end, numerous players are involved, including chartered banks, investment houses and other financial institutions. Some of these players participated in multiple ways. The Plan in this proceeding relates to approximately $32 billion of non-bank sponsored ABCP, the restructuring of which is considered essential to the preservation of the Canadian ABCP market.

[13] As I understand it, prior to August 2007, when it was frozen, the ABCP market worked as follows.

[14] Various corporations (the "Sponsors") would arrange for entities they control ("Conduits") to make ABCP Notes available to be sold to investors through "Dealers" (banks and other investment dealers). Typically, ABCP was issued by series and sometimes by classes within a series.

[15] The cash from the purchase of the ABCP Notes was used to purchase assets which were held by trustees of the Conduits ("Issuer Trustees") and which stood as security for repayment of the notes. Financial institutions that sold or provided the Conduits with the assets that secured the ABCP are known as "Asset Providers". To help ensure that investors would be able to redeem their notes, "Liquidity Providers" agreed to provide funds that could be drawn upon to meet the demands of maturing ABCP Notes in certain circumstances. Most Asset Providers were also Liquidity Providers. Many of these banks and financial institutions were also holders of ABCP Notes ("Noteholders"). The Asset and Liquidity Providers held first charges on the assets.

[16] When the market was working well, cash from the purchase of new ABCP Notes was also used to pay off maturing ABCP

[page519] Notes; alternatively, Noteholders simply rolled their maturing notes over into new ones. As I will explain, however, there was a potential underlying predicament with this scheme.

The liquidity crisis

[17] The types of assets and asset interests acquired to "back" the ABCP Notes are varied and complex. They were generally long-term assets such as residential mortgages, credit card receivables, auto loans, cash collateralized debt obligations and derivative investments such as credit default swaps. Their particular characteristics do not matter for the purpose of this appeal, but they shared a common feature that proved to be the Achilles heel of the ABCP market: because of their long-term nature, there was an inherent timing mismatch between the cash they generated and the cash needed to repay maturing ABCP Notes.

[18] When uncertainty began to spread through the ABCP marketplace in the summer of 2007, investors stopped buying the ABCP product and existing Noteholders ceased to roll over their maturing notes. There was no cash to redeem those notes. Although calls were made on the Liquidity Providers for payment, most of the Liquidity Providers declined to fund the redemption of the notes, arguing that the conditions for liquidity funding had not been met in the circumstances. Hence the "liquidity crisis" in the ABCP market.

[19] The crisis was fuelled largely by a lack of transparency in the ABCP scheme. Investors could not tell what assets were backing their notes -- partly because the ABCP Notes were often sold before or at the same time as the assets backing them were acquired; partly because of the sheer complexity of certain of the underlying assets; and partly because of assertions of confidentiality by those involved with the assets. As fears arising from the spreading U.S. sub-prime mortgage crisis mushroomed, investors became increasingly concerned that their ABCP Notes may be supported by those crumbling assets. For the reasons outlined above, however, they were unable to redeem their maturing ABCP Notes.

The Montreal Protocol

[20] The liquidity crisis could have triggered a wholesale liquidation of the assets, at depressed prices. But it did not. During the week of August 13, 2007, the ABCP market in Canada froze -- the result of a standstill arrangement orchestrated on the heels of the crisis by numerous market participants, including Asset Providers, Liquidity Providers, Noteholders and other financial industry representatives. Under the standstill agreement -- known as the Montreal Protocol -- the parties committed [page520] to restructuring the ABCP market with a view, as much as possible, to preserving the value of the assets and of the notes.

[21] The work of implementing the restructuring fell to the Pan-Canadian Investors Committee, an applicant in the proceeding and respondent in the appeal. The Committee is composed of 17 financial and investment institutions, including chartered banks, credit unions, a pension board, a Crown corporation and a university board of governors. All 17 members are themselves Noteholders; three of them also participated in the ABCP market in other capacities as well. Between them, they hold about two-thirds of the $32 billion of ABCP sought to be restructured in these proceedings.

[22] Mr. Crawford was named the Committee's chair. He thus had a unique vantage point on the work of the Committee and the restructuring process as a whole. His lengthy affidavit strongly informed the application judge's understanding of the factual context, and our own. He was not cross-examined and his evidence is unchallenged.

[23] Beginning in September 2007, the Committee worked to craft a plan that would preserve the value of the notes and assets, satisfy the various stakeholders to the extent possible and restore confidence in an important segment of the Canadian financial marketplace. In March 2008, it and the other applicants sought CCAA protection for the ABCP debtors and the approval of a Plan that had been pre-negotiated with some, but not all, of those affected by the misfortunes in the Canadian

ABCP market.

The Plan

(a) Plan overview

[24] Although the ABCP market involves many different players and kinds of assets, each with their own challenges, the committee opted for a single plan. In Mr. Crawford's words, "all of the ABCP suffers from common problems that are best addressed by a common solution". The Plan the Committee developed is highly complex and involves many parties. In its essence, the Plan would convert the Noteholders' paper -- which has been frozen and therefore effectively worthless for many months -- into new, long-term notes that would trade freely, but with a discounted face value. The hope is that a strong secondary market for the notes will emerge in the long run.

[25] The Plan aims to improve transparency by providing investors with detailed information about the assets supporting their ABCP Notes. It also addresses the timing mismatch between the notes and the assets by adjusting the maturity provisions and interest rates on the new notes. Further, the Plan [page521] adjusts some of the underlying credit default swap contracts by increasing the thresholds for default triggering events; in this way, the likelihood of a forced liquidation flowing from the credit default swap holder's prior security is reduced and, in turn, the risk for ABCP investors is decreased.

[26] Under the Plan, the vast majority of the assets underlying ABCP would be pooled into two master asset vehicles (MAV1 and MAV2). The pooling is designed to increase the collateral available and thus make the notes more secure.

[27] The Plan does not apply to investors holding less than $1 million of notes. However, certain Dealers have agreed to buy the ABCP of those of their customers holding less than the $1 million threshold, and to extend financial assistance to these customers. Principal among these Dealers are National Bank and Canaccord, two of the respondent financial institutions the appellants most object to releasing. The application judge found that these developments appeared to be

designed to secure votes in favour of the Plan by various Noteholders and were apparently successful in doing so. If the Plan is approved, they also provide considerable relief to the many small investors who find themselves unwittingly caught in the ABDP collapse.

(b) The releases

[28] This appeal focuses on one specific aspect of the Plan: the comprehensive series of releases of third parties provided for in art. 10.

[29] The Plan calls for the release of Canadian banks, Dealers, Noteholders, Asset Providers, Issuer Trustees, Liquidity Providers and other market participants -- in Mr. Crawford's words, "virtually all participants in the Canadian ABCP market" -- from any liability associated with ABCP, with the exception of certain narrow claims relating to fraud. For instance, under the Plan as approved, creditors will have to give up their claims against the Dealers who sold them their ABCP Notes, including challenges to the way the Dealers characterized the ABCP and provided (or did not provide) information about the ABCP. The claims against the proposed defendants are mainly in tort: negligence, misrepresentation, negligent misrepresentation, failure to act prudently as a dealer/advisor, acting in conflict of interest and in a few cases fraud or potential fraud. There are also allegations of breach of fiduciary duty and claims for other equitable relief.

[30] The application judge found that, in general, the claims for damages include the face value of the Notes, plus interest and additional penalties and damages.

[31] The releases, in effect, are part of a quid pro quo. Generally speaking, they are designed to compensate various participants in [page522] the market for the contributions they would make to the restructuring. Those contributions under the Plan include the requirements that:

(a) Asset Providers assume an increased risk in their credit default swap contracts, disclose certain proprietary information in relation to the assets and provide below-cost financing for margin funding facilities that are

designed to make the notes more secure;
(b) Sponsors -- who in addition have co-operated with the Investors' Committee throughout the process, including by sharing certain proprietary information -- give up their existing contracts;
(c) the Canadian banks provide below-cost financing for the margin funding facility; and
(d) other parties make other contributions under the Plan.

[32] According to Mr. Crawford's affidavit, the releases are part of the Plan "because certain key participants, whose participation is vital to the restructuring, have made comprehensive releases a condition for their participation".

The CCAA proceedings to date

[33] On March 17, 2008, the applicants sought and obtained an Initial Order under the CCAA staying any proceedings relating to the ABCP crisis and providing for a meeting of the Noteholders to vote on the proposed Plan. The meeting was held on April 25. The vote was overwhelmingly in support of the Plan -- 96 per cent of the Noteholders voted in favour. At the instance of certain Noteholders, and as requested by the application judge (who has supervised the proceedings from the outset), the monitor broke down the voting results according to those Noteholders who had worked on or with the Investors' Committee to develop the Plan and those Noteholders who had not. Re-calculated on this basis the results remained firmly in favour of the proposed Plan -- 99 per cent of those connected with the development of the Plan voted positively, as did 80 per cent of those Noteholders who had not been involved in its formulation.

[34] The vote thus provided the Plan with the "double majority" approval -- a majority of creditors representing two-thirds in value of the claims -- required under s. 6 of the CCAA.

[35] Following the successful vote, the applicants sought court approval of the Plan under s. 6. Hearings were held on May 12 [page523] and 13. On May 16, the application judge

issued a brief endorsement in which he concluded that he did not have sufficient facts to decide whether all the releases proposed in the Plan were authorized by the CCAA. While the application judge was prepared to approve the releases of negligence claims, he was not prepared at that point to sanction the release of fraud claims. Noting the urgency of the situation and the serious consequences that would result from the Plan's failure, the application judge nevertheless directed the parties back to the bargaining table to try to work out a claims process for addressing legitimate claims of fraud.

[36] The result of this renegotiation was a "fraud carve-out" -- an amendment to the Plan excluding certain fraud claims from the Plan's releases. The carve-out did not encompass all possible claims of fraud, however. It was limited in three key respects. First, it applied only to claims against ABCP Dealers. Secondly, it applied only to cases involving an express fraudulent misrepresentation made with the intention to induce purchase and in circumstances where the person making the representation knew it to be false. Thirdly, the carve-out limited available damages to the value of the notes, minus any funds distributed as part of the Plan. The appellants argue vigorously that such a limited release respecting fraud claims is unacceptable and should not have been sanctioned by the application judge.

[37] A second sanction hearing -- this time involving the amended Plan (with the fraud carve-out) -- was held on June 3, 2008. Two days later, Campbell J. released his reasons for decision, approving and sanctioning the Plan on the basis both that he had jurisdiction to sanction a Plan calling for third-party releases and that the Plan including the third-party releases in question here was fair and reasonable.

[38] The appellants attack both of these determinations.

C. Law and Analysis

[39] There are two principal questions for determination on this appeal:

(1) As a matter of law, may a CCAA plan contain a release of claims against anyone other than the debtor company or its

directors?

(2) If the answer to that question is yes, did the application judge err in the exercise of his discretion to sanction the Plan as fair and reasonable given the nature of the releases called for under it? [page524]

(1) Legal authority for the releases

[40] The standard of review on this first issue -- whether, as a matter of law, a CCAA plan may contain third-party releases -- is correctness.

[41] The appellants submit that a court has no jurisdiction or legal authority under the CCAA to sanction a plan that imposes an obligation on creditors to give releases to third parties other than the directors of the debtor company. [See Note 1 below] The requirement that objecting creditors release claims against third parties is illegal, they contend, because:

(a) on a proper interpretation, the CCAA does not permit such releases;

(b) the court is not entitled to "fill in the gaps" in the CCAA or rely upon its inherent jurisdiction to create such authority because to do so would be contrary to the principle that Parliament did not intend to interfere with private property rights or rights of action in the absence of clear statutory language to that effect;

(c) the releases constitute an unconstitutional confiscation of private property that is within the exclusive domain of the provinces under s. 92 of the Constitution Act, 1867;

(d) the releases are invalid under Quebec rules of public order; and because

(e) the prevailing jurisprudence supports these conclusions.

[42] I would not give effect to any of these submissions.

Interpretation, "gap filling" and inherent jurisdiction

[43] On a proper interpretation, in my view, the CCAA permits the inclusion of third-party releases in a plan of compromise or arrangement to be sanctioned by the court where those releases are reasonably connected to the proposed restructuring. I am led to this conclusion by a combination of

(a) the open-ended, flexible character of the CCAA itself, (b) the broad nature of the term "compromise or arrangement" as used in the Act, and (c) the express statutory effect of the "double-majority" vote and court sanction which render the plan binding on all creditors, including [page525] those unwilling to accept certain portions of it. The first of these signals a flexible approach to the application of the Act in new and evolving situations, an active judicial role in its application and interpretation, and a liberal approach to that interpretation. The second provides the entre to negotiations between the parties affected in the restructuring and furnishes them with the ability to apply the broad scope of their ingenuity in fashioning the proposal. The latter afford necessary protection to unwilling creditors who may be deprived of certain of their civil and property rights as a result of the process.

[44] The CCAA is skeletal in nature. It does not contain a comprehensive code that lays out all that is permitted or barred. Judges must therefore play a role in fleshing out the details of the statutory scheme. The scope of the Act and the powers of the court under it are not limitless. It is beyond controversy, however, that the CCAA is remedial legislation to be liberally construed in accordance with the modern purposive approach to statutory interpretation. It is designed to be a flexible instrument and it is that very flexibility which gives the Act its efficacy: Canadian Red Cross Society (Re), [1998] O.J. No. 3306, 5 C.B.R. (4th) 299 (Gen. Div.). As Farley J. noted in Dylex Ltd. (Re), [1995] O.J. No. 595, 31 C.B.R. (3d) 106 (Gen. Div.), at p. 111 C.B.R., "[t]he history of CCAA law has been an evolution of judicial interpretation".

[45] Much has been said, however, about the "evolution of judicial interpretation" and there is some controversy over both the source and scope of that authority. Is the source of the court's authority statutory, discerned solely through application of the principles of statutory interpretation, for example? Or does it rest in the court's ability to "fill in the gaps" in legislation? Or in the court's inherent jurisdiction?

[46] These issues have recently been canvassed by the

Honourable Georgina R. Jackson and Dr. Janis Sarra in their publication "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters", [See Note 2 below] and there was considerable argument on these issues before the application judge and before us. While I generally agree with the authors' suggestion that the courts should adopt a hierarchical approach in their resort to these interpretive tools -- statutory interpretation, gap-filling, discretion and inherent jurisdiction [page526] -- it is not necessary, in my view, to go beyond the general principles of statutory interpretation to resolve the issues on this appeal. Because I am satisfied that it is implicit in the language of the CCAA itself that the court has authority to sanction plans incorporating third-party releases that are reasonably related to the proposed restructuring, there is no "gap-filling" to be done and no need to fall back on inherent jurisdiction. In this respect, I take a somewhat different approach than the application judge did.

[47] The Supreme Court of Canada has affirmed generally -- and in the insolvency context particularly -- that remedial statutes are to be interpreted liberally and in accordance with Professor Driedger's modern principle of statutory interpretation. Driedger advocated that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": Rizzo & Rizzo Shoes Ltd. (Re) (1998), 36 O.R. (3d) 418, [1998] 1 S.C.R. 27, [1998] S.C.J. No. 2, at para. 21, quoting E.A. Driedger, Construction of Statutes, 2nd ed. (Toronto: Butterworths, 1983); Bell ExpressVu Ltd. Partnership v. Rex, [2002] 2 S.C.R. 559, [2002] S.C.J. No. 43, at para. 26.

[48] More broadly, I believe that the proper approach to the judicial interpretation and application of statutes -- particularly those like the CCAA that are skeletal in nature -- is succinctly and accurately summarized by Jackson and Sarra in their recent article, supra, at p. 56:

The exercise of a statutory authority requires the statute to

be construed. The plain meaning or textualist approach has given way to a search for the object and goals of the statute and the intentionalist approach. This latter approach makes use of the purposive approach and the mischief rule, including its codification under interpretation statutes that every enactment is deemed remedial, and is to be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects. This latter approach advocates reading the statute as a whole and being mindful of Driedger's "one principle", that the words of the Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. It is important that courts first interpret the statute before them and exercise their authority pursuant to the statute, before reaching for other tools in the judicial toolbox. Statutory interpretation using the principles articulated above leaves room for gap-filling in the common law provinces and a consideration of purpose in Qubec as a manifestation of the judge's overall task of statutory interpretation. Finally, the jurisprudence in relation to statutory interpretation demonstrates the fluidity inherent in the judge's task in seeking the objects of the statute and the intention of the legislature.

[49] I adopt these principles. [page527]

[50] The remedial purpose of the CCAA -- as its title affirms -- is to facilitate compromises or arrangements between an insolvent debtor company and its creditors. In Chef Ready Foods Ltd. v. Hongkong Bank of Canada, [1990] B.C.J. No. 2384, 4 C.B.R. (3d) 311 (C.A.), at p. 318 C.B.R., Gibbs J.A. summarized very concisely the purpose, object and scheme of the Act:

Almost inevitably, liquidation destroyed the shareholders' investment, yielded little by way of recovery to the creditors, and exacerbated the social evil of devastating levels of unemployment. The government of the day sought, through the C.C.A.A., to create a regime whereby the principals of the company and the creditors could be brought together under the supervision of the court to attempt a

reorganization or compromise or arrangement under which the company could continue in business.

[51] The CCAA was enacted in 1933 and was necessary -- as the then secretary of state noted in introducing the Bill on First Reading-- "because of the prevailing commercial and industrial depression" and the need to alleviate the effects of business bankruptcies in that context: see the statement of the Hon. C.H. Cahan, Secretary of State, House of Commons Debates (Hansard) (April 20, 1933) at 4091. One of the greatest effects of that Depression was what Gibbs J.A. described as "the social evil of devastating levels of unemployment". Since then, courts have recognized that the Act has a broader dimension than simply the direct relations between the debtor company and its creditors and that this broader public dimension must be weighed in the balance together with the interests of those most directly affected: see, for example, Elan Corp. v. Comiskey (1990), 1 O.R. (3d) 289, [1990] O.J. No. 2180 (C.A.), per Doherty J.A. in dissent; Skydome Corp. v. Ontario, [1998] O.J. No. 6548, 16 C.B.R. (4th) 125 (Gen. Div.); Anvil Range Mining Corp. (Re) (1998), 7 C.B.R. (4th) 51 (Ont. Gen. Div.).

[52] In this respect, I agree with the following statement of Doherty J.A. in Elan, supra, at pp. 306-307 O.R.:

> [T]he Act was designed to serve a "broad constituency of investors, creditors and employees". [See Note 3 below] Because of that "broad constituency" the court must, when considering applications brought under the Act, have regard not only to the individuals and organizations directly affected by the application, but also to the wider public interest.

(Emphasis added)

Application of the principles of interpretation

[53] An interpretation of the CCAA that recognizes its broader socio-economic purposes and objects is apt in this case. As the [page528] application judge pointed out, the restructuring underpins the financial viability of the Canadian

ABCP market itself.

[54] The appellants argue that the application judge erred in taking this approach and in treating the Plan and the proceedings as an attempt to restructure a financial market (the ABCP market) rather than simply the affairs between the debtor corporations who caused the ABCP Notes to be issued and their creditors. The Act is designed, they say, only to effect reorganizations between a corporate debtor and its creditors and not to attempt to restructure entire marketplaces.

[55] This perspective is flawed in at least two respects, however, in my opinion. First, it reflects a view of the purpose and objects of the CCAA that is too narrow. Secondly, it overlooks the reality of the ABCP marketplace and the context of the restructuring in question here. It may be true that, in their capacity as ABCP Dealers, the releasee financial institutions are "third-parties" to the restructuring in the sense that they are not creditors of the debtor corporations. However, in their capacities as Asset Providers and Liquidity Providers, they are not only creditors but they are prior secured creditors to the Noteholders. Furthermore -- as the application judge found -- in these latter capacities they are making significant contributions to the restructuring by "foregoing immediate rights to assets and . . . providing real and tangible input for the preservation and enhancement of the Notes" (para. 76). In this context, therefore, the application judge's remark, at para. 50, that the restructuring "involves the commitment and participation of all parties" in the ABCP market makes sense, as do his earlier comments, at paras. 48-49:

> Given the nature of the ABCP market and all of its participants, it is more appropriate to consider all Noteholders as claimants and the object of the Plan to restore liquidity to the assets being the Notes themselves. The restoration of the liquidity of the market necessitates the participation (including more tangible contribution by many) of all Noteholders.
>
> In these circumstances, it is unduly technical to classify

the Issuer Trustees as debtors and the claims of the Noteholders as between themselves and others as being those of third party creditors, although I recognize that the restructuring structure of the CCAA requires the corporations as the vehicles for restructuring.

(Emphasis added)

[56] The application judge did observe that "[t]he insolvency is of the ABCP market itself, the restructuring is that of the market for such paper . . ." (para. 50). He did so, however, to point out the uniqueness of the Plan before him and its industry-wide significance and not to suggest that he need have no regard to the provisions of the CCAA permitting a restructuring as between debtor [page529] and creditors. His focus was on the effect of the restructuring, a perfectly permissible perspective given the broad purpose and objects of the Act. This is apparent from his later references. For example, in balancing the arguments against approving releases that might include aspects of fraud, he responded that "what is at issue is a liquidity crisis that affects the ABCP market in Canada" (para. 125). In addition, in his reasoning on the fair-and-reasonable issue, he stated, at para. 142: "Apart from the Plan itself, there is a need to restore confidence in the financial system in Canada and this Plan is a legitimate use of the CCAA to accomplish that goal".

[57] I agree. I see no error on the part of the application judge in approaching the fairness assessment or the interpretation issue with these considerations in mind. They provide the context in which the purpose, objects and scheme of the CCAA are to be considered.

The statutory wording

[58] Keeping in mind the interpretive principles outlined above, I turn now to a consideration of the provisions of the CCAA. Where in the words of the statute is the court clothed with authority to approve a plan incorporating a requirement for third-party releases? As summarized earlier, the answer to that question, in my view, is to be found in:

(a) the skeletal nature of the CCAA;

(b) Parliament's reliance upon the broad notions of "compromise" and "arrangement" to establish the framework within which the parties may work to put forward a restructuring plan; and in

(c) the creation of the statutory mechanism binding all creditors in classes to the compromise or arrangement once it has surpassed the high "double majority" voting threshold and obtained court sanction as "fair and reasonable".

Therein lies the expression of Parliament's intention to permit the parties to negotiate and vote on, and the court to sanction, third-party releases relating to a restructuring.

[59] Sections 4 and 6 of the CCAA state:

> 4. Where a compromise or an arrangement is proposed between a debtor company and its unsecured creditors or any class of them, the court may, on the application in a summary way of the company, of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs. [page530]
>
> . . . . .
>
> 6. Where a majority in number representing two-thirds in value of the creditors, or class of creditors, as the case may be, present and voting either in person or by proxy at the meeting or meetings thereof respectively held pursuant to sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court, and if so sanctioned is binding
>
> (a) on all the creditors or the class of creditors, as the case may be, and on any trustee for any such class of creditors, whether secured or unsecured, as the case may be, and on the company; and
>
> (b) in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the Bankruptcy and

> Insolvency Act or is in the course of being wound up under the Winding-up and Restructuring Act, on the trustee in bankruptcy or liquidator and contributories of the company.

Compromise or arrangement

[60] While there may be little practical distinction between "compromise" and "arrangement" in many respects, the two are not necessarily the same. "Arrangement" is broader than "compromise" and would appear to include any scheme for reorganizing the affairs of the debtor: L.W. Houlden and C.H. Morawetz, Bankruptcy and Insolvency Law of Canada, looseleaf, 3rd ed., vol. 4 (Scarborough, Ont.: Carswell, 1992) at 10A-12.2, N10. It has been said to be "a very wide and indefinite [word]": Reference re Timber Regulations, [1935] A.C. 184, [1935] 2 D.L.R. 1 (P.C.), at p. 197 A.C., affg [1933] S.C.R. 616, [1933] S.C.J. No. 53. See also Guardian Assurance Co. (Re), [1917] 1 Ch. 431 (C.A.), at pp. 448, 450 Ch.; T&N Ltd. and Others (No. 3) (Re), [2007] 1 All E.R. 851, [2006] E.W.H.C. 1447 (Ch.).

[61] The CCAA is a sketch, an outline, a supporting framework for the resolution of corporate insolvencies in the public interest. Parliament wisely avoided attempting to anticipate the myriad of business deals that could evolve from the fertile and creative minds of negotiators restructuring their financial affairs. It left the shape and details of those deals to be worked out within the framework of the comprehensive and flexible concepts of a "compromise" and "arrangement". I see no reason why a release in favour of a third party, negotiated as part of a package between a debtor and creditor and reasonably relating to the proposed restructuring cannot fall within that framework.

[62] A proposal under the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 (the "BIA") is a contract: Employers' Liability Assurance Corp. v. Ideal Petroleum (1959) Ltd., [1978] 1 S.C.R. 230, [1976] S.C.J. No. 114, at p. 239 S.C.R.; [page531] Society of Composers, Authors and Music Publishers of Canada v. Armitage (2000), 50 O.R. (3d) 688,

[2000] O.J. No. 3993 (C.A.), at para. 11. In my view, a compromise or arrangement under the CCAA is directly analogous to a proposal for these purposes and, therefore, is to be treated as a contract between the debtor and its creditors. Consequently, parties are entitled to put anything into such a plan that could lawfully be incorporated into any contract. See Air Canada (Re), [2004] O.J. No. 1909, 2 C.B.R. (5th) 4 (S.C.J.), at para. 6; Olympia & York Developments Ltd. (Re) (1993), 12 O.R. (3d) 500, [1993] O.J. No. 545 (Gen. Div.), at p. 518 O.R.

[63] There is nothing to prevent a debtor and a creditor from including in a contract between them a term providing that the creditor release a third party. The term is binding as between the debtor and creditor. In the CCAA context, therefore, a plan of compromise or arrangement may propose that creditors agree to compromise claims against the debtor and to release third parties, just as any debtor and creditor might agree to such a term in a contract between them. Once the statutory mechanism regarding voter approval and court sanctioning has been complied with, the plan -- including the provision for releases -- becomes binding on all creditors (including the dissenting minority).

[64] T&N Ltd. and Others (Re), supra, is instructive in this regard. It is a rare example of a court focusing on and examining the meaning and breadth of the term "arrangement". T&N and its associated companies were engaged in the manufacture, distribution and sale of asbestos-containing products. They became the subject of many claims by former employees, who had been exposed to asbestos dust in the course of their employment, and their dependents. The T&N companies applied for protection under s. 425 of the U.K. Companies Act 1985, a provision virtually identical to the scheme of the CCAA -- including the concepts of compromise or arrangement. [See Note 4 below]

[65] T&N carried employers' liability insurance. However, the employers' liability insurers (the "EL insurers") denied coverage. This issue was litigated and ultimately resolved through the establishment of a multi-million pound fund against which the employees and their dependants (the EL claimants)

would assert their claims. In return, T&N's former employees and dependants (the EL claimants) agreed to forego any further claims against the EL insurers. This settlement was incorporated into the plan of [page532] compromise and arrangement between the T&N companies and the EL claimants that was voted on and put forward for court sanction.

[66] Certain creditors argued that the court could not sanction the plan because it did not constitute a "compromise or arrangement" between T&N and the EL claimants since it did not purport to affect rights as between them but only the EL claimants' rights against the EL insurers. The court rejected this argument. Richards J. adopted previous jurisprudence -- cited earlier in these reasons -- to the effect that the word "arrangement" has a very broad meaning and that, while both a compromise and an arrangement involve some "give and take", an arrangement need not involve a compromise or be confined to a case of dispute or difficulty (paras. 46-51). He referred to what would be the equivalent of a solvent arrangement under Canadian corporate legislation as an example. [See Note 5 below] Finally, he pointed out that the compromised rights of the EL claimants against the EL insurers were not unconnected with the EL claimants' rights against the T&N companies; the scheme of arrangement involving the EL insurers was "an integral part of a single proposal affecting all the parties" (para. 52). He concluded his reasoning with these observations (para. 53):

> In my judgment it is not a necessary element of an arrangement for the purposes of s 425 of the 1985 Act that it should alter the rights existing between the company and the creditors or members with whom it is made. No doubt in most cases it will alter those rights. But, provided that the context and content of the scheme are such as properly to constitute an arrangement between the company and the members or creditors concerned, it will fall within s 425. It is ... neither necessary nor desirable to attempt a definition of arrangement. The legislature has not done so. To insist on an alteration of rights, or a termination of rights as in the case of schemes to effect takeovers or mergers, is to impose a restriction which is neither warranted by the statutory language nor justified by the courts' approach over many

years to give the term its widest meaning. Nor is an arrangement necessarily outside the section, because its effect is to alter the rights of creditors against another party or because such alteration could be achieved by a scheme of arrangement with that party.
(Emphasis added)

[67] I find Richard J.'s analysis helpful and persuasive. In effect, the claimants in T&N were being asked to release their claims against the EL insurers in exchange for a call on the fund. Here, the appellants are being required to release their claims against certain financial third parties in exchange for what is anticipated to be an improved position for all ABCP Noteholders, stemming from the contributions the financial [page533] third parties are making to the ABCP restructuring. The situations are quite comparable.

The binding mechanism

[68] Parliament's reliance on the expansive terms "compromise" or "arrangement" does not stand alone, however. Effective insolvency restructurings would not be possible without a statutory mechanism to bind an unwilling minority of creditors. Unanimity is frequently impossible in such situations. But the minority must be protected too. Parliament's solution to this quandary was to permit a wide range of proposals to be negotiated and put forward (the compromise or arrangement) and to bind all creditors by class to the terms of the plan, but to do so only where the proposal can gain the support of the requisite "double majority" of votes [See Note 6 below] and obtain the sanction of the court on the basis that it is fair and reasonable. In this way, the scheme of the CCAA supports the intention of Parliament to encourage a wide variety of solutions to corporate insolvencies without unjustifiably overriding the rights of dissenting creditors.

The required nexus

[69] In keeping with this scheme and purpose, I do not suggest that any and all releases between creditors of the debtor company seeking to restructure and third parties may be

made the subject of a compromise or arrangement between the debtor and its creditors. Nor do I think the fact that the releases may be "necessary" in the sense that the third parties or the debtor may refuse to proceed without them, of itself, advances the argument in favour of finding jurisdiction (although it may well be relevant in terms of the fairness and reasonableness analysis).

[70] The release of the claim in question must be justified as part of the compromise or arrangement between the debtor and its creditors. In short, there must be a reasonable connection between the third-party claim being compromised in the plan and the restructuring achieved by the plan to warrant inclusion of the third-party release in the plan. This nexus exists here, in my view.

[71] In the course of his reasons, the application judge made the following findings, all of which are amply supported on the record:

(a) The parties to be released are necessary and essential to the restructuring of the debtor; [page534]

(b) the claims to be released are rationally related to the purpose of the Plan and necessary for it;

(c) the Plan cannot succeed without the releases;

(d) the parties who are to have claims against them released are contributing in a tangible and realistic way to the Plan; and

(e) the Plan will benefit not only the debtor companies but creditor Noteholders generally.

[72] Here, then -- as was the case in T&N -- there is a close connection between the claims being released and the restructuring proposal. The tort claims arise out of the sale and distribution of the ABCP Notes and their collapse in value, as do the contractual claims of the creditors against the debtor companies. The purpose of the restructuring is to stabilize and shore up the value of those notes in the long run. The third parties being released are making separate contributions to enable those results to materialize. Those contributions are identified earlier, at para. 31 of these reasons. The application judge found that the claims being

released are not independent of or unrelated to the claims that the Noteholders have against the debtor companies; they are closely connected to the value of the ABCP Notes and are required for the Plan to succeed. At paras. 76-77, he said:

> I do not consider that the Plan in this case involves a change in relationship among creditors "that does not directly involve the Company." Those who support the Plan and are to be released are "directly involved in the Company" in the sense that many are foregoing immediate rights to assets and are providing real and tangible input for the preservation and enhancement of the Notes. It would be unduly restrictive to suggest that the moving parties' claims against released parties do not involve the Company, since the claims are directly related to the value of the Notes. The value of the Notes is in this case the value of the Company.
>
> This Plan, as it deals with releases, doesn't change the relationship of the creditors apart from involving the Company and its Notes.

[73] I am satisfied that the wording of the CCAA -- construed in light of the purpose, objects and scheme of the Act and in accordance with the modern principles of statutory interpretation -- supports the court's jurisdiction and authority to sanction the Plan proposed here, including the contested third-party releases contained in it.

The jurisprudence

[74] Third-party releases have become a frequent feature in Canadian restructurings since the decision of the Alberta Court of Queen's [page535] Bench in Canadian Airlines Corp. (Re), [2000] A.J. No. 771, 265 A.R. 201 (Q.B.), leave to appeal refused by Resurgence Asset Management LLC v. Canadian Airlines Corp., [2000] A.J. No. 1028, 266 A.R. 131 (C.A.), and [2001] S.C.C.A. No. 60, 293 A.R. 351. In Muscletech Research and Development Inc. (Re), [2006] O.J. No. 4087, 25 C.B.R. (5th) 231 (S.C.J.), Justice Ground remarked (para. 8):

> [It] is not uncommon in CCAA proceedings, in the context of a plan of compromise and arrangement, to compromise claims against the Applicants and other parties against whom such claims or related claims are made.

[75] We were referred to at least a dozen court-approved CCAA plans from across the country that included broad third-party releases. With the exception of Canadian Airlines (Re), however, the releases in those restructurings -- including Muscletech -- were not opposed. The appellants argue that those cases are wrongly decided because the court simply does not have the authority to approve such releases.

[76] In Canadian Airlines (Re) the releases in question were opposed, however. Paperny J. (as she then was) concluded the court had jurisdiction to approve them and her decision is said to be the wellspring of the trend towards third-party releases referred to above. Based on the foregoing analysis, I agree with her conclusion although for reasons that differ from those cited by her.

[77] Justice Paperny began her analysis of the release issue with the observation, at para. 87, that "[p]rior to 1997, the CCAA did not provide for compromises of claims against anyone other than the petitioning company". It will be apparent from the analysis in these reasons that I do not accept that premise, notwithstanding the decision of the Quebec Court of Appeal in Michaud v. Steinberg, [See Note 7 below] of which her comment may have been reflective. Paperny J.'s reference to 1997 was a reference to the amendments of that year adding s. 5.1 to the CCAA, which provides for limited releases in favour of directors. Given the limited scope of s. 5.1, Justice Paperny was thus faced with the argument -- dealt with later in these reasons -- that Parliament must not have intended to extend the authority to approve third-party releases beyond the scope of this section. She chose to address this contention by concluding that, although the amendments "[did] not authorize a release of claims against third parties other than directors, [they did] not prohibit such releases either" (para. 92). [page536]

[78] Respectfully, I would not adopt the interpretive

principle that the CCAA permits releases because it does not expressly prohibit them. Rather, as I explain in these reasons, I believe the open-ended CCAA permits third-party releases that are reasonably related to the restructuring at issue because they are encompassed in the comprehensive terms "compromise" and "arrangement" and because of the double-voting majority and court-sanctioning statutory mechanism that makes them binding on unwilling creditors.

[79] The appellants rely on a number of authorities, which they submit support the proposition that the CCAA may not be used to compromise claims as between anyone other than the debtor company and its creditors. Principal amongst these are Michaud v. Steinberg, supra; NBD Bank, Canada v. Dofasco Inc. (1999), 46 O.R. (3d) 514, [1999] O.J. No. 4749 (C.A.); Pacific Coastal Airlines Ltd. v. Air Canada, [2001] B.C.J. No. 2580, 19 B.L.R. (3d) 286 (S.C.); and Stelco Inc. (Re) (2005), 78 O.R. (3d) 241, [2005] O.J. No. 4883 (C.A.) ("Stelco I"). I do not think these cases assist the appellants, however. With the exception of Steinberg, they do not involve third-party claims that were reasonably connected to the restructuring. As I shall explain, it is my opinion that Steinberg does not express a correct view of the law, and I decline to follow it.

[80] In Pacific Coastal Airlines, Tysoe J. made the following comment, at para. 24:

> [The purpose of the CCAA proceeding] is not to deal with disputes between a creditor of a company and a third party, even if the company was also involved in the subject matter of the dispute. While issues between the debtor company and non-creditors are sometimes dealt with in CCAA proceedings, it is not a proper use of a CCAA proceeding to determine disputes between parties other than the debtor company.

[81] This statement must be understood in its context, however. Pacific Coastal Airlines had been a regional carrier for Canadian Airlines prior to the CCAA reorganization of the latter in 2000. In the action in question, it was seeking to assert separate tort claims against Air Canada for contractual interference and inducing breach of contract in relation to

certain rights it had to the use of Canadian's flight designator code prior to the CCAA proceeding. Air Canada sought to have the action dismissed on grounds of res judicata or issue estoppel because of the CCAA proceeding. Tysoe J. rejected the argument.

[82] The facts in Pacific Coastal are not analogous to the circumstances of this case, however. There is no suggestion that a resolution of Pacific Coastal's separate tort claim against Air Canada was in any way connected to the Canadian Airlines restructuring, even though Canadian -- at a contractual level -- may have had some involvement with the particular dispute. [page537] Here, however, the disputes that are the subject matter of the impugned releases are not simply "disputes between parties other than the debtor company". They are closely connected to the disputes being resolved between the debtor companies and their creditors and to the restructuring itself.

[83] Nor is the decision of this court in the NBD Bank case dispositive. It arose out of the financial collapse of Algoma Steel, a wholly owned subsidiary of Dofasco. The bank had advanced funds to Algoma allegedly on the strength of misrepresentations by Algoma's Vice-President, James Melville. The plan of compromise and arrangement that was sanctioned by Farley J. in the Algoma CCAA restructuring contained a clause releasing Algoma from all claims creditors "may have had against Algoma or its directors, officers, employees and advisors". Mr. Melville was found liable for negligent misrepresentation in a subsequent action by the bank. On appeal, he argued that since the bank was barred from suing Algoma for misrepresentation by its officers, permitting it to pursue the same cause of action against him personally would subvert the CCAA process -- in short, he was personally protected by the CCAA release.

[84] Rosenberg J.A., writing for this court, rejected this argument. The appellants here rely particularly upon his following observations, at paras. 53-54:

> In my view, the appellant has not demonstrated that

allowing the respondent to pursue its claim against him would undermine or subvert the purposes of the Act. As this court noted in Elan Corp. v. Comiskey (1990), 1 O.R. (3d) 289 at p. 297, . . . the CCAA is remedial legislation "intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both". It is a means of avoiding a liquidation that may yield little for the creditors, especially unsecured creditors like the respondent, and the debtor company shareholders. However, the appellant has not shown that allowing a creditor to continue an action against an officer for negligent misrepresentation would erode the effectiveness of the Act.

In fact, to refuse on policy grounds to impose liability on an officer of the corporation for negligent misrepresentation would contradict the policy of Parliament as demonstrated in recent amendments to the CCAA and the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3. Those Acts now contemplate that an arrangement or proposal may include a term for compromise of certain types of claims against directors of the company except claims that "are based on allegations of misrepresentations made by directors". L.W. Houlden and C.H. Morawetz, the editors of The 2000 Annotated Bankruptcy and Insolvency Act (Toronto: Carswell, 1999) at p. 192 are of the view that the policy behind the provision is to encourage directors of an insolvent corporation to remain in office so that the affairs of the corporation can be reorganized. I can see no similar policy interest in barring an action against an officer of the company who, prior to the insolvency, has misrepresented the financial affairs of the corporation to its creditors. It may be necessary to permit the compromise of claims against the debtor corporation, otherwise it may [page538] not be possible to successfully reorganize the corporation. The same considerations do not apply to individual officers. Rather, it would seem to me that it would be contrary to good policy to immunize officers from the consequences of their negligent statements which might otherwise be made in anticipation of being forgiven under a subsequent corporate proposal or arrangement. (Footnote omitted)

[85] Once again, this statement must be assessed in context. Whether Justice Farley had the authority in the earlier Algoma CCAA proceedings to sanction a plan that included third-party releases was not under consideration at all. What the court was determining in NBD Bank was whether the release extended by its terms to protect a third party. In fact, on its face, it does not appear to do so. Justice Rosenberg concluded only that not allowing Mr. Melville to rely upon the release did not subvert the purpose of the CCAA. As the application judge here observed, "there is little factual similarity in NBD to the facts now before the Court" (para. 71). Contrary to the facts of this case, in NBD Bank the creditors had not agreed to grant a release to officers; they had not voted on such a release and the court had not assessed the fairness and reasonableness of such a release as a term of a complex arrangement involving significant contributions by the beneficiaries of the release -- as is the situation here. Thus, NBD Bank is of little assistance in determining whether the court has authority to sanction a plan that calls for third-party releases.

[86] The appellants also rely upon the decision of this court in Stelco I. There, the court was dealing with the scope of the CCAA in connection with a dispute over what were called the "Turnover Payments". Under an inter-creditor agreement, one group of creditors had subordinated their rights to another group and agreed to hold in trust and "turn over" any proceeds received from Stelco until the senior group was paid in full. On a disputed classification motion, the Subordinated Debt Holders argued that they should be in a separate class from the Senior Debt Holders. Farley J. refused to make such an order in the court below, stating:

> [Sections] 4, 5 and 6 [of the CCAA] talk of compromises or arrangements between a company and its creditors. There is no mention of this extending by statute to encompass a change of relationship among the creditors vis--vis the creditors themselves and not directly involving the company.

(Citations omitted; emphasis added)
See Stelco Inc. (Re), [2005] O.J. No. 4814, 15 C.B.R. (5th) 297 (S.C.J.), at para. 7.

[87] This court upheld that decision. The legal relationship between each group of creditors and Stelco was the same, albeit there were inter-creditor differences, and creditors were to be classified in accordance with their legal rights. In addition, the [page539] need for timely classification and voting decisions in the CCAA process militated against enmeshing the classification process in the vagaries of inter-corporate disputes. In short, the issues before the court were quite different from those raised on this appeal.

[88] Indeed, the Stelco plan, as sanctioned, included third-party releases (albeit uncontested ones). This court subsequently dealt with the same inter-creditor agreement on an appeal where the Subordinated Debt Holders argued that the inter-creditor subordination provisions were beyond the reach of the CCAA and, therefore, that they were entitled to a separate civil action to determine their rights under the agreement: Stelco Inc. (Re), [2006] O.J. No. 1996, 21 C.B.R. (5th) 157 (C.A.) ("Stelco II"). The court rejected that argument and held that where the creditors' rights amongst themselves were sufficiently related to the debtor and its plan, they were properly brought within the scope of the CCAA plan. The court said (para. 11):

> In [Stelco I] -- the classification case -- the court observed that it is not a proper use of a CCAA proceeding to determine disputes between parties other than the debtor company . . . [H]owever, the present case is not simply an inter-creditor dispute that does not involve the debtor company; it is a dispute that is inextricably connected to the restructuring process.

(Emphasis added)

[89] The approach I would take to the disposition of this appeal is consistent with that view. As I have noted, the third-party releases here are very closely connected to the ABCP restructuring process.

[90] Some of the appellants -- particularly those represented by Mr. Woods -- rely heavily upon the decision of the Quebec

Court of Appeal in Michaud v. Steinberg, supra. They say that it is determinative of the release issue. In Steinberg, the court held that the CCAA, as worded at the time, did not permit the release of directors of the debtor corporation and that third-party releases were not within the purview of the Act. Deschamps J.A. (as she then was) said (paras. 42, 54 and 58 -- English translation):

> Even if one can understand the extreme pressure weighing on the creditors and the respondent at the time of the sanctioning, a plan of arrangement is not the appropriate forum to settle disputes other than the claims that are the subject of the arrangement. In other words, one cannot, under the pretext of an absence of formal directives in the Act, transform an arrangement into a potpourri.
>
> . . . . .
>
> The Act offers the respondent a way to arrive at a compromise with is creditors. It does not go so far as to offer an umbrella to all the persons within its orbit by permitting them to shelter themselves from any recourse.
>
> . . . . . [page540]
>
> The [CCAA] and the case law clearly do not permit extending the application of an arrangement to persons other than the respondent and its creditors and, consequently, the plan should not have been sanctioned as is [that is, including the releases of the directors].

[91] Justices Vallerand and Delisle, in separate judgments, agreed. Justice Vallerand summarized his view of the consequences of extending the scope of the CCAA to third-party releases in this fashion (para. 7):

> In short, the Act will have become the Companies' and Their Officers and Employees Creditors Arrangement Act -- an awful mess -- and likely not attain its purpose, which is to enable the company to survive in the face of its creditors and through their will, and not in the face of the creditors of its officers. This is why I feel, just like my colleague, that such a clause is contrary to the Act's mode of

> operation, contrary to its purposes and, for this reason, is to be banned.

[92] Justice Delisle, on the other hand, appears to have rejected the releases because of their broad nature -- they released directors from all claims, including those that were altogether unrelated to their corporate duties with the debtor company -- rather than because of a lack of authority to sanction under the Act. Indeed, he seems to have recognized the wide range of circumstances that could be included within the term "compromise or arrangement". He is the only one who addressed that term. At para., 90 he said:

> The CCAA is drafted in general terms. It does not specify, among other things, what must be understood by "compromise or arrangement". However, it may be inferred from the purpose of this [A]ct that these terms encompass all that should enable the person who has recourse to it to fully dispose of his debts, both those that exist on the date when he has recourse to the statute and those contingent on the insolvency in which he finds himself . . .

(Emphasis added)

[93] The decision of the court did not reflect a view that the terms of a compromise or arrangement should "encompass all that should enable the person who has recourse to [the Act] to dispose of his debts ... and those contingent on the insolvency in which he finds himself", however. On occasion, such an outlook might embrace third parties other than the debtor and its creditors in order to make the arrangement work. Nor would it be surprising that, in such circumstances, the third parties might seek the protection of releases, or that the debtor might do so on their behalf. Thus, the perspective adopted by the majority in Steinberg, in my view, is too narrow, having regard to the language, purpose and objects of the CCAA and the intention of Parliament. They made no attempt to consider and explain why a compromise or arrangement could not include third-party releases. In addition, the decision [page541] appears to have been based, at least partly, on a rejection of the use of contract-law concepts in analyzing the Act -- an approach inconsistent with the jurisprudence referred to above.

[94] Finally, the majority in Steinberg seems to have proceeded on the basis that the CCAA cannot interfere with civil or property rights under Quebec law. Mr. Woods advanced this argument before this court in his factum, but did not press it in oral argument. Indeed, he conceded that if the Act encompasses the authority to sanction a plan containing third-party releases -- as I have concluded it does -- the provisions of the CCAA, as valid federal insolvency legislation, are paramount over provincial legislation. I shall return to the constitutional issues raised by the appellants later in these reasons.

[95] Accordingly, to the extent Steinberg stands for the proposition that the court does not have authority under the CCAA to sanction a plan that incorporates third-party releases, I do not believe it to be a correct statement of the law and I respectfully decline to follow it. The modern approach to interpretation of the Act in accordance with its nature and purpose militates against a narrow interpretation and towards one that facilitates and encourages compromises and arrangements. Had the majority in Steinberg considered the broad nature of the terms "compromise" and "arrangement" and the jurisprudence I have referred to above, they might well have come to a different conclusion.

The 1997 amendments

[96] Steinberg led to amendments to the CCAA, however. In 1997, s. 5.1 was added, dealing specifically with releases pertaining to directors of the debtor company. It states:

> 5.1(1) A compromise or arrangement made in respect of a debtor company may include in its terms provision for the compromise of claims against directors of the company that arose before the commencement of proceedings under this Act and that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations.

Exception

(2) A provision for the compromise of claims against directors may not include claims that

(a) relate to contractual rights of one or more creditors; or

(b) are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.

Powers of court

(3) The court may declare that a claim against directors shall not be compromised if it is satisfied that the compromise would not be fair and reasonable in the circumstances. [page542]

Resignation or removal of directors

(4) Where all of the directors have resigned or have been removed by the shareholders without replacement, any person who manages or supervises the management of the business and affairs of the debtor company shall be deemed to be a director for the purposes of this section.

[97] Perhaps the appellants' strongest argument is that these amendments confirm a prior lack of authority in the court to sanction a plan including third-party releases. If the power existed, why would Parliament feel it necessary to add an amendment specifically permitting such releases (subject to the exceptions indicated) in favour of directors? Expressio unius est exclusio alterius, is the Latin maxim sometimes relied on to articulate the principle of interpretation implied in that question: to express or include one thing implies the exclusion of the other.

[98] The maxim is not helpful in these circumstances, however. The reality is that there may be another explanation why Parliament acted as it did. As one commentator has noted: [See Note 8 below]

Far from being a rule, [the maxim expressio unius] is not

even lexicographically accurate, because it is simply not true, generally, that the mere express conferral of a right or privilege in one kind of situation implies the denial of the equivalent right or privilege in other kinds. Sometimes it does and sometimes its does not, and whether it does or does not depends on the particular circumstances of context. Without contextual support, therefore there is not even a mild presumption here. Accordingly, the maxim is at best a description, after the fact, of what the court has discovered from context.

[99] As I have said, the 1997 amendments to the CCAA providing for releases in favour of directors of debtor companies in limited circumstances were a response to the decision of the Quebec Court of Appeal in Steinberg. A similar amendment was made with respect to proposals in the BIA at the same time. The rationale behind these amendments was to encourage directors of an insolvent company to remain in office during a restructuring rather than resign. The assumption was that by remaining in office the directors would provide some stability while the affairs of the company were being reorganized: see Houlden and Morawetz, vol. 1, supra, at 2-144, E11A; Dans l'affaire de la proposition de: Le Royal Penfield inc. et Groupe Thibault Van Houtte et Associs lte), [2003] J.Q. no. 9223, [2003] R.J.Q. 2157 (C.S.), at paras. 44-46.

[100] Parliament thus had a particular focus and a particular purpose in enacting the 1997 amendments to the CCAA and the [page543] BIA. While there is some merit in the appellants' argument on this point, at the end of the day I do not accept that Parliament intended to signal by its enactment of s. 5.1 that it was depriving the court of authority to sanction plans of compromise or arrangement in all circumstances where they incorporate third-party releases in favour of anyone other than the debtor's directors. For the reasons articulated above, I am satisfied that the court does have the authority to do so. Whether it sanctions the plan is a matter for the fairness hearing.

The deprivation of proprietary rights

[101] Mr. Shapray very effectively led the appellants' argument that legislation must not be construed so as to interfere with or prejudice established contractual or proprietary rights -- including the right to bring an action -- in the absence of a clear indication of legislative intention to that effect: Halsbury's Laws of England, 4th ed. reissue, vol. 44(1) (London: Butterworths, 1995) at paras. 1438, 1464 and 1467; Driedger, 2nd ed., supra, at 183; E.A. Driedger and Ruth Sullivan, Sullivan and Driedger on the Construction of Statutes, 4th ed., (Markham, Ont.: Butterworths, 2002) at 399. I accept the importance of this principle. For the reasons I have explained, however, I am satisfied that Parliament's intention to clothe the court with authority to consider and sanction a plan that contains third-party releases is expressed with sufficient clarity in the "compromise or arrangement" language of the CCAA coupled with the statutory voting and sanctioning mechanism making the provisions of the plan binding on all creditors. This is not a situation of impermissible "gap-filling" in the case of legislation severely affecting property rights; it is a question of finding meaning in the language of the Act itself. I would therefore not give effect to the appellants' submissions in this regard.

The division of powers and paramountcy

[102] Mr. Woods and Mr. Sternberg submit that extending the reach of the CCAA process to the compromise of claims as between solvent creditors of the debtor company and solvent third parties to the proceeding is constitutionally impermissible. They say that under the guise of the federal insolvency power pursuant to s. 91(21) of the Constitution Act, 1867, this approach would improperly affect the rights of civil claimants to assert their causes of action, a provincial matter falling within s. 92(13), and contravene the rules of public order pursuant to the Civil Code of Quebec. [page544]

[103] I do not accept these submissions. It has long been established that the CCAA is valid federal legislation under the federal insolvency power: Reference re: Constitutional Creditors Arrangement Act (Canada), [1934] S.C.R. 659, [1934] S.C.J. No. 46. As the Supreme Court confirmed in that case (p.

661 S.C.R.), citing Viscount Cave L.C. in Royal Bank of Canada v. Larue, [1928] A.C. 187 (J.C.P.C.), "the exclusive legislative authority to deal with all matters within the domain of bankruptcy and insolvency is vested in Parliament". Chief Justice Duff elaborated:

> Matters normally constituting part of a bankruptcy scheme but not in their essence matters of bankruptcy and insolvency may, of course, from another point of view and in another aspect be dealt with by a provincial legislature; but, when treated as matters pertaining to bankruptcy and insolvency, they clearly fall within the legislative authority of the Dominion.

[104] That is exactly the case here. The power to sanction a plan of compromise or arrangement that contains third-party releases of the type opposed by the appellants is embedded in the wording of the CCAA. The fact that this may interfere with a claimant's right to pursue a civil action -- normally a matter of provincial concern -- or trump Quebec rules of public order is constitutionally immaterial. The CCAA is a valid exercise of federal power. Provided the matter in question falls within the legislation directly or as necessarily incidental to the exercise of that power, the CCAA governs. To the extent that its provisions are inconsistent with provincial legislation, the federal legislation is paramount. Mr. Woods properly conceded this during argument.

Conclusion with respect to legal authority

[105] For all of the foregoing reasons, then, I conclude that the application judge had the jurisdiction and legal authority to sanction the Plan as put forward.

(2) The Plan is "fair and reasonable"

[106] The second major attack on the application judge's decision is that he erred in finding that the Plan is "fair and reasonable" and in sanctioning it on that basis. This attack is centred on the nature of the third-party releases contemplated and, in particular, on the fact that they will permit the release of some claims based in fraud.

[107] Whether a plan of compromise or arrangement is fair and reasonable is a matter of mixed fact and law, and one on which the application judge exercises a large measure of discretion. The standard of review on this issue is therefore one of deference. In [page545] the absence of a demonstrable error, an appellate court will not interfere: see Ravelston Corp. Ltd. (Re), [2007] O.J. No. 1389, 31 C.B.R. (5th) 233 (C.A.).

[108] I would not interfere with the application judge's decision in this regard. While the notion of releases in favour of third parties -- including leading Canadian financial institutions -- that extend to claims of fraud is distasteful, there is no legal impediment to the inclusion of a release for claims based in fraud in a plan of compromise or arrangement. The application judge had been living with and supervising the ABCP restructuring from its outset. He was intimately attuned to its dynamics. In the end, he concluded that the benefits of the Plan to the creditors as a whole, and to the debtor companies, outweighed the negative aspects of compelling the unwilling appellants to execute the releases as finally put forward.

[109] The application judge was concerned about the inclusion of fraud in the contemplated releases and at the May hearing adjourned the final disposition of the sanctioning hearing in an effort to encourage the parties to negotiate a resolution. The result was the "fraud carve-out" referred to earlier in these reasons.

[110] The appellants argue that the fraud carve-out is inadequate because of its narrow scope. It (i) applies only to ABCP Dealers; (ii) limits the type of damages that may be claimed (no punitive damages, for example); (iii) defines "fraud" narrowly, excluding many rights that would be protected by common law, equity and the Quebec concept of public order; and (iv) limits claims to representations made directly to Noteholders. The appellants submit it is contrary to public policy to sanction a plan containing such a limited restriction on the type of fraud claims that may be pursued against the third parties.

[111] The law does not condone fraud. It is the most serious kind of civil claim. There is, therefore, some force to the appellants' submission. On the other hand, as noted, there is no legal impediment to granting the release of an antecedent claim in fraud, provided the claim is in the contemplation of the parties to the release at the time it is given: Fotini's Restaurant Corp. v. White Spot Ltd., [1998] B.C.J. No. 598, 38 B.L.R. (2d) 251 (S.C.), at paras. 9 and 18. There may be disputes about the scope or extent of what is released, but parties are entitled to settle allegations of fraud in civil proceedings -- the claims here all being untested allegations of fraud -- and to include releases of such claims as part of that settlement.

[112] The application judge was alive to the merits of the appellants' submissions. He was satisfied in the end, however, [page546] that the need "to avoid the potential cascade of litigation that . . . would result if a broader 'carve out' were to be allowed" (para. 113) outweighed the negative aspects of approving releases with the narrower carve-out provision. Implementation of the Plan, in his view, would work to the overall greater benefit of the Noteholders as a whole. I can find no error in principle in the exercise of his discretion in arriving at this decision. It was his call to make.

[113] At para. 71, above, I recited a number of factual findings the application judge made in concluding that approval of the Plan was within his jurisdiction under the CCAA and that it was fair and reasonable. For convenience, I reiterate them here -- with two additional findings -- because they provide an important foundation for his analysis concerning the fairness and reasonableness of the Plan. The application judge found that:

(a) The parties to be released are necessary and essential to the restructuring of the debtor;
(b) the claims to be released are rationally related to the purpose of the Plan and necessary for it;
(c) the Plan cannot succeed without the releases;
(d) the parties who are to have claims against them released are contributing in a tangible and realistic way to the

Plan;
(e) the Plan will benefit not only the debtor companies but creditor Noteholders generally;
(f) the voting creditors who have approved the Plan did so with knowledge of the nature and effect of the releases; and that,
(g) the releases are fair and reasonable and not overly broad or offensive to public policy.

[114] These findings are all supported on the record. Contrary to the submission of some of the appellants, they do not constitute a new and hitherto untried "test" for the sanctioning of a plan under the CCAA. They simply represent findings of fact and inferences on the part of the application judge that underpin his conclusions on jurisdiction and fairness.

[115] The appellants all contend that the obligation to release the third parties from claims in fraud, tort, breach of fiduciary duty, etc. is confiscatory and amounts to a requirement that they -- as individual creditors -- make the equivalent of a greater financial contribution to the Plan. In his usual lively fashion, [page547] Mr. Sternberg asked us the same rhetorical question he posed to the application judge. As he put it, how could the court countenance the compromise of what in the future might turn out to be fraud perpetrated at the highest levels of Canadian and foreign banks? Several appellants complain that the proposed Plan is unfair to them because they will make very little additional recovery if the Plan goes forward, but will be required to forfeit a cause of action against third-party financial institutions that may yield them significant recovery. Others protest that they are being treated unequally because they are ineligible for relief programs that Liquidity Providers such as Canaccord have made available to other smaller investors.

[116] All of these arguments are persuasive to varying degrees when considered in isolation. The application judge did not have that luxury, however. He was required to consider the circumstances of the restructuring as a whole, including the reality that many of the financial institutions were not only

acting as Dealers or brokers of the ABCP Notes (with the impugned releases relating to the financial institutions in these capacities, for the most part) but also as Asset and Liquidity Providers (with the financial institutions making significant contributions to the restructuring in these capacities).

[117] In insolvency restructuring proceedings, almost everyone loses something. To the extent that creditors are required to compromise their claims, it can always be proclaimed that their rights are being unfairly confiscated and that they are being called upon to make the equivalent of a further financial contribution to the compromise or arrangement. Judges have observed on a number of occasions that CCAA proceedings involve "a balancing of prejudices", inasmuch as everyone is adversely affected in some fashion.

[118] Here, the debtor corporations being restructured represent the issuers of the more than $32 billion in non-bank sponsored ABCP Notes. The proposed compromise and arrangement affects that entire segment of the ABCP market and the financial markets as a whole. In that respect, the application judge was correct in adverting to the importance of the restructuring to the resolution of the ABCP liquidity crisis and to the need to restore confidence in the financial system in Canada. He was required to consider and balance the interests of all Noteholders, not just the interests of the appellants, whose notes represent only about 3 per cent of that total. That is what he did.

[119] The application judge noted, at para. 126, that the Plan represented "a reasonable balance between benefit to all Noteholders and enhanced recovery for those who can make out [page548] specific claims in fraud" within the fraud carve-out provisions of the releases. He also recognized, at para. 134, that:

> No Plan of this size and complexity could be expected to satisfy all affected by it. The size of the majority who have approved it is testament to its overall fairness. No plan to address a crisis of this magnitude can work perfect equity

among all stakeholders.

[120] In my view, we ought not to interfere with his decision that the Plan is fair and reasonable in all the circumstances.

D. Disposition

[121] For the foregoing reasons, I would grant leave to appeal from the decision of Justice Campbell, but dismiss the appeal.

Appeal dismissed.

SCHEDULE "A" -- CONDUITS

Apollo Trust
Apsley Trust
Aria Trust
Aurora Trust
Comet Trust
Encore Trust
Gemini Trust
Ironstone Trust
MMAI-I Trust
Newshore Canadian Trust
Opus Trust
Planet Trust
Rocket Trust
Selkirk Funding Trust
Silverstone Trust
Slate Trust
Structured Asset Trust
Structured Investment Trust III
Symphony Trust
Whitehall Trust

SCHEDULE "B" -- APPLICANTS

ATB Financial
Caisse de dpt et placement du Qubec
Canaccord Capital Corporation [page549]
Canada Mortgage and Housing Corporation
Canada Post Corporation
Credit Union Central Alberta Limited
Credit Union Central of BC
Credit Union Central of Canada

Credit Union Central of Ontario
Credit Union Central of Saskatchewan
Desjardins Group
Magna International Inc.
National Bank of Canada/National Bank Financial Inc.
NAV Canada
Northwater Capital Management Inc.
Public Sector Pension Investment Board
The Governors of the University of Alberta

SCHEDULE "C" -- COUNSEL

(1) Benjamin Zarnett and Frederick L. Myers, for the Pan-Canadian Investors Committee

(2) Aubrey E. Kauffman and Stuart Brotman, for 4446372 Canada Inc. and 6932819 Canada Inc.

(3) Peter F.C. Howard, and Samaneh Hosseini, for Bank of America N.A.; Citibank N.A.; Citibank Canada, in its capacity as Credit Derivative Swap Counterparty and not in any other capacity; Deutsche Bank AG; HSBC Bank Canada; HSBC Bank USA, National Association; Merrill Lynch International; Merill Lynch Capital Services, Inc.; Swiss Re Financial Products Corporation; and UBS AG

(4) Kenneth T. Rosenberg, Lily Harmer, and Max Starnino, for Jura Energy Corporation and Redcorp Ventures Ltd.

(5) Craig J. Hill and Sam P. Rappos, for the Monitors (ABCP Appeals)

(6) Jeffrey C. Carhart and Joseph Marin, for Ad Hoc Committee and Pricewaterhouse Coopers Inc., in its capacity as Financial Advisor

(7) Mario J. Forte, for Caisse de Dpt et Placement du Qubec

(8) John B. Laskin, for National Bank Financial Inc. and National Bank of Canada [page550]

(9) Thomas McRae and Arthur O. Jacques, for Ad Hoc Retail Creditors Committee (Brian Hunter, et al.)

(10) Howard Shapray, Q.C. and Stephen Fitterman for Ivanhoe Mines Ltd.

(11) Kevin P. McElcheran and Heather L. Meredith for Canadian Banks, BMO, CIBC RBC, Bank of Nova Scotia and T.D. Bank

(12) Jeffrey S. Leon, for CIBC Mellon Trust Company, Computershare Trust Company of Canada and BNY Trust Company of Canada, as Indenture Trustees

(13) Usman Sheikh, for Coventree Capital Inc.
(14) Allan Sternberg and Sam R. Sasso, for Brookfield Asset Management and Partners Ltd. and Hy Bloom Inc. and Cardacian Mortgage Services Inc.
(15) Neil C. Saxe, for Dominion Bond Rating Service
(16) James A. Woods, Sbastien Richemont and Marie-Anne Paquette, for Air Transat A.T. Inc., Transat Tours Canada Inc., The Jean Coutu Group (PJC) Inc., Aroports de Montral, Aroports de Montral Capital Inc., Pomerleau Ontario Inc., Pomerleau Inc., Labopharm Inc., Agence Mtropolitaine de Transport (AMT), Giro Inc., Vtements de sports RGR Inc., 131519 Canada Inc., Tecsys Inc., New Gold Inc. and Jazz Air LP
(17) Scott A. Turner, for Webtech Wireless Inc., Wynn Capital Corporation Inc., West Energy Ltd., Sabre Energy Ltd., Petrolifera Petroleum Ltd., Vaquero Resources Ltd., and Standard Energy Ltd.
(18) R. Graham Phoenix, for Metcalfe & Mansfield Alternative Investments II Corp., Metcalfe & Mansfield Alternative Investments III Corp., Metcalfe & Mansfield Alternative Investments V Corp., Metcalfe & Mansfield Alternative Investments XI Corp., Metcalfe & Mansfield Alternative Investments XII Corp., Quanto Financial Corporation and Metcalfe & Mansfield Capital Corp.

Notes

Note 1: Section 5.1 of the CCAA specifically authorizes the granting of releases to directors in certain circumstances.

Note 2: Georgina R. Jackson and Janis P. Sarra, "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters" in Sarra, ed., Annual Review of Insolvency Law, 2007 (Vancouver, B.C.: Carswell, 2007).

Note 3: Citing Gibbs J.A. in Chef Ready Foods, supra, at pp. 319-20 C.B.R.

Note 4: The legislative debates at the time the CCAA was introduced in Parliament in April 1933 make it clear that the CCAA is patterned after the predecessor provisions of s. 425 of the Companies Act 1985 (U.K.): see House of Commons Debates (Hansard), supra.

Note 5: See Canada Business Corporations Act, R.S.C. 1985, c. C-44, s. 192; Ontario Business Corporations Act, R.S.O. 1990, c. B.16, s. 182.

Note 6: A majority in number representing two-thirds in value of the creditors (s. 6).

Note 7: Steinberg was originally reported in French: Steinberg Inc. c. Michaud, [1993] J.Q. no. 1076, [1993] R.J.Q. 1684 (C.A.). All paragraph references to Steinberg in this judgment are from the unofficial English translation available at 1993 CarswellQue 2055.

Note 8: Reed Dickerson, The Interpretation and Application of Statutes (Boston: Little Brown and Company, 1975) at pp. 234-35, cited in Bryan A. Garner, ed., Black's Law Dictionary, 8th ed. (West Group, St. Paul, Minn., 2004) at p. 621.

CITATION: Lydian International Limited (Re), 2020 ONSC 4006
COURT FILE NO.: CV-19-00633392-00CL
DATE: 2020-07-10

SUPERIOR COURT OF JUSTICE - ONTARIO
(COMMERCIAL LIST)

RE: IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF LYDIAN INTERNATIONAL LIMITED, LYDIAN CANADA VENTURES CORPORATION AND LYDIAN U.K. CORPORATION LIMITED

BEFORE: Chief Justice G.B. Morawetz

COUNSEL: *Elizabeth Pillon*, *Maria Konyukhova*, *Sanja Sopic*, and *Nicholas Avis*, for the Applicants

D. J. Miller and *Rachel Bergino*, for Alvarez & Marsal Inc.

Robert Mason and *Virginie Gauthier*, for Osisko Bermuda Limited

Pamela Huff and *Chris Burr*, for Resource Capital Fund VI L.P.

David Bish and *Michael Pickersgill*, for Orion Capital Management

Alexander Steele, for Caterpillar Financial Services (UK) Limited

Bruce Darlington, for ING Bank N.V./Abs Svensk Exportkredit (publ)

John LeRoux, *Hasan Ciftehan*, *Mehmet Ali Ekingen and Atilla Bozkay*, each in their capacity as a Shareholders of Lydian International Limited

HEARD by ZOOM Hearing and DECIDED: **June 29, 2020**

REASONS RELEASED: **July 10, 2020**

ENDORSEMENT

[1] Lydian International Limited, Lydian Canada Ventures Corporation and Lydian U.K. Corporation Limited (the "Applicants") bring this motion for an order (the "Sanction and Implementation Order"), among other things:

a) declaring that the Meeting of Affected Creditors held on June 19, 2020 was duly convened and held, all in accordance with the Meeting Order;

b) sanctioning and approving the Applicants' Plan of Arrangement (the "Plan") as approved by a requisite majority of Affected Creditors at the Meeting, in accordance with the Plan Meeting Order (each as defined below), a copy of which is attached as Schedule "A" to the draft Sanction and Implementation Order; and

c) granting various other related relief (as more particularly outlined below).

[2] The Applicants submit that the Plan represents the culmination of the Applicants' restructuring efforts and allows for the resolution of these CCAA Proceedings. The Monitor and the majority of the Affected Creditors are supportive of the Plan and if sanctioned and implemented, the Plan will provide a path forward for Lydian Canada and Lydian UK as part of a privatized Restructured Lydian Group (as defined in the Plan) and ultimately lead to the termination of these CCAA Proceedings.

[3] Shortly after the conclusion of the hearing on June 29, 2020, which was conducted by Zoom, I granted the motion with reasons to follow.

[4] The facts with respect to this motion are more fully set out in the Affidavit of Edward A. Sellers sworn June 24, 2020 (the "Sellers Sanction Affidavit"), the Affidavit of Edward A. Sellers sworn June 15, 2020 (the "Sellers Meeting Affidavit") and the Affidavit of Mark Caiger sworn June 11, 2020 (the "BMO Affidavit"). Mr. Sellers and Mr. Caiger were not cross-examined. Capitalized terms used herein but not otherwise defined have the meanings ascribed to them in the Sellers Sanction Affidavit, the Sellers Meeting Affidavit, and the Plan. All references to currency in this factum are references to United States dollars, unless otherwise indicated.

Background

[5] The Applicants are three entities at the top of the Lydian Group. The Lydian Group owns a development-stage gold mine in south-central Armenia through its wholly owned non-applicant operating subsidiary Lydian Armenia. The Applicants contend that they have been unable to access their main operating asset, the Amulsar mine, since June 2018 due to blockades and the associated actions and inactions of the Government of Armenia ("GOA"), and as a result, this has prevented the Applicants from completing construction of the mine and generating revenue in the ordinary course.

[6] The Applicants further contend that the effects of the blockades, amongst other factors, caused the Applicants to seek protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA"). An Initial Order was granted on December 23, 2019. Alvarez & Marsal Canada Inc. was appointed as Monitor.

[7] In the two years since the blockades began, the Applicants contend that they have used their best efforts to resolve the factors that led to their insolvency, including engaging in negotiations with the GOA, defending their commercial rights and commencing legal proceedings in Armenia to attempt to remove the blockades but these efforts have yet to result in the Applicants re-gaining access to the Amulsar site.

[8] In early 2018, the Applicants retained BMO to canvass the market for potential refinancing or sale options. BMO has conducted multiple rounds of a sales process to market the Lydian Group's mining assets. BMO also ran a process to solicit interest in financing the Applicants' potential Treaty Arbitration. These efforts have not yet resulted in a transaction capable of satisfying the claims of the Applicants' secured lenders.

[9] Since the blockades began, the Senior Lenders have been funding the Applicants' efforts to find a solution to the situation caused by the blockades. The Senior Lenders provided additional financial support to the Lydian Group totalling in excess of $43 million.

[10] As of March 31, 2020, the Lydian Group owed its secured lenders more than $406.8 million.

[11] According to the Applicants, the secured lenders are no longer willing to support the Applicants' efforts to monetize their assets. The Equipment Financiers CAT and ING have taken enforcement steps and Ameriabank has issued preliminary notice of enforcement.

[12] Further, the Applicants point out that the liquidity made available to the Applicants since April 30, 2020 has been conditioned on the Applicants: (i) proposing a restructuring that would be equivalent to the Senior Lenders enforcing their security over the shares of Lydian Canada; and (ii) meeting a deadline to exit the CCAA Proceedings imposed by a majority of the Applicants' Senior Lenders, or further enforcement steps would be taken.

[13] The Applicants submit that the Plan represents the most efficient mechanism to effect an orderly transition of the Lydian Group's affairs. The Applicants contend that the Plan minimizes adverse collateral impacts on Lydian Armenia, provides for winding down the proceedings before this court and the Jersey Court and avoids uncoordinated enforcement steps being taken on the Lydian Group's property to the detriment of the Lydian Group's stakeholders generally.

The Plan

[14] The Plan recognizes and continues the priority position of the Senior Lenders in the Restructured Lydian Group. The Senior Lenders make up the only class eligible to vote on the Plan and receive a distribution thereunder.

[15] According to the Applicants, secured creditors and unsecured creditors with claims at or below Restructured Lydian will continue to maintain their claims in the Restructured Lydian Group, including Lydian Armenia, with the same priority as they previously had, ranking behind the Senior Lenders. Stakeholders with claims at the Lydian International level will continue to have their claims on the Plan Implementation Date, which are intended to be addressed through

the proposed J&E Process in Jersey. Equity claims and unsecured claims against Lydian International will not be assumed by Restructured Lydian as part of the Plan.

[16] The purpose of the Plan is to (a) implement a corporate and financial restructuring of the Applicants, (b) provide for the assignment or settlement of all intercompany debts owing to the Applicants prior to the Effective Time to, among other things, minimize adverse tax consequences to Lydian Armenia and its stakeholders, (c) provide for the equivalent of an assignment of substantially all of the assets of Lydian International to an entity owned and controlled by the Senior Lenders ("SL Newco"), through an amalgamation of Lydian Canada with SL Newco resulting in a new entity ("Restructured Lydian"), and (d) provide a release of all of the existing indebtedness and obligations owing by Lydian International to the Senior Lenders. The Plan will result in the privatization of the Lydian Group to continue as the Restructured Lydian Group.

[17] The steps involved in the Plan's execution are described in detailed in paragraphs 71 to 74 of the Sellers Meeting Affidavit.

[18] The Plan provides for certain releases. The releases are more fully described in the Sellers Meeting Affidavit at paragraph 83.

[19] Mr. Sellers in the Sellers Sanction Affidavit at para. 16 states that the releases were critical components of the negotiations and decision-making process for the D&Os and Senior Lenders in obtaining support for the Plan and resolving these CCAA Proceedings for the benefit of the Restructured Lydian Group, including Lydian Armenia, and all of its stakeholders.

[20] Mr. Sellers further states that the Released Parties made significant contributions to the Applicants' restructuring, both prior to and throughout these CCAA Proceedings, which resulted directly in the preservation of the Lydian Group's business, provided numerous opportunities for the Applicants to seek to monetize their assets for the benefit of stakeholders generally and led to the successful negotiation of the Plan for the benefit of the Restructured Lydian Group.

[21] The Plan provides for a Plan Implementation Date on or prior to June 30, 2020. The majority of the Applicants' Senior Lenders have agreed to fund the costs associated with implementing the Plan and termination of the CCAA Proceedings and the J&E Process in Jersey, through the DIP Exit Facility Amendment, which will make a DIP Exit Credit Facility available to the Applicants totalling an estimated additional $1.866 million.

[22] The test that a debtor company must satisfy in seeking the Court's approval for a plan of compromise or arrangement under the CCAA is well established:

a) there must be strict compliance with all statutory requirements;

b) all materials filed and procedures carried out must be examined to determine if anything has been done or purported to be done which is not authorized by the CCAA and prior Orders of the Court in the CCAA proceedings; and

c) the plan must be fair and reasonable.

Issues

[23] The issues for determination on this motion are whether:

a) the Plan is fair and reasonable and should be sanctioned;

b) the releases contemplated by the Plan are appropriate;

c) the increase to the DIP Charge to capture the amounts to be advanced under the DIP Exit Credit Facilities is appropriate;

d) the Stay Period should be extended;

e) the unredacted Sellers Sanction Affidavit should be sealed; and

f) the Monitor's activities, as detailed in the Fifth Report, Sixth Report and Seventh Report, should be approved and the fees of Monitor and its counsel through to June 23, 2020 should be approved.

LAW AND ANALYSIS

Approval of the Plan

[24] To determine whether there has been strict compliance with all statutory requirements, the court considers factors such as whether: (a) the applicant meets the definition of a "debtor company" under section 2 of the CCAA; (b) the applicant has total claims against it in excess of C$5 million; (c) the notice calling the creditors' meeting was sent in accordance with the order of the court; (d) the creditors were properly classified; (e) the meeting of creditors was properly constituted; (f) the voting was properly carried out; and (g) the plan was approved by the requisite majority.

[25] The Applicants submit that they have complied with the procedural requirements of the CCAA, the Initial Order, the Amended and Restated Initial Order, the Meeting Order and all other Orders granted by this Court during these CCAA Proceedings. In particular:

a) at the time the Initial Order was granted, the Applicants were found to be "debtor companies" to which the CCAA applied and that the Applicants' liabilities exceeded the C$5 million threshold amount under the CCAA;

b) the classification of the Applicants' Senior Lenders into one voting class (namely, the Affected Creditors class) was approved pursuant to the Meeting Order. This classification was not opposed at the hearing to approve the Meeting, nor was the Meeting Order appealed; the Applicants properly effected notice in accordance with the Meeting Order prior to the

Meeting. In addition, the Applicants issued a press release on June 15, 2020 announcing their intention to seek an Order of the Court to file the Plan and call, hold and conduct a meeting of the Senior Lenders;

c) the Meeting was properly constituted and the voting on the Plan was carried out in accordance with the Meeting Order; and

d) the Plan was approved by the Required Majority.

[26] Sections 6(3), 6(5) and 6(6) of the CCAA provide that the Court may not sanction a plan unless the plan contains certain specified provisions concerning Crown claims, employee claims and pension claims. The Applicants' submit that these provisions of the CCAA are satisfied by the Plan. Crown claims and employee claims are treated by the Plan as Unaffected Claims, meaning that such claims, if any, are not compromised or otherwise affected. The Applicants do not maintain any pension plans, and thus section 6(6) of the CCAA does not apply. In compliance with s. 6(8) of the CCAA, the Plan does not provide for any recovery to equity holders.

[27] I accept the foregoing submissions. I am satisfied that the statutory prerequisites to approval of the Plan have been satisfied, and that there has been strict compliance with all statutory requirements.

[28] The Applicants submit that no unauthorized steps have been taken in these CCAA Proceedings and throughout the entirety of these CCAA Proceedings, they have kept this Court and Monitor appraised of all material aspects of the Applicants' conduct, activities, and key issues they have worked to resolve. I accept this submission.

[29] The Applicants' submit that when considering whether a plan of compromise and arrangement is fair and reasonable, the court should consider the relative degree of prejudice that would flow from granting or refusing to grant the relief sought. Courts should also consider whether the proposed plan represents a reasonable and fair balancing of interests, in light of the other commercial alternatives available (see: *Re Canadian Airlines Corp*, 2000 ABQB 442 at paras. 3, 94, 96, and 137 – 138; and *Re Canwest Global Communications Corp*, 2010 ONSC 4209).

[30] The CCAA permits the filing of a Plan by an Applicant to its secured creditors. The Applicants' submit the fact that unsecured creditors may receive no recovery under a proposed plan of arrangement does not, of itself, negate the fairness and reasonableness of a plan of arrangement (*Anvil Range Mining Corp. (Re)*, 2002 CanLII 42003 (ONCA); and *1078385 Ontario Ltd., (Re)*, 2004 CanLII 55041 (ONCA) at paras 30-31 (CanLII), affirming 2004 CanLII 66329 (ONSC)).

[31] The Plan was presented to the Senior Lenders, who are the Applicants' only secured creditors and they voted on the Plan as a single class. The Senior Lenders voted in favour of the Plan by the Required Majority. The value of the claims of Orion and Osisko, who voted in

favour of the Plan comprise 77.8% of the total value of the Affected Creditors who were present and voting.

[32] RCF, a secured lender and 32% shareholder, did not vote in favour of the Plan. RCF has advised that it "does not intend at this time to propose or fund an alternative to the Plan, and in the absence of such an alternative we expect that the Court will have no choice but to issue the Sanction and Implementation Order."

[33] I have been advised that an issue as between the Senior Lenders and ING has been resolved and for greater certainty this Plan does not compromise any claim that ING may have in respect of proceeds from a successfully-asserted arbitration claim. In addition, the Senior Lenders have agreed that, after payment of all claims of the Senior Lenders to proceeds from a successfully-asserted arbitration claim whether on account of: (i) claims of the Senior Lenders prior to the Plan Implementation Date; or (ii) further advances made by the Senior Lenders (or their affiliates) after the Plan Implementation Date, (whether such further advances are made as equity, secured debt or unsecured debt), the proceeds will be paid to Lydian Armenia in an amount sufficient and to be used to pay ING's claims against Lydian Armenia prior to any further monies being returned to equity holders.

[34] The Applicants submit that the structure and the nature of the releases in the Plan recognizes and continues the priority position of the Senior Lenders. Secured creditors and unsecured creditors with claims at or below Restructured Lydian will continue to maintain their claims in the Restructured Lydian Group, including Lydian Armenia, with the same priority as they previously had, ranking behind the Senior Lenders.

[35] The Applicants state that they have considered and believe the Plan is the best available outcome for the Applicants, and the interests of the stakeholders generally in the Lydian Group.

[36] As noted in the BMO Affidavit, despite multiple rounds of the SISP and the Treaty Arbitration financing solicitation process, the Applicants submit that no transaction which would satisfy the Lydian Group's secured obligations is currently available to the Applicants.

[37] The Applicants submit that the monetization of Treaty Arbitration is also not open to the Applicants at this time, and if initiated would require an extended period to litigate and significant additional financial resources.

[38] The Applicants submit that for the purposes of valuing an estate at a plan sanction hearing, the "value has to be determined on a current basis. […] It is inappropriate to value the assets on a speculative or (remote) possibility basis." A relevant consideration in this analysis is the scope and extent of previous sale or capital raising efforts undertaken by the company and any financial advisors. In support of this submission, the Applicants reference: *Anvil Range Mining Corp. (Re)*, 2002 CanLII 42003 (ONCA), para 36 (CanLII); *Philip Services Corp., Re*, 1999 CanLII 15012 (ONSC) at para 9 (CanLII) *1078385 Ontario Ltd., (Re*), 2004 CanLII 55041 (ONCA) at paras 30-31 (CanLII), affirming *1078385 Ontario Ltd. (Re)*, 2004 CanLII 66329 (ONSC) (CanLII).

[39] The Applicants submit that the outcome of the Plan, that being the distribution of the Applicants' estates to the Senior Lenders, is essentially identical to what would be achieved with any other options available in the circumstances. Without the Plan, the Senior Lenders could (a) privatize the Applicants' assets through the enforcement of share pledges and other security, or (b) could credit bid their debt to acquire the shares or assets; or (c) enforce their secured positions following the Applicants filing for bankruptcy, administration, or liquidation proceedings across multiple jurisdictions. In each scenario (as with the Plan), the Applicants' assets are transitioned to the Senior Lenders.

[40] The foregoing submissions were not challenged.

[41] The Monitor supports the Plan. As noted in the Monitor's Seventh Report, "it is the Monitor's view that the Plan represents a better path forward than any other alternative that is available to the Applicants and is fair and reasonable."

[42] I am aware that concerns with respect to the fairness of the Plan have been raised by numerous shareholders of Lydian International and oral submissions were made by John LeRoux, Hasan Ciftehan, Mehmet Ali Ekingen and Atilla Bozkay.

[43] In addition, a number of emails were sent directly to the court, which were forwarded to counsel to the Monitor. In addition, certain emails were sent to the Monitor. None of the emails were in a proper evidentiary form.

[44] The concerns of the shareholders included criminal complaints of activities in Armenia, the content of certain press releases and the impact of the COVID-19 pandemic. Some shareholders requested a delay of three months in these proceedings.

[45] As previously noted, equity claims and unsecured claims against Lydian International will not be assumed by Restructured Lydian as part of the Plan. Simply put, the shareholders of Lydian International will not receive any compensation for their shareholdings. This is a reflection of the insolvency of the Applicants and the priority position afforded to shareholders by the CCAA.

[46] I recognize that the shareholders' monetary loss will be crystalized if the Plan is sanctioned. However, a monetary loss resulting from the ownership, purchase or sale of their equity interest is an "equity claim" as defined in s. 2(1) of the CCAA. This definition is significant as s. 6(8) of the CCAA provides:

> 6(8) Payment – equity claims – No compromise or arrangement that provides for the payment of an equity claim is to be sanctioned by the court unless it provides that all claims that are not equity claims are to be paid in full before the equity claim is to be paid.

[47] The Plan does not provide for payment in full of claims that are not equity claims. Consequently, equity claimants are not in the position to receive any compensation.

[48] The economic reality facing the shareholders existed prior to the COVID-19 pandemic. The Applicants were insolvent when they filed these proceedings on December 23, 2019. The financial situation facing the Applicants has not improved since the filing. In fact, it has declined. The mine is not operating with the obvious result that it is not generating revenues and interest continues to accrue on the secured debt. The fact that shareholders will receive no compensation is unfortunate but is a reflection of reality which does not preclude a finding that the Plan is fair and reasonable for the purposes of this motion.

[49] The Senior Lenders have voted in sufficient numbers in favour of the Plan. I am satisfied that there are no viable alternatives, and, in my view, it is not feasible to further delay these proceedings.

[50] Section 6.6 of the Plan provides for full and final releases in favour of the Released Parties, who consist of (a) the Applicants, their employees, agents and advisors (including counsel) and each of the members of the Existing Lydian Group's current and former directors and officers; (b) the Monitor and its counsel; and (c) the Senior Lenders and each of their respective affiliates, affiliated funds, their directors, officers, employees, agents and advisors (including counsel) (collectively, the "Ancillary Releases"). A chart setting out the impact of the releases is attached as Schedule "A" to these reasons.

[51] The Applicants submit that the releases apply to the extent permitted by law and expressly do not apply to, among other things:

a) Lydian Canada's, Lydian UK's or the Senior Lenders' obligations under the Plan or incorporated into the Plan;

b) obligations of any Existing Lydian Group member other than Lydian International under the Credit Agreement and Stream Agreement, and any agreements entered into relating to the foregoing, from and after the Plan Implementation Date;

c) any claims arising from the willful misconduct or gross negligence of any applicable Released Party; and

d) any Director from any Director Claim that is not permitted to be released pursuant to section 5.1(2) of the CCAA.

[52] Unsecured creditors' claims, other than the Ancillary Releases in favour of the Directors, are not compromised or released and remain in the Restructured Lydian Group.

[53] The Applicants submit that it is accepted that there is jurisdiction to sanction plans containing releases if the release was negotiated in favour of a third party as part of the "compromise" or "arrangement" where the release reasonably relates to the proposed restructuring and is not overly broad. There must be a reasonable connection between the third-party claim being compromised in the plan and the restructuring achieved by the plan to warrant inclusion of the third-party release in the plan (see: *Re Canadian Airlines Corp*, 2000 ABQB 442

at para 92 (CanLII) CCAA at s. 5(1); *Re Metcalfe & Mansfield Alternative Investments II Corp*., 2008 ONCA 587 at paras 61 and 70 (CanLII); *Re Canwest Global Communications Corp*, 2010 ONSC 4209 at para 28-30 (CanLII); and *Re Kitchener Frame Ltd*, 2012 ONSC 234 at paras 85-88 (CanLII).

[54] The Applicants submit that in considering whether to approve releases in favour of third parties, courts will consider the particular circumstances of the case and the objectives of the CCAA. While no single factor will be determinative, the courts have considered the following factors:

a) Whether the parties to be released from claims were necessary and essential to the restructuring of the debtor;

b) Whether the claims to be released were rationally connected to the purpose of the plan and necessary for it;

c) Whether the plan could succeed without the releases;

d) Whether the parties being released were contributing to the plan; and

e) Whether the release benefitted the debtors as well as the creditors generally.

[55] The Applicants submit that the releases were critical components of the decision-making process for the Applicants' directors and officers and Senior Lenders' participation in these CCAA Proceedings in proposing the Plan and the Applicants submit that they would not have brought forward the Plan absent the inclusion of the releases.

[56] The Applicants also submit that the support of the Senior Lenders is essential to the Plan's viability. Without such support, which is conditional on the releases, the Plan would not succeed.

[57] The Applicants submit that the Released Parties made significant contributions to the Applicants' restructuring, both prior to and throughout these CCAA Proceedings. The extensive efforts of the Applicants' directors and officers and the Senior Lenders and Monitor resulted in the negotiation of the Plan, which forms the foundation for the completion of these CCAA Proceedings. The Senior Lenders financial contributions through forbearances, additional advances and DIP and Exit Financing were instrumental.

[58] The Applicants also submit that the releases are an integral part of the CCAA Plan which provides an orderly and effective alternative to uncoordinated and disruptive secured lender enforcement proceedings. The Plan permits unsecured creditors future potential recovery in the Restructured Lydian Group, which may not exist in bankruptcy (*Re Metcalfe &Mansfield Alternative Investments II Corp*., 2008 ONCA 587 at paras 71 (CanLII); and *Re Kitchener Frame Ltd*, 2012 ONSC 234 at paras 80-82 (CanLII).

[59] The Applicants submit that this Court has exercised its authority to grant similar releases, including in circumstances where the released claims included claims of parties who did not vote on the plan and were not eligible to receive distributions (*Target Canada Co. et al*. (2 June 2016), Toronto CV-15-10832-00CL (Ont. Sup. Ct. [Comm. List]) Sanction and Vesting Order at Schedule "B" art. 7 (Monitor's website); *Rubicon Minerals Corporation et al*. (8 December 2016), Toronto CV-16-11566-00CL (Ont. Sup. Ct. [Comm. List]) Sanction Order at Schedule "A" art. 7 (Monitor's website); and *Nortel Networks Corporation et al*. (30 November 2016), Toronto 09-CL-7950 (Ont. Sup. Ct. [Comm. List]) Plan of Compromise and Arrangement at art. 7 (Monitor's website)).

[60] Full disclosure of the releases was made in (a) the draft Plan that was circulated to the Service List and filed with this Court as part of the Applicants' Motion Record (returnable June 18, 2020); and (b) the Plan attached to the Meeting Order. The Applicants also issued the Press Releases. This notification process ensured that the Applicants' stakeholders had notice of the nature and effect of the Plan and releases.

[61] The foregoing submissions with respect to the releases were not challenged.

[62] In my view, each of the Released Parties has made a contribution to the development of the Plan. In arriving at this determination, I have taken into account the activities of the Released Parties as described in the Reports of the court-appointed Monitor. I am satisfied that it is appropriate for the Plan to include the releases in favour of the Released Parties.

[63] The development of this Plan has been challenging and as the Monitor has stated, "the Plan represents a better path forward than any other alternative that is available to the Applicants and is fair and reasonable".

[64] I accept this assessment and find that the Plan is fair and reasonable in the circumstances.

DIP Charge

[65] The terms of the DIP Exit Facility Amendment are described in the Sellers Sanction Affidavit. The DIP Exit Facility Amendment provides for exit financing totalling $1.866 million to assist in implementing the Plan and taking the necessary ancillary steps to terminate the CCAA Proceedings and support the J&E Process.

[66] This Court has the jurisdiction to authorize funding in the context of a CCAA restructuring pursuant to s. 11.2(1) and 11.2(2) of the CCAA. In considering whether to approve DIP financing, the Court is to consider the non-exhaustive list of factors set out in s. 11.2(4) of the CCAA. These same provisions of the CCAA provide this Court with the authority to approve amendments to a DIP agreement and secure all obligations arising from the amended DIP loans with an increased DIP charge.

[67] The Applicants submit that, based on the following, the DIP Amendment should be approved and the increase to the DIP Facility should be secured by the DIP Charge:

a) the DIP Exit Credit Facility is necessary to enable the Applicants to implement the Plan;

b) the Monitor is supportive of the DIP Exit Facility Amendment;

c) the DIP Exit Facility Amendment is not anticipated to give rise to any material financial prejudice; and

d) the DIP Lenders are the majority of Senior Lenders.

[68] I am satisfied that the requested relief in respect to the DIP Amendment is reasonably necessary and appropriate in the circumstances.

Sealing Request

[69] The Applicants seek to seal the unredacted Sellers Sanction Affidavit on the basis that the redacted portions of the Sellers Sanction Affidavit contain commercially sensitive information, the disclosure of which could be harmful to stakeholders.

[70] The redactions currently being sought are consistent with previous Orders in these CCAA Proceedings. In my view, the documents in question contain sensitive commercial information. Having considered the principles set out in *Sierra Club of Canada* v. *Canada (Minister of Finance)*, 2002 Sec. 41 at para. 53 I am satisfied that the request for a sealing order is appropriate and is granted.

Stay Period

[71] On the Plan Implementation Date, the CCAA Proceedings with respect to Lydian UK and Lydian Canada will be terminated, such that Lydian International will be the only remaining Applicant in the CCAA Proceedings. The Applicants are requesting an extension of the Stay Period for Lydian International until and including the earlier of (i) the issuance of the Monitor's CCAA Termination Certificate and (ii) December 21, 2020 to enable the remaining Applicant and the Monitor to take the steps necessary to implement the Plan and terminate the CCAA Proceedings and initiate the J&E Process. The Applicants are also requesting an extension of the Stay Period for the Non-Applicant Stay Parties (other than Lydian US) until and including the earlier of the issuance of the Monitor's Plan Implementation Certificate.

[72] I am satisfied that the Applicants in requesting the extension of the Stay Period have demonstrated that circumstances exist that make the order appropriate; and that they have acted and are acting in good faith and with due diligence such that the request is appropriate.

Approval of Monitor's Activities

[73] The Applicants are seeking an order approving the Monitor's activities to date, as detailed in the Fifth Report, Sixth Report and the Seventh Report (collectively, the "Reports").

This Court has already approved the activities of the Monitor that were detailed in its previous reports. There was no opposition to the request.

[74] I am satisfied that the Reports and the activities described therein should be approved. The Reports were prepared in a manner consistent with the Monitor's duties and the provisions of the CCAA and in compliance with the Initial Order. The Reports are approved in accordance with the language provided in the draft order.

Approval of Monitor's Fees

[75] The Applicants further seek approval of the fees and disbursements of (i) the Monitor for the period April 14, 2020 to June 23, 2020, inclusive, and (ii) counsel to the Monitor for the period April 16, 2020 to June 23, 2020. The Applicants have reviewed the fees of the Monitor and its counsel and support the payment of the same.

[76] I am satisfied that the fee requests are appropriate in the circumstances and they are approved.

DISPOSITION

[77] The Applicants' motion is granted. The Plan is sanctioned and approved. The ancillary relief referenced in the motion is also granted and an Order reflecting the foregoing has been signed.

Chief Justice Geoffrey B. Morawetz

Date: July 10, 2020

SCHEDULE "A"

Lydian International Limited et al.

Impact of the Releases Described in s. 6.6 of the Plan

Lydian Jersey		
Type of Claim	**Treatment**	**Plan Reference**
Senior Lender Claims Held by RCF, Orion and Osisko	Released	Section 6.3(n)
Unsecured Guarantee of Equipment Lessors ING, CAT, Ameriabank	Not Released. Addressed in the J&E Process in Jersey	Section 6.6 (carve-out (E))
Other Unsecured Claims Includes Maverix Metals claim against Lydian Jersey	Not Released. Addressed in the J&E Process in Jersey.	Section 6.6 (carve-out (E))
Equity Claims Held by RCF, Orion, and public Shareholders	Not Released. Addressed in the J&E Process in Jersey.	Section 3.5
D&O Claims Claims against the Directors and their legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)
Claims against Monitor Claims against the Monitor, and Monitor's legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)
Claims against Senior Lenders Claims against the Senior Lenders and their legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)
Intercompany Claims Claims by Lydian Jersey against Lydian Canada and other subsidiaries	Assigned to Lydian Canada	Section 6.3(h)
Priority Claims Admin Charge, DIP Lender's Charge, Transaction Charge, D&O Charge	Transaction Charge and D&O Charge to be terminated on Plan Implementation Date Admin Charge and DIP Lender's Charge to be terminated on CCAA Termination Date	Section 5.2(i)

Lydian Canada		
Type of Claim	**Treatment**	**Plan Reference**
Senior Lender Claims Held by RCF, Orion and Osisko	Not Released	Section 6.6
Unsecured Claims of Equipment Lessors[1] ING, CAT, Ameriabank	Not Released	Section 6.6 (carve-out (E))
Other Unsecured Claims	Not Released	Section 6.6 (carve-out (E))
Equity Claims Shareholdings of Lydian Jersey in Lydian Canada	Not Released (but subject to amalgamation with SL Newco)	Section 3.5
D&O Claims Claims against the Directors and their legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)

[1] This includes contractual rights as outlined in the Waiver and Consent Agreement between Lydian Jersey, Lydian Canada, Lydian UK and Lydian Armenia dated November 26, 2018 (the "**Waiver**").

Claims against Monitor Claims against the Monitor, and Monitor's legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)
Claims against Senior Lenders Claims against the Senior Lenders and their legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)
Priority Claims Admin Charge, DIP Lender's Charge, Transaction Charge, D&O Charge	Transaction Charge and D&O Charge to be terminated on Plan Implementation Date Admin Charge and DIP Lender's Charge to be terminated on CCAA Termination Date	Section 5.2(i)

Lydian UK		
Type of Claim	**Treatment**	**Plan Reference**
Senior Lender Claims Held by RCF, Orion and Osisko	Not Released	Section 6.6
Unsecured Claims of Equipment Lessors ING, CAT, Ameriabank[2]	Not Released	Section 6.6 (carve-out (E))
Other Unsecured Claims	Not Released	Section 6.6 (carve-out (E))
Equity Claims Shareholdings of Lydian Canada in Lydian UK	Not Released	Section 3.5
D&O Claims Claims against the Directors and their legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)
Claims against Monitor Claims against the Monitor, and Monitor's legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)
Claims against Senior Lenders Claims against the Senior Lenders and their legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)
Priority Claims Admin Charge, DIP Lender's Charge, Transaction Charge, D&O Charge	Transaction Charge and D&O Charge to be terminated on Plan Implementation Date Admin Charge and DIP Lender's Charge to be terminated on CCAA Termination Date	Section 5.2(i)

[2] This includes the contractual rights outlined in the Waiver.

11910728 Canada Inc. ("DirectorCo")		
Type of Claim	**Treatment**	**Plan Reference**
Senior Lender Claims Held by RCF, Orion and Osisko	Not Released	Section 6.6
Unsecured Claims	Not Released	Section 6.6 (carve-out (E))
Equity Claims Shareholdings of Lydian Canada in DirectorCo	Not Released	Section 3.5
D&O Claims Claims against the Directors and their legal cousnel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii) of the Plan
Claims against Monitor Claims against the Monitor, and Monitor's legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)
Claims against Senior Lenders Claims against the Senior Lenders and their legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)

Lydian International Holdings Limited, Lydian Resources Armenia Limited, and Lydian Resources Kosovo Limited		
Type of Claim	**Treatment**	**Plan Reference**
Senior Lender Claims Held by RCF, Orion and Osisko	Not Released	Section 6.6
Other Secured Claims Includes claim of Maverix Metals in shares of Lydian Resources Armenia Limited, which is subordinated to claims of Senior Lenders	Not Released	Section 6.6
Unsecured Claims Includes Maverix Metals claim against Lydian International Holdings Limited	Not Released	Section 6.6 (carve-out (E))
Equity Claims Shareholdings of Lydian UK in Lydian International Holdings Limited, and shareholdings of Lydian International Holdings Limited in Lydian Resources Armenia ("**BVI**") and Lydian Resources Kosovo Limited Includes Maverix Metals' share pledge in BVI	Not Released	Section 6.6 (carve-out (E))
D&O Claims Claims against the Directors and their legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii) of the Plan
Claims against Monitor Claims against the Monitor, and Monitor's legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)
Claims against Senior Lenders Claims against the Senior Lenders and their legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)

Lydian Armenia		
Type of Claim	**Treatment**	**Plan Reference**
Senior Lender Claims Held by RCF, Orion and Osisko	Not Released	Section 6.6
Equipment Lessor Secured Claims ING, CAT and Ameriabank (to the extent secured by their collateral)	Not Released	Section 6.6 (carve-out (E))
Equipment Lessor Unsecured Claims ING, CAT and Ameriabank (unsecured deficiency claims)	Not Released	Section 6.6 (carve-out (E))
Other Unsecured Claims e.g. Trade creditors	Not Released	Section 6.6 (carve-out (E))
Equity Claims Shareholdings held by BVI / DirectorCo (as sole shareholder representative of BVI	Not Released	Section 3.5
D&O Claims Claims against the Directors	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6 (i) and (ii)
Claims against Monitor Claims against the Monitor, and Monitor's legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)
Claims against Senior Lenders Claims against the Senior Lenders and their legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)

Lydian US Lydian Zoloto, Lydian Resources Georgia Limited ("Lydian Georgia") and Georgian Resource Company LLC ("Lydian GRC", and collectively with Lydian US, Lydian Zoloto and Lydian Georgia, the "Released Guarantors" under the Plan)		
Type of Claim	**Treatment**	**Plan Reference**
Senior Lender Claims Held by RCF, Orion and Osisko	Released	Section 6.3(n)
Unsecured Claims	Not Released	Section 6.6
Equity Claims (a) Shareholdings of Lydian Jersey in Lydian US, Lydian Georgia and Lydian Zoloto; and (b) Shareholdings of Lydian Georgia in Lydian GRC	(a) Not Released. Per s. 6.4 of the Plan, Lydian US and Lydian Zoloto to be wound-up and dissolved pursuant to the laws of Colorado and Armenia, respectively. (b) Lydian Georgia shares held by Lydian Jersey to be transferred to Lydian Georgia Purchaser on Plan Implementation Date. (b) Shares of Lydian GRC held by Lydian Georgia not released. See note re: Lydian Georgia above.	Section 3.5 and section 6.4
D&O Claims, Claims against the Directors and their legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)

Claims against Monitor Claims against the Monitor, and Monitor's legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)
Claims against Senior Lenders Claims against the Senior Lenders and their legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)

COURT FILE NUMBER	2401-09688
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY

Clerk's stamp

JUDICIAL CENTRE OF CALGARY
FILED DIGITALLY
2401 09688
Feb 3, 2025
11:24 AM
CLERK OF THE COURT

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, RSC 1985, c C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF DELTA 9 CANNABIS INC., DELTA 9 LOGISTICS INC., DELTA 9 BIO-TECH INC., DELTA 9 LIFESTYLE CANNABIS CLINIC INC. and DELTA 9 CANNABIS STORE INC.

APPLICANTS	DELTA 9 CANNABIS INC., DELTA 9 LOGISTICS INC., DELTA 9 BIO-TECH INC., DELTA 9 LIFESTYLE CANNABIS CLINIC INC. and DELTA 9 CANNABIS STORE INC.
DOCUMENT	**ORDER – SANCTION OF PLAN AND STAY EXTENSION**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

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File No. 0136555.00034

DATE ON WHICH ORDER WAS PRONOUNCED: ~~**JANUARY 10, 2025**~~ January 29, 2025 MM

LOCATION WHERE ORDER WAS PRONOUNCED: **CALGARY, ALBERTA**

NAME OF JUSTICE WHO MADE THIS ORDER: **THE HONOURABLE JUSTICE M.A. MARION**

UPON the application (the "**Application**") of Delta 9 Cannabis Inc. ("**D9 Parent**"), Delta 9 Logistics Inc. ("**Logistics**"), Delta 9 Bio-Tech Inc. ("**Bio-Tech**"), Delta 9 Lifestyle Cannabis Clinic Inc. ("**Lifestyle**") and Delta 9 Cannabis Store Inc. ("**Store**", and collectively with D9 Parent, Logistics, Bio-Tech and Lifestyle, the "**Applicants**" or "**Delta 9 Group**") for an Order granting,

among other things: (i) an extension of the stay of proceedings pursuant to the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, as amended (the "**CCAA**"); and (ii) sanctioning and approving the Plan of Compromise and Arrangement, dated November 25, 2024 (the "**Plan**") for D9 Parent, Lifestyle and Store (collectively, the "**Plan Entities**"); **AND UPON** having read the Sixth Affidavit of John Arbuthnot IV, sworn on December 30, 2024, the Fourth Report of Alvarez & Marsal Canada Inc. (the "**Monitor**"), dated November 13, 2024 (the "**Fourth Report**"), the Fifth Report of the Monitor, dated November 26, 2024 (the "**Fifth Report**"), the Monitor's Report to Creditors dated December 11, 2024, the Sixth Report of the Monitor, filed January 6, 2025 (the "**Sixth Report**"), and the Affidavit of Service of Regie Agcaoili, sworn on January 9, 2025; **AND UPON** hearing the submissions of counsel for the Applicants, counsel for the Monitor, counsel for the 2759054 Ontario Inc. o/a Fika Herbal Goods (the "**Plan Sponsor**"), and counsel for any other parties present; **IT IS HEREBY ORDERED AND DECLARED THAT**:

SERVICE

1. The time for service of the notice of the Application and the materials filed in connection therewith are hereby abridged and service thereof is deemed good and sufficient, and this Application is properly returnable today.

DEFINED TERMS

2. All capitalized terms used herein that are not otherwise defined have the meanings ascribed to them in the Plan and the Creditors' Meeting Order, granted by the Honourable Justice R.W. Armstrong on December 2, 2024 (the "**Meeting Order**").

EXTENSION OF THE STAY PERIOD

3. The Stay Period, as defined in paragraph 14 of the Amended and Restated Initial Order, granted on July 24, 2024 (the "**ARIO**") and extended pursuant to the Order of the Honourable Justice C.D. Simard, granted on September 11, 2024 (the "**First Stay Extension Order**") and the Order of the Honourable Justice M.A. Marion, granted on November 1, 2024 (the "**Second Stay Extension Order**") in the within proceeding, is hereby extended until and including February 28, 2025.

CREDITORS' MEETING

4. Service of the Meeting Materials is deemed good and sufficient, and the Creditors' Meeting held on December 20, 2024 (the "**Meeting**") was duly called, convened, held and

conducted, in conformity with the CCAA and the Meeting Order.

5. The Delta 9 Group and the Plan Sponsor were authorized and directed to call the Meeting and to present the Plan for the purpose of having the Eligible Voting Creditors vote on the Plan.

6. The Plan was voted on and approved by the Required Majority in conformity with the CCAA, the Plan and the Meeting Order.

SANCTION OF THE PLAN

7. The Plan Entities have complied with the provisions of the CCAA and the Meeting Order, and all other Orders made in these CCAA Proceedings in all respects.

8. The Plan Entities have acted and are acting in good faith and with due diligence and have not done or purported to do (nor does the Plan do or purport to do) anything that is not authorized by the CCAA.

9. The Plan and all terms and conditions thereof are fair, reasonable, not oppressive and are in the best interests of the Plan Entities and their stakeholders.

10. The Plan is hereby sanctioned and approved pursuant to section 6 of the CCAA.

IMPLEMENTATION OF THE PLAN

11. The Plan and all associated steps, compromises, transactions, arrangements, releases, and reorganizations effected thereby are hereby:

    (a) approved;

    (b) deemed to be implemented; and

    (c) binding and effective upon and with respect to the Plan Entities, the Plan Sponsor, all Affected Creditors, the Directors and Officers, and all other Persons named or referred to in or subject to the Plan and their respective heirs, executors, administrators and other legal representatives, successors and assigns;

    all in accordance with the provisions of the Plan, as of the Implementation Date commencing at the Effective Time and in the sequential order contemplated by the

Restructuring Steps Supplement (or in such other manner or sequence or such other time or times as the Plan Entities, may determine in consultation with the Plan Sponsor and the Monitor and subject to the Plan and the Meeting Order).

12. The Plan shall be binding upon and *enure* to the benefit of the Plan Entities, the Released Parties, all Affected Creditors, and all other Persons named or referred to in, affected by, or subject to the Plan, including, without limitation, their respective heirs, executors, administrators, and other legal representatives, successors, and assigns.

13. The Plan Entities, the Directors and Officers, the Plan Sponsor and the Monitor are authorized and directed to take all steps and actions and to do all things reasonably necessary or appropriate, to implement the Plan in accordance with its terms, and to enter into, execute, deliver, complete, implement and consummate all transactions, distributions, disbursements, payments, deliveries, allocations, instruments and agreements contemplated by and subject to the terms of the Plan, and such steps and actions are hereby authorized, ratified and approved. Furthermore, none of the Plan Entities, the Directors and Officers, the Plan Sponsor or the Monitor shall incur any liability as a result of acting in accordance with the terms of the Plan and this Sanction Order, other than any liability arising out of or in connection with the gross negligence or wilful misconduct of such parties.

14. In addition, to the extent not previously given, all necessary approvals of and from the shareholders, members, directors, managers or officers of the Plan Entities, as applicable (including all necessary resolutions, whether ordinary, special or otherwise, of the shareholders, members, directors, managers or officers of the Plan Entities, as applicable) to take all actions under the Plan or contemplated thereby (including but not limited to the adoption, execution, delivery, implementation and consummation of all matters contemplated under the Plan) shall be deemed to have been made, given, passed or obtained, and no agreement between or among the shareholders or members of the Plan Entities, or any of them, or between a shareholder or member and another Person, that limits or purports to limit in any way the right to vote shares or membership interests held by such shareholder(s) or member(s) with respect to any of the steps or transactions contemplated by the Plan, shall be effective, and all such agreements shall be deemed to be of no force or effect.

15. Each of the Plan Entities, the Plan Sponsor, and the Monitor, and any other Person required to make any distributions, deliveries or allocations or take any steps or actions related thereto pursuant to the Plan are hereby directed to complete such distributions, deliveries or allocations and to take any such related steps and/or actions in accordance with the terms of the Plan, and such distributions, deliveries and allocations, and steps and actions related thereto, are hereby approved.

16. All distributions or payments by the Plan Entities or the Monitor to the Affected Creditors with Proven Claims under the Plan are for the account of the applicable Plan Entity and the fulfillment of its respective obligations under the Plan.

17. The Plan Entities and the Monitor shall be authorized, in connection with the making of any payment or distribution and in connection with the taking of any step or transaction or performance of any function under or in connection with the Plan, to apply to any Governmental Authority for any consent, authorization, certificate or approval in connection therewith.

18. The Plan Entities are hereby authorized to execute and file notices of alteration, articles of amendment, amalgamation, continuance or reorganization or such other documents or instruments as may be required to permit or enable and effect the Restructuring Steps Supplement and that such articles, documents or other instruments shall be deemed to be duly authorized, valid and effective notwithstanding any requirement under federal or provincial law to obtain director or shareholder approval with respect to such actions or to deliver any statutory declarations that may otherwise be required under corporate law to effect the Restructuring Steps Supplement, and, for greater clarity, no shareholder or other approval shall be required in connection therewith.

19. All Governmental Authorities, including but not limited to Registrar of Companies appointed pursuant to the *Business Corporations Act* (British Columbia) SBC 2022, c 57, the Executive Director as defined in the *Business Corporations Act*, RSA 2000, c B-9, as may be amended, the Director appointed under the *Corporations Act* (Manitoba) CCSM, c C225, and the Director of Corporations under the *Canada Business Corporations Act* RSC 1985, c C-44 and all similar Governmental Authorities in any other jurisdictions, are hereby authorized and directed to accept and receive any notices of alteration, articles of amendment, amalgamation, continuance or reorganization or such other documents or

instruments as may be required to permit or enable and effect the Implementation Steps contemplated in the Subscription Agreement, filed by any of the Applicants, the Plan Sponsor, or ResidualCo as the case may be.

20. Any securities or other consideration issued, transferred or distributed pursuant to the Plan shall be issued, transferred or distributed free and clear of any Encumbrances, other than the Encumbrances created in the Plan.

21. On the Effective Date, the Existing Equity shall be redeemed and cancelled for no consideration pursuant to this Order and the Plan.

22. On the Effective Date, the New Delta Parent Common Shares to be issued pursuant to the Plan shall be and are hereby deemed to have been validly authorized, created, issued and outstanding as fully-paid and non-assessable shares in the capital of Delta Parent, and Delta Parent shall issue the New Delta Parent Common Shares in accordance with the Plan. The New Delta Parent Common Shares issued pursuant to the Plan shall be free and clear of any Encumbrances except Permitted Encumbrances.

23. All directors serving on the Plan Entities' boards of directors (and any committee thereof) immediately prior to the Effective Time shall be deemed to resign, and the New Boards shall be deemed to have been appointed as the board of the directors of the applicable Plan Entity, with each member thereof becoming a director of the applicable Plan Entity.

24. Upon receiving written notice from the Plan Sponsor, the Plan Entities, and SNDL, confirming the satisfaction or waiver of the conditions set out in section 8.1., 8.2, and 8.3 of the Plan, the Monitor is authorized and directed to deliver to the Plan Sponsor and the Plan Entities a certificate substantially in the form attached as **Schedule "B"** hereto (the "**Monitor's Certificate**") signed by the Monitor, certifying that the Implementation Date has occurred and that the Plan is effective in accordance with its terms and the terms of this Sanction Order. As soon as practicable following the Implementation Date, the Monitor shall file such certificate with the Court and post a copy of same on the Monitor's website.

COMPROMISE OF CLAIMS AND EFFECT OF PLAN

25. Pursuant to and in accordance with the terms of the Plan, and subject to any other Order of the Court granted in these proceedings (including the Claims Process Order), from and

after the Effective Time:

(a) all Affected Claims shall be fully, finally, irrevocably, and forever compromised, settled, released, discharged, extinguished, cancelled and barred;

(b) the ability of any Person, along with their respective affiliates, present and former officers, directors, employees, partners, associated individuals, auditors, financial advisors, legal counsel, other professionals, sureties, insurers, indemnities, agents, dependents, heirs, representatives and assigns, as applicable, to proceed against any of the Released Parties in respect of or relating to any Affected Claims or Released Claims shall be forever barred, estopped, stayed and enjoined from:

(i) commencing, conducting or continuing any action, claim, suit, demand or other proceeding of any nature or kind whatsoever against the Release Parties;

(ii) enforcing, levying, attaching, collecting or otherwise recovering or enforcing by any manner or means, directly or indirectly, any judgment, award, decree or order against the Released Parties or their property;

(iii) commencing, conducting, or continuing in any manner, directly or indirectly, any action, claim, suit, demand, including without limitation by way of contribution or indemnity or other relief, in common law, or in equity, breach of trust or breach of fiduciary duty or under the provisions of any statute or regulation, or other proceedings of any nature or kind whatsoever (including, without limitation, any proceeding in a judicial, arbitral, administrative or other forum) against any Person who makes such a claim or might reasonably be expected to make such a claim in any manner or forum, against one or more of the Released Parties;

(iv) creating, perfecting, asserting or otherwise enforcing, directly or indirectly, any Lien or Encumbrance of any kind against the Released Parties or their property; or

(v) taking any actions to interfere with the implementation or consummation of the Plan or the transactions contemplated therein.

26. Any and all Persons who have previously commenced an Affected Claim or a Released Claim in any court, which has not been finally determined, discontinued or dismissed prior to the Effective Time shall, forthwith after the Effective Time take all steps necessary to discontinue or dismiss such Affected Claims or Released Claim on a without costs basis.

27. On the Implementation Date, the releases set out in Article 9 of the Plan shall become effective and the ability of any Person to proceed against any Released Party in respect of any Released Claim released therein shall be forever discharged, barred and restrained, and all proceedings with respect to, in connection with, or relating to any such matter is enjoined and permanently stayed; provided that nothing herein shall release or discharge (a) the right to enforce the obligations of any Person under the Plan, (b) any Released Party if the Released Party is determined by a Final Order of a Court of competent jurisdiction to have committed criminal acts, fraud or wilful misconduct, (c) the Plan Entities, their Directors or Officers from or in respect of any Unaffected Claim or any Released Claim that is not permitted to be released pursuant to Section 19(2) of the CCAA, or (d) any Director or Officer of the Plan Entities from any Released Claim that is not permitted to be released pursuant to Section 5.1(2) of the CCAA, as determined by a Final Order of the Court. However, notwithstanding anything to the contrary herein, from and after the Implementation Date, a Person may only commence an action against a Released Party in connection with (b), (c) or (d) above if such Person has first obtained leave of this Court on notice to the applicable Released Party, the Plan Entities, the Monitor (unless previously discharged), and any applicable insurers.

28. From and after the Implementation Date, any and all Persons shall be and are hereby barred, stopped, stayed and enjoined from commencing, taking, applying for or issuing or continuing any and all steps or proceedings, including without limitation, administrative hearings and orders, declarations or assessments, commenced, taken or proceeded with or that may be commenced, taken or proceeded with against any Released Party in respect of all Released Claims and any matter which is released pursuant to Article 9 of the Plan.

29. Each Affected Creditor and each Person holding a Released Claim is hereby deemed to have (i) consented to all of the provisions of the Plan, in its entirety, and (ii) executed and delivered to the Plan Entities and any other Released Party all consents, releases, assignments and waivers, statutory or otherwise, required to implement and carry out the

Plan in its entirety.

30. The procedure for determining the validity and quantum of the Affected Claims and for resolving the Disputed Claims for voting and distribution purposes under the Plan shall be governed by the Claims Procedure Order, the Meeting Order, the CCAA, the Plan and any further order of the Court. Without limiting the provisions of the Claims Procedure Order, any Person that did not file a Proof of Claim, a Notice of Dispute or a Notice of Dispute of Revision or Disallowance (each as defined in the Claims Procedure Order), as applicable, by the Claims Bar Date (as defined in the Plan, the Claims Procedure Order, or as amended in a subsequent Order) or such other date provided for in the Claims Procedure Order, as applicable, whether or not such Affected Creditor received direct notice of the claims process established by the Claims Procedure Order, shall be and is hereby forever barred from making any Claim and shall not be entitled to any distribution under the Plan, and such Person's Claim shall be and is hereby forever barred and extinguished. Nothing in the Plan extends or shall be interpreted as extending or amending the Claims Bar Date or any other bar date deadline provided for in the Claims Procedure Order or subsequent Order or the Plan, or gives or shall be interpreted as giving any rights to any Person in respect of Claims that have been barred or extinguished pursuant to the Claims Procedure Order, the Plan, or the Sanction Order.

31. An Affected Creditor with a Disputed Claim shall not be entitled to receive a distribution under the Plan in respect of such Disputed Claim or any portion thereof unless and until such Disputed Claim becomes an Allowed Affected Claim in accordance with the Meeting Order and the Claims Procedure Order.

32. As of the Implementation Date, all debentures, notes, certificates, agreements, invoices and other instruments evidencing Affected Claims shall not entitle any holder thereof to any compensation or participation and shall be and are hereby deemed to be cancelled and shall be and are hereby deemed to be null and void.

33. Pursuant to and in accordance with the terms of the Plan, following delivery of the Monitor’s Certificate, any and all liens, encumbrances, security interests and registrations in favour of any Affected Creditor or which any Affected Creditor holds by way of subrogation, including, but not limited to, all registrations made in accordance with the *Personal Property Security Act*, RSA 2000, c P-7, the *Land Titles Act*, RSA 2000, c L-4, c

M-17, the *Prompt Payment and Construction Lien Act,* RSA 2000, c P-26.4, the *Garage Keepers' Lien Act*, RSA 2000, c G2, the *Law of Property Act*, RSA 2000, c L-7, or any other similar legislation in any jurisdiction against the interests of the Plan Entities, other than in respect of an Unaffected Claim, are hereby wholly terminated, discharged and extinguished as against the Plan Entities and all of their business, assets and undertakings.

34. The Plan Entities and their counsel, MLT Aikins LLP, are hereby authorized and permitted to file discharges and full terminations of all filings referred to in paragraph 36 above (whether pursuant to personal property security legislation or otherwise) against the Plan Entities in any jurisdiction without any further action or consent required whatsoever.

35. The Registrar of all governmental authorities are hereby authorized, requested, and directed to accept delivery of the Monitor's Certificate and a certified copy of this Sanction Order as though they were originals and to register such discharges and discharge statements as may be required to give effect to this Order.

36. Section 36.1 of the CCAA and sections 38 and 95 to 101 of the *Bankruptcy and Insolvency Act* RSC 1985, c. B-3 (Canada) (the "**BIA**") and any other federal or provincial law relating to preferences, fraudulent conveyances or transfers at undervalue, shall not apply to the Plan or to any transactions, distributions or payments made in connection with transactions entered into by or on behalf of the Plan Entities, whether before or after the Filing Date, including to any and all of the payments, distributions and transactions contemplated by and to be implemented pursuant to the Plan.

37. Except as provided in the Plan, all obligations, agreements, or leases to which the Plan Entities are a party to on the Implementation Date, including all Continuing Contracts, shall be and remain in full force and effect, unamended except as they have been amended by agreements of the parties thereto subsequent to the Filing Date, and no party to any such obligation or agreement shall on or following the Implementation Date, accelerate, terminate, refuse to renew, rescind, refuse to perform or otherwise disclaim or resiliate its obligations thereunder, or enforce or exercise (or purport to enforce or exercise) any right (including any right of set-off, option, dilution or other remedy) or remedy under or in respect of any such obligation or agreement, by reason of:

    (a) any event which occurred prior to, and is not continuing after, the Implementation Date, or which is or continues to be suspended or waived under the Plan which

would have entitled such party to enforce those rights or remedies;

(b) that the Plan Entities have ought or obtained relief or have taken steps as part of the Plan or under the CCAA, or that the Plan has been implemented;

(c) any default or event of default arising as a result of the financial condition or insolvency of the Plan Entities;

(d) the effect upon the Plan Entities of the completion of any transactions contemplated by the Plan, including any change of control of the Plan Entities arising from the implementation of the transactions contemplated by the Plan; or

(e) of any compromises, settlements, restructuring, recapitalizations, reorganizations or steps effected pursuant to the Plan.

38. No Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any non-competition agreement or obligation, provided that such agreement shall terminate or expire in accordance with the terms thereof or as otherwise agreed by the Plan Entities and the applicable Persons.

ESTABLISHMENT OF PLAN IMPLEMENTATION FUND

39. On or prior to the Implementation Date, the Plan Sponsor shall deliver to the Monitor, an amount equal to the Creditor Cash Pool, together with funding sufficient to satisfy the Allowed Affected Claims of Convenience Creditors (the "**Plan Implementation Fund**").

40. The Plan Implementation Fund shall be held by the Monitor in a segregated account of the Monitor, and shall be used by the Monitor to pay, on behalf of the Plan Sponsor and the Plan Entities, all amounts payable to Eligible Voting Creditors and Convenience Creditors under the Plan.

ESTABLISHMENT OF DISPUTED AMOUNT ACCOUNT

41. If a Final Order determining the portion of the Disputed Amount that is due and payable to SNDL pursuant to the SNDL 2L Claim has not been issued on or prior to the Implementation Date, then the Plan Entities or the Plan Sponsor may elect to pay the Disputed Amount to the Monitor to be held in trust by the Monitor, in a segregated account (the "**Disputed Amount Account**") on the condition that, immediately upon a Final Order

being issued, the Monitor will, and the Monitor is hereby directed and authorized to, distribute the Disputed Amount to the Plan Entities and SNDL Inc., in accordance with the terms of such Final Order.

42. Upon receipt of the Disputed Amount by the Monitor in accordance with paragraph 44 above, the security held by SNDL and the obligations of the Plan Entities with respect to the SNDL 2L Claim will automatically attach to the Disputed Amount and the Plan Entities' respective obligations relative to the SNDL 2L Claim will be deemed to have been fully performed and discharged, and, for certainty, the security held by SNDL in respect of the SNDL 2L Claim will be released and discharged as against the property and assets of the Plan Entities and Bio-Tech.

CHARGES

43. Upon payment of the amounts referred to in paragraph 5.4(c)(i) and effective as of the Implementation Date, the Administration Charge shall be and shall be deemed to be fully and finally satisfied and discharged from and against any and all assets of the Plan Entities and the Plan Implementation Fund.

44. As of the Implementation Date, the Directors' Charge shall be and be deemed to be fully and finally discharged from and against the Plan Implementation Fund.

45. As of the Implementation Date, the Interim Lenders' Charge shall be discharged from and against any and all assets of the Applicants and the Plan Implementation Fund.

46. Upon payment of the amounts referred to in paragraph 5.4(c)(iv) of the Plan and effective as of the Implementation Date, the KERP Charge shall be and shall be deemed to be fully and finally satisfied and discharged from and against any and all assets of the Plan Entities and the Plan Implementation Fund.

47. As of the Implementation Date, the Plan Sponsor Protection Charge shall be and be deemed to be fully and finally discharged from and against any and all assets of the Plan Entities and the Plan Implementation Fund.

THE MONITOR

48. In addition to its prescribed rights and obligations under the CCAA and all Orders of the Court made in these CCAA Proceedings, the Monitor is granted the powers, duties and

protections contemplated by and required under the Plan and the Monitor shall be and is hereby authorized, entitled and empowered to perform its duties and fulfill its obligations under the Plan to facilitate the implementation thereof.

49. In no circumstances will the Monitor have any liability for any Claims against the Plan Entities, including but not limited to, any Claims with respect to tax liabilities regardless of how or when such Claims may have arisen.

50. In carrying out the terms of this Sanction Order and the Plan, (i) the Monitor shall have all the protections given to it by the CCAA, the Initial Order, any other Orders of this Court in the CCAA proceedings, and as an officer of the Court, including the stay of proceedings in its favour; (ii) the Monitor shall incur no liability, save and except for any gross negligence or wilful misconduct on its part; (iii) the Monitor shall be entitled to rely on the books and records of the Applicants and any information provided by the Applicants without independent investigation; and (iv) the Monitor shall not be liable for any claims or damages resulting from any errors or omissions in such books, records or information. In no circumstance will the Monitor have any liability for any Person's tax liabilities regardless of how or when such liabilities may have arisen.

GENERAL PROVISIONS

51. As of the date on which the Monitor's Certificate is filed, the CCAA Proceeding with respect to the Plan Entities shall be terminated without any other act or formality and the Monitor shall be discharged with respect to the Plan Entities without any other act or formality.

52. For greater certainty, the Monitor shall continue to have the benefit of all of the protections and priorities as set out in the Initial Order, the Plan, this Sanction Order, and the CCAA, and any such protections and priorities shall apply to the Monitor in fulfilling its duties under this Order or in carrying out the provisions of this Order or any other Order granted in the CCAA Proceeding, notwithstanding the termination of the CCAA Proceeding.

53. Notwithstanding the termination of the CCAA Proceeding with respect to the Plan Entities, the Court shall remain seized of any matter arising from the CCAA Proceeding, and the Plan Entities and the Monitor shall have the authority from and after the date of this Order to apply to this Court to address any matters ancillary or incidental to the CCAA Proceeding notwithstanding the termination thereof. In completing or addressing any such

ancillary or incidental matters, the Monitor shall continue to have the benefit of the provisions of the CCAA and the provisions of all Orders made in the CCAA Proceeding in relation to its capacity as Monitor, including all approvals, protections and stays of proceedings in the Monitor's favour.

54. The Applicants, the Plan Sponsor, or the Monitor may apply to the Court from time to time for advice and direction in respect of any matters arising from or under the Plan and to the extent that any Person seeks any advice or direction with respect to any matter arising from or under the Plan or this Sanction Order, such application shall be brought in the within Action.

55. This Sanction Order shall have full force and effect in all provinces and territories in Canada, outside Canada and against all Persons against whom it may be enforceable. The Plan Entities, the Plan Sponsor, and the Monitor may apply to a Court of competent jurisdiction to recognize the Plan or this Sanction Order and to confirm the Plan and the Sanction Order as binding and effective in any foreign jurisdiction.

56. This Court hereby requests the aid and recognition of any court, tribunal, regulatory or administrative bodies, having jurisdiction in Canada or in the United States of America, to give effect to this Sanction Order and to assist the Applicants, the Monitor, and the Plan Sponsor, and their respective representatives and agents in carrying out the terms of this Sanction Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicants and the Monitor, as an officer of this Court, as may be reasonably necessary or desirable to give effect to this Sanction Order.

57. This Sanction Order shall be posted on the Monitor's Website at https://www.alvarezandmarsal.com/Delta9 and only be required to be served on the parties on the Service List and those parties who appeared at the hearing of the motion for this Sanction Order.

Justice M.A. Marion

The Honourable Justice M.A. Marion
Justice of the Court of King's Bench of Alberta

SCHEDULE "A"

PLAN OF COMPROMISE AND ARRANGEMENT

SCHEDULE "B"

FORM OF MONITOR'S CERTIFICATE

COURT FILE NUMBER	2401-09688
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
	IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, RSC 1985, c C-36, AS AMENDED AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF DELTA 9 CANNABIS INC., DELTA 9 LOGISTICS INC., DELTA 9 BIO-TECH INC., DELTA 9 LIFESTYLE CANNABIS CLINIC INC. and DELTA 9 CANNABIS STORE INC.
APPLICANTS	DELTA 9 CANNABIS INC., DELTA 9 LOGISTICS INC., DELTA 9 BIO-TECH INC., DELTA 9 LIFESTYLE CANNABIS CLINIC INC. and DELTA 9 CANNABIS STORE INC.
DOCUMENT	**MONITOR'S CERTIFICATE**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**MLT AIKINS LLP** Barristers and Solicitors #2100 – 222 3rd Ave SW Calgary, AB T2P 0B4 Attention: Ryan Zahara / Molly McIntosh Telephone: (403) 693-5420 / (780) 969-3501 Email: rzahara@mltaikins.com mmcintosh@mltaikins.com File No. 0136555.00034

MONITOR'S CERTIFICATE

(PLAN IMPLEMENTATION)

All capitalized terms used herein that are not otherwise defined have the meaning ascribed to them in the Plan of Compromise and Arrangement dated November 25, 2024, as may be further amended, varied or supplemented from time to time in accordance with the terms thereof (the "**Plan**");

Pursuant to paragraph 27 of the Order of the Honourable Justice M. A. Marion made in

these proceedings on January 10, 2025 (the "**Sanction Order**") and Article 8.5 of the Plan, Alvarez & Marsal Canada Inc., in its capacity as the Court-appointed Monitor of the Plan Entities (the "**Monitor**") delivers to the Plan Entities this certificate and hereby certifies that:

1. The Monitor has received written notice from the Plan Entities, the Plan Sponsor and SNDL that the conditions precedent in sections 8.1., 8.2, and 8.3 of the Plan have been satisfied or waived in accordance with the terms of the Plan; and

2. the Implementation Date has occurred and the Plan is effective in accordance with its terms and the terms of the Sanction Order.

DATED at the City of Calgary, in the Province of Alberta, this ___ day of _____, 2025.

ALVAREZ & MARSAL CANADA INC., solely in its capacity as Court-appointed Monitor of the Delta 9 Group. and not in its personal or corporate capacity.

By: _____
Name:
Title:

COURT FILE NUMBER	2401-09688
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
	IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, RSC 1985, c C-36, AS AMENDED AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF DELTA 9 CANNABIS INC., DELTA 9 LOGISTICS INC., DELTA 9 BIO-TECH INC., DELTA 9 LIFESTYLE CANNABIS CLINIC INC. and DELTA 9 CANNABIS STORE INC.
APPLICANTS	DELTA 9 CANNABIS INC., DELTA 9 LOGISTICS INC., DELTA 9 BIO-TECH INC., DELTA 9 LIFESTYLE CANNABIS CLINIC INC. and DELTA 9 CANNABIS STORE INC.
DOCUMENT	**APPLICATION FOR SANCTION ORDER & STAY EXTENSION**

Clerk's stamp

JUDICIAL CENTRE OF CALGARY
FILED DIGITALLY
2401 09688
Jan 2, 2025
10:02 AM
CLERK OF THE COURT

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

MLT AIKINS LLP
Barristers and Solicitors
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mmcintosh@mltaikins.com
File No. 0136555.00034

NOTICE TO RESPONDENTS:

This application is made against you. You are a respondent.

You have the right to state your side of this matter before the judge.

To do so, you must be in Court when the application is heard as shown below:

Date:	January 10, 2025
Time:	10:00 a.m.
Where:	Calgary Courts Centre via WebEx Virtual Courtroom 60: https://albertacourts.webex.com/meet/virtual.courtroom60
Before:	The Honourable Justice M. A. Marion

Go to the end of this document to see what you can do and when you must do it.

REMEDY CLAIMED OR SOUGHT:

1. The Applicants, Delta 9 Cannabis Inc. ("**D9 Parent**"), Delta 9 Logistics Inc. ("**Logistics**"), Delta 9 Bio-Tech Inc. ("**Bio-Tech**"), Delta 9 Lifestyle Cannabis Clinic Inc. ("**Lifestyle**"), and Delta 9 Cannabis Store Inc. ("**Store**", and collectively with Logistics, Bio-Tech, and Lifestyle, the "**Applicants**" or "**Delta 9**") seek the following relief:

   (a) an Order pursuant to the *Companies' Creditors Arrangement Act,* RSC 1985, c C-36 (the "**CCAA**") substantially in the form attached hereto as **Schedule "A"** (the "**Sanction and Extension Order**") granting the following relief:

      (i) declaring service of this Application and its supporting materials good and sufficient and, if necessary, abridging the time for notice of the Application to the time actually given;

      (ii) sanctioning the plan of compromise and arrangement (the "**Plan**") of D9 Parent, Lifestyle and Store (the "**Plan Entities**") which was approved by the requisite majority of Affected Creditors (defined below) at the Creditors' Meeting on December 20, 2024 (the "**Meeting**");

      (iii) extending the Stay Period (defined below) up to and including February 28, 2025, or such further and other date as this Court may consider appropriate; and

      (iv) approving the activities, including the fees and disbursements of Alvarez & Marsal Canada Inc. (the "**Monitor**") and its legal counsel, as set out in the Sixth Report of the Monitor, to be filed (the "**Sixth Report**") and

   (b) such further and other relief as this Court may deem just and appropriate in the circumstances.

2. Capitalized terms used herein that are not otherwise defined have the meaning ascribed to them in the Plan.

GROUNDS FOR MAKING THIS APPLICATION:

Procedural History

3. The Delta 9 Group are a vertically integrated group of companies in the business of cannabis cultivation, processing, extraction, wholesale distribution and retail sales. Bio-Tech holds cannabis licences from Health Canada and the Canada Revenue Agency pursuant to the *Excise Act, 2001*.

4. On July 15, 2024, the Honourable Justice D.R. Mah granted an Initial Order pursuant to the CCAA (the "**Initial Order**") which, among other things, appointed Alvarez & Marsal Canada Inc. as the Monitor of the Applicants (the "**Monitor**").

5. On July 24, 2024, the Honourable Associate Chief Justice K.G. Nielsen granted the following orders:

   (a) an Amended and Restated Initial Order (the "**ARIO**"), which, among other things:

      (i) extended the stay of proceedings under the Initial Order to September 15, 2024;

      (ii) approved the break-fee of $1,500,000 (the "**Break Fee**") set out in the Restructuring Term Sheet, dated July 12, 2024 between 2759054 Ontario Inc. o/a Fika Herbal Goods ("**Fika**" or the "**Plan Sponsor**") and the Applicants (the "**Restructuring Term Sheet**") and granted a charge (the "**Plan Sponsor Protection Charge**") to secure the Break Fee;

      (iii) approved an interim financing loan agreement between the Applicants and the Plan Sponsor dated July 18, 2024 (the "**Interim Financing Agreement**") and a charge securing the Interim Financing Agreement not to exceed $16,000,000 plus interest, costs, and expenses in favour of the Plan Sponsor, as security for advances made by the Plan Sponsor pursuant to the Interim Financing Agreement (the "**Interim Financing Charge**");

      (iv) approved a key employee retention plan (the "**KERP**") and corresponding charge to secure obligations under the KERP up to the amount of $655,000 (the "**KERP Charge**");

(v) approved an increase to the Administration Charge (as defined in the Initial Order) from $350,000 to $750,000 and the Director's Charge (as defined in the Initial Order) from $300,000 to $900,000; and

(vi) appointed Mark Townsend as the chief restructuring officer of the Applicants;

(b) an Order approving the sales and investment solicitation process in respect of a going-concern sale of the assets and/or shares of Bio-Tech (the "**Bio-Tech SISP**"); and

(c) an Order (the "**Claims Procedure Order**") approving a claims procedure with respect to the Applicants (the "**Claims Procedure**").

6. On September 11, 2024, the Honourable Justice C. D. Simard granted an Order (the "**First Stay Extension Order**"), extending the stay of proceedings pursuant to the ARIO up to and including November 1, 2024, and approving an amendment to the Interim Financing Agreement and an increase to the Increase Financing Charge up to $17,500,000.

7. On November 1, 2024, the Honourable Justice M.A. Marion granted an Order (the "**Second Stay Extension Order**"), further extending the stay period up to and including January 31, 2025 and approving a further amendment to the Interim Financing Agreement and a further increase to the Increase Financing Charge up to $18,500,000. Justice Marion granted a further Order approving an amendment to the Claims Procedure Order (the "**Amended and Restated Claims Procedure Order**") to allow the Monitor to accept some late claims.

8. On December 2, 2024, the Honourable Justice R. W. Armstrong granted an Order (the "**Meeting Order**") that, among other things: (a) accepted the Plan for filing; (b) authorized the Applicants to hold, and present the Plan to Affected Creditors (defined below) at, a meeting of the Affected Creditors to be held on December 20, 2024 (the "**Meeting**"); and (c) subject to approval of the Plan by Affected Creditors at the Meeting, authorized the Applicants to make an application to the Court on January 10, 2024 seeking an Order sanctioning the Plan.

The Sanction Order is Appropriate

9. Pursuant to the ARIO, the Court approved the Restructuring Term Sheet between the Applicants and the Plan Sponsor, which contemplates the acquisition of the Applicants' retail cannabis operations through a plan of arrangement with the concurrent goal of monetizing Bio-Tech's business as a going-concern through the Bio-Tech SISP.

10. The Plan Sponsor and the Applicants, in consultation with the Monitor, CRO, and SNDL Inc. ("**SNDL**") developed the Plan to, among other things: (a) facilitate and implement the restructuring in accordance with the Restructuring Term Sheet; (b) effect a compromise, settlement, release and discharge of all Affected Claims in exchange for distributions to Affected Creditors; and (iii) ensure the continuation of D9 Parent, Lifestyle, and Store (collectively, the "**Plan Entities**") and their retail operations for the benefit of all stakeholders.

11. The key terms of the Plan include the following:

    (a) the Plan Sponsor shall acquire 100% of the issued and outstanding equity of the Plan Entities, along with the proceeds of sale resulting from the monetization of Bio-Tech's business and/or assets (through the Bio-Tech SISP or otherwise);

    (b) Store and Lifestyle will continue as normal and without disruption following implementation of the Plan and, unless otherwise required by the Plan or agreed to in writing between the Plan Sponsor and the applicable employee, all employment agreements that have not been disclaimed prior to the Implementation Date will remain in place;

    (c) Affected Creditors shall receive distributions, comprised as follows:

        (i) Allowed Affected Claims that have made a Convenience Election shall receive a cash payment equal to the Convenience Amount (being less than or equal to $4,000); and

        (ii) Eligible Voting Creditors with Allowed Affected Claims that do not constitute Convenience claims shall receive a *pro rata* Cash Payment from the Creditor Cash Pool (that has a total amount available of $750,000) and a Creditor Equity Payment from the

Creditor Equity Pool (being 270,270 Class "A" Voting common shares in the capital of the Plan Sponsor);

(d) the Plan does not affect the following Claims (the "**Unaffected Claims**"):

(i) Claims against Bio-Tech;

(ii) Claims against Logistics;

(iii) Post-Filing Claims;

(iv) Crown Claims;

(v) Secured Claims, including the SNDL Claims;

(vi) Claims secured by a Charge;

(vii) Employee Priority Claims;

(viii) Intercompany Claims;

(ix) D&O Claims that cannot be compromised pursuant to section 5.1(2) of the CCAA; and

(x) Claims that cannot be compromised pursuant to section 19(2) of the CCAA.

(e) those with Unaffected Claims were not entitled to vote and are not entitled to receive any distribution under the Plan in respect of such Unaffected Claims;

(f) the Unaffected Claims, with the exception of the Claims against Bio-Tech and Logistics (which remain and are unaffected by the Plan), will be paid in full or otherwise addressed pursuant to arrangements negotiated amongst the applicable parties;

(g) as a result of the decision to sell or liquidate Bio-Tech, creditors of Bio-Tech shall not be considered Creditors for the purposes of the Plan and are not entitled to vote on the Plan;

(h) as a result of the decision to wind-down Logistics and make an assignment into bankruptcy under the *BIA*, creditors of Logistics shall not be considered Creditors for the purposes of the Plan and are not entitled to vote on the Plan;

(i) all D&O Claims (except for those that cannot be compromised under section 5.1(2) of the CCAA) shall be fully, finally, and irrevocably compromised, released, discharged, cancelled, extinguished and barred and the Directors Charge shall be fully and finally discharged from and against the Plan Implementation Fund; and

(j) on or prior to the Implementation Date, the Plan Sponsor shall pay to the Monitor the Administrative Expense Reserve and following the Implementation Date, Administration Expenses (fees and expenses incurred post-Implementation Date by the Monitor, its legal counsel, the Applicants, their legal counsel, or any third party retained by the Monitor in connection with the administration of the estate) shall be paid from the Administrative Expense Reserve.

12. The Plan was voted on at the Meeting of Affected Creditors on December 20, 2024 and was approved by the requisite majority.

13. It is a condition precedent to implementation of the Plan that the requested Sanction Order be granted.

14. The Plan meets the statutory requirements of the *CCAA*, and is fair and reasonable, and ought to be sanctioned and approved.

The Stay Extension Order is Appropriate

15. The stay of proceedings granted by the Initial Order and subsequently extended by the ARIO, the First Stay Extension Order, and the Second Stay Extension Order, currently expires on January 31, 2025 (the "**Stay Period**").

16. The Applicants are seeking a further extension of the Stay Period up to and including February 28, 2025.

17. The Applicants require an extension of the Stay Period to, among others, implement the Plan, to seek approval of certain transactions in respect of Bio-Tech and thereafter, implement same and attend to various post-closing and post-implementation matters.

18. The Applicants have acted, and continue to act, in good faith and with due diligence to, among other things, operate their Business in the ordinary course and to advance these CCAA proceedings.

19. Approving the extension of the Stay Period is in the best interest of all stakeholders as it will provide the Applicants and the Monitor with the time and space required to affect a successful compromise and emerge as a sustainable operation.

20. The Applicants are also seeking approval of the fees and activities of the Monitor incurred and undertaken in these proceedings between October 22, 2024 to December 29, 2024. The substantive evidence and reporting on these fees and activities will be contained in the Sixth Report.

MATERIAL OR EVIDENCE TO BE RELIED UPON:

21. The Sixth Affidavit of John Arbuthnot, sworn on December 30, 2024, to be filed;

22. The Fourth Report of the Monitor, filed on October 30, 2024;

23. The Fifth Report of the Monitor, filed on November 26, 2024;

24. The Sixth Report of the Monitor, to be filed;

25. The Brief of Law of the Applicants; and

26. Such further and other materials as counsel for the Monitor or the Applicants may advise and this Honourable Court may permit.

APPLICABLE RULES:

27. Part 6, Division 1 of the Alberta *Rules of Court*, Alta Reg 124/2010.

APPLICABLE ACTS AND REGULATIONS

28. The *Companies' Creditors Arrangement Act*, RSC 1985, c C-36; and

29. Such further and other Acts or regulations as counsel may advise and this Honourable Court may permit.

ANY IRREGULARITY COMPLAINED OF:

30. None.

HOW THE APPLICATION IS PROPOSED TO BE HEARD OR CONSIDERED:

31. By WebEx videoconference before the Honourable Justice M. A. Marion pursuant to the WebEx details enclosed hereto at **Appendix "A"**.

WARNING

If you do not come to Court either in person or by your lawyer, the Court may give the applicant what they want in your absence. You will be bound by any order that the Court makes. If you want to take part in this application, you or your lawyer must attend in Court on the date and at the time shown at the beginning of the form. If you intend to give evidence in response to the application, you must reply by filing an affidavit or other evidence with the Court and serving a copy of that affidavit or other evidence on the applicant a reasonable time before the application is to be heard or considered.

Appendix "A" – WebEx Details

The above booking is Confirmed
File #(s) : 2401 09688
Style of Cause: DELTA 9 CANNABIS INC. v. COMPANIES' CREDITORS ARRANGEMENT ACT

Date/Duration:
January 10, 2024 at 10:00 a.m.
Total: 240 Minute(s)
Booking Type/List: Commercial
Purpose of Hearing: Commercial Hearing
Counsel: Molly Gretna Heather McIntosh;Ryan Zahara;Christopher Allan Nyberg;David LeGeyt;Ryan Edward Algar;Jennifer Nicole Deyholos;James William Reid;Sean Francis Collins;Ashley Elizabeth Bowron;

Virtual Courtroom 60 has been assigned for the above noted matter:

Virtual Courtroom Link:

https://albertacourts.webex.com/meet/virtual.courtroom60

SCHEDULE “A”

Form of Sanction and Stay Extension Order

COURT FILE NUMBER	2401-09688
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
	IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, RSC 1985, c C-36, AS AMENDED AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF DELTA 9 CANNABIS INC., DELTA 9 LOGISTICS INC., DELTA 9 BIO-TECH INC., DELTA 9 LIFESTYLE CANNABIS CLINIC INC. and DELTA 9 CANNABIS STORE INC.
APPLICANTS	DELTA 9 CANNABIS INC., DELTA 9 LOGISTICS INC., DELTA 9 BIO-TECH INC., DELTA 9 LIFESTYLE CANNABIS CLINIC INC. and DELTA 9 CANNABIS STORE INC.
DOCUMENT	**ORDER – SANCTION OF PLAN AND STAY EXTENSION**

Clerk's stamp

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

MLT AIKINS LLP
Barristers and Solicitors
#2100 – 222 3rd Ave SW
Calgary, AB T2P 0B4
Attention: Ryan Zahara / Molly McIntosh
Telephone: (403) 693-5420 / (780) 969-3501
Email: rzahara@mltaikins.com
mmcintosh@mltaikins.com
File No. 0136555.00034

DATE ON WHICH ORDER WAS PRONOUNCED:	**JANUARY 10, 2025**
LOCATION WHERE ORDER WAS PRONOUNCED:	**CALGARY, ALBERTA**
NAME OF JUSTICE WHO MADE THIS ORDER:	**THE HONOURABLE JUSTICE M.A. MARION**

UPON the application (the "**Application**") of Delta 9 Cannabis Inc. ("**D9 Parent**"), Delta 9 Logistics Inc. ("**Logistics**"), Delta 9 Bio-Tech Inc. ("**Bio-Tech**"), Delta 9 Lifestyle Cannabis Clinic Inc. ("**Lifestyle**") and Delta 9 Cannabis Store Inc. ("**Store**", and collectively with D9 Parent, Logistics, Bio-Tech and Lifestyle, the "**Applicants**" or "**Delta 9 Group**") for an Order granting,

among other things: (i) an extension of the stay of proceedings pursuant to the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, as amended (the "**CCAA**"); and (ii) sanctioning and approving the Plan of Compromise and Arrangement, dated November 25, 2024 (the "**Plan**") for D9 Parent, Lifestyle and Store (collectively, the "**Plan Entities**"); **AND UPON** having read the Sixth Affidavit of John Arbuthnot IV, sworn on December 30, 2024, the Fourth Report of Alvarez & Marsal Canada Inc. (the "**Monitor**"), dated November 13, 2024 (the "**Fourth Report**"), the Fifth Report of the Monitor, dated November 26, 2024 (the "**Fifth Report**"), the Monitor's Report to Creditors dated December 11, 2024, the Sixth Report of the Monitor, dated December ___, 2024 (the "**Sixth Report**"), and the Affidavit of Service of _____, sworn on January ____, 2025; **AND UPON** hearing the submissions of counsel for the Applicants, counsel for the Monitor, counsel for the 2759054 Ontario Inc. o/a Fika Herbal Goods (the "**Plan Sponsor**"), and counsel for any other parties present; **IT IS HEREBY ORDERED AND DECLARED THAT**:

SERVICE

1. The time for service of the notice of the Application and the materials filed in connection therewith are hereby abridged and service thereof is deemed good and sufficient, and this Application is properly returnable today.

DEFINED TERMS

2. All capitalized terms used herein that are not otherwise defined have the meanings ascribed to them in the Plan and the Creditors' Meeting Order, granted by the Honourable Justice R.W. Armstrong on December 2, 2024 (the "**Meeting Order**").

EXTENSION OF THE STAY PERIOD

3. The Stay Period, as defined in paragraph 14 of the Amended and Restated Initial Order, granted on July 24, 2024 (the "**ARIO**") and extended pursuant to the Order of the Honourable Justice C.D. Simard, granted on September 11, 2024 (the "**First Stay Extension Order**") and the Order of the Honourable Justice M.A. Marion, granted on November 1, 2024 (the "**Second Stay Extension Order**") in the within proceeding, is hereby extended until and including February 28, 2025.

APPROVAL OF ACTIVITIES & FEES

4. The Monitor's accounts for fees and disbursements, as set out in the Sixth Report, are hereby approved.

5. The accounts of the Monitor's legal counsel, Burnet, Duckworth & Palmer LLP, for its fees and disbursements, as set out in the Sixth Report, are hereby approved.

6. The Monitor's activities, actions, and conduct, as set out in the Sixth Report, are hereby approved.

CREDITORS' MEETING

7. Service of the Meeting Materials is deemed good and sufficient, and the Creditors' Meeting held on December 20, 2024 (the "**Meeting**") was duly called, convened, held and conducted, in conformity with the CCAA and the Meeting Order.

8. The Delta 9 Group and the Plan Sponsor were authorized and directed to call the Meeting and to present the Plan for the purpose of having the Eligible Voting Creditors vote on the Plan.

9. The Plan was voted on and approved by the Required Majority in conformity with the CCAA, the Plan and the Meeting Order.

SANCTION OF THE PLAN

10. The Plan Entities have complied with the provisions of the CCAA and the Meeting Order, and all other Orders made in these CCAA Proceedings in all respects.

11. The Plan Entities have acted and are acting in good faith and with due diligence and have not done or purported to do (nor does the Plan do or purport to do) anything that is not authorized by the CCAA.

12. The Plan and all terms and conditions thereof are fair, reasonable, not oppressive and are in the best interests of the Plan Entities and their stakeholders.

13. The Plan is hereby sanctioned and approved pursuant to section 6 of the CCAA.

IMPLEMENTATION OF THE PLAN

14. The Plan and all associated steps, compromises, transactions, arrangements, releases, and reorganizations effected thereby are hereby:

    (a) approved;

(b) deemed to be implemented; and

(c) binding and effective upon and with respect to the Plan Entities, the Plan Sponsor, all Affected Creditors, the Directors and Officers, and all other Persons named or referred to in or subject to the Plan and their respective heirs, executors, administrators and other legal representatives, successors and assigns;

all in accordance with the provisions of the Plan, as of the Implementation Date commencing at the Effective Time and in the sequential order contemplated by the Restructuring Steps Supplement (or in such other manner or sequence or such other time or times as the Plan Entities, may determine in consultation with the Plan Sponsor and the Monitor and subject to the Plan and the Meeting Order).

15. The Plan shall be binding upon and *enure* to the benefit of the Plan Entities, the Released Parties, all Affected Creditors, and all other Persons named or referred to in, affected by, or subject to the Plan, including, without limitation, their respective heirs, executors, administrators, and other legal representatives, successors, and assigns.

16. The Plan Entities, the Directors and Officers, the Plan Sponsor and the Monitor are authorized and directed to take all steps and actions and to do all things reasonably necessary or appropriate, to implement the Plan in accordance with its terms, and to enter into, execute, deliver, complete, implement and consummate all transactions, distributions, disbursements, payments, deliveries, allocations, instruments and agreements contemplated by and subject to the terms of the Plan, and such steps and actions are hereby authorized, ratified and approved. Furthermore, none of the Plan Entities, the Directors and Officers, the Plan Sponsor or the Monitor shall incur any liability as a result of acting in accordance with the terms of the Plan and this Sanction Order, other than any liability arising out of or in connection with the gross negligence or wilful misconduct of such parties.

17. In addition, to the extent not previously given, all necessary approvals of and from the shareholders, members, directors, managers or officers of the Plan Entities, as applicable (including all necessary resolutions, whether ordinary, special or otherwise, of the shareholders, members, directors, managers or officers of the Plan Entities, as applicable) to take all actions under the Plan or contemplated thereby (including but not limited to the adoption, execution, delivery, implementation and consummation of all matters

contemplated under the Plan) shall be deemed to have been made, given, passed or obtained, and no agreement between or among the shareholders or members of the Plan Entities, or any of them, or between a shareholder or member and another Person, that limits or purports to limit in any way the right to vote shares or membership interests held by such shareholder(s) or member(s) with respect to any of the steps or transactions contemplated by the Plan, shall be effective, and all such agreements shall be deemed to be of no force or effect.

18. Each of the Plan Entities, the Plan Sponsor, and the Monitor, and any other Person required to make any distributions, deliveries or allocations or take any steps or actions related thereto pursuant to the Plan are hereby directed to complete such distributions, deliveries or allocations and to take any such related steps and/or actions in accordance with the terms of the Plan, and such distributions, deliveries and allocations, and steps and actions related thereto, are hereby approved.

19. All distributions or payments by the Plan Entities or the Monitor to the Affected Creditors with Proven Claims under the Plan are for the account of the applicable Plan Entity and the fulfillment of its respective obligations under the Plan.

20. The Plan Entities and the Monitor shall be authorized, in connection with the making of any payment or distribution and in connection with the taking of any step or transaction or performance of any function under or in connection with the Plan, to apply to any Governmental Authority for any consent, authorization, certificate or approval in connection therewith.

21. Any securities or other consideration issued, transferred or distributed pursuant to the Plan shall be issued, transferred or distributed free and clear of any Encumbrances, other than the Encumbrances created in the Plan.

22. On the Effective Date, the New Delta Parent Common Shares to be issued pursuant to the Plan shall be and are hereby deemed to have been validly authorized, created, issued and outstanding as fully-paid and non-assessable shares in the capital of Delta Parent, and Delta Parent shall issue the New Delta Parent Common Shares in accordance with the Plan. The New Delta Parent Common Shares issued pursuant to the Plan shall be free and clear of any Encumbrances except Permitted Encumbrances.

23. All directors serving on the Plan Entities' boards of directors (and any committee thereof) immediately prior to the Effective Time shall be deemed to resign, and the New Boards shall be deemed to have been appointed as the board of the directors of the applicable Plan Entity, with each member thereof becoming a director of the applicable Plan Entity.

24. Upon receiving written notice from the Plan Sponsor, the Plan Entities, and SNDL, confirming the satisfaction or waiver of the conditions set out in section 8.1., 8.2, and 8.3 of the Plan, the Monitor is authorized and directed to deliver to the Plan Sponsor and the Plan Entities a certificate substantially in the form attached as **Schedule "B"** hereto (the "**Monitor's Certificate**") signed by the Monitor, certifying that the Implementation Date has occurred and that the Plan is effective in accordance with its terms and the terms of this Sanction Order. As soon as practicable following the Implementation Date, the Monitor shall file such certificate with the Court and post a copy of same on the Monitor's website.

COMPROMISE OF CLAIMS AND EFFECT OF PLAN

25. Pursuant to and in accordance with the terms of the Plan, and subject to any other Order of the Court granted in these proceedings (including the Claims Process Order), from and after the Effective Time:

    (a) all Affected Claims shall be fully, finally, irrevocably, and forever compromised, settled, released, discharged, extinguished, cancelled and barred;

    (b) the ability of any Person, along with their respective affiliates, present and former officers, directors, employees, partners, associated individuals, auditors, financial advisors, legal counsel, other professionals, sureties, insurers, indemnities, agents, dependents, heirs, representatives and assigns, as applicable, to proceed against any of the Released Parties in respect of or relating to any Affected Claims or Released Claims shall be forever barred, estopped, stayed and enjoined from:

        (i) commencing, conducting or continuing any action, claim, suit, demand or other proceeding of any nature or kind whatsoever against the Release Parties;

        (ii) enforcing, levying, attaching, collecting or otherwise recovering or enforcing by any manner or means, directly or indirectly, any judgment,

award, decree or order against the Released Parties or their property;

(iii) commencing, conducting, or continuing in any manner, directly or indirectly, any action, claim, suit, demand, including without limitation by way of contribution or indemnity or other relief, in common law, or in equity, breach of trust or breach of fiduciary duty or under the provisions of any statute or regulation, or other proceedings of any nature or kind whatsoever (including, without limitation, any proceeding in a judicial, arbitral, administrative or other forum) against any Person who makes such a claim or might reasonably be expected to make such a claim in any manner or forum, against one or more of the Released Parties;

(iv) creating, perfecting, asserting or otherwise enforcing, directly or indirectly, any Lien or Encumbrance of any kind against the Released Parties or their property; or

(v) taking any actions to interfere with the implementation or consummation of the Plan or the transactions contemplated therein.

26. Any and all Persons who have previously commenced an Affected Claim or a Released Claim in any court, which has not been finally determined, discontinued or dismissed prior to the Effective Time shall, forthwith after the Effective Time take all steps necessary to discontinue or dismiss such Affected Claims or Released Claim on a without costs basis.

27. On the Implementation Date, the releases set out in Article 9 of the Plan shall become effective and the ability of any Person to proceed against any Released Party in respect of any Released Claim released therein shall be forever discharged, barred and restrained, and all proceedings with respect to, in connection with, or relating to any such matter is enjoined and permanently stayed; provided that nothing herein shall release or discharge (a) the right to enforce the obligations of any Person under the Plan, (b) any Released Party if the Released Party is determined by a Final Order of a Court of competent jurisdiction to have committed criminal acts, fraud or wilful misconduct, (c) the Plan Entities, their Directors or Officers from or in respect of any Unaffected Claim or any Released Claim that is not permitted to be released pursuant to Section 19(2) of the CCAA, or (d) any Director or Officer of the Plan Entities from any Released Claim that is not permitted to be released pursuant to Section 5.1(2) of the CCAA, as determined by a Final Order of

the Court. However, notwithstanding anything to the contrary herein, from and after the Implementation Date, a Person may only commence an action against a Released Party in connection with (b), (c) or (d) above if such Person has first obtained leave of this Court on notice to the applicable Released Party, the Plan Entities, the Monitor (unless previously discharged), and any applicable insurers.

28. From and after the Implementation Date, any and all Persons shall be and are hereby barred, stopped, stayed and enjoined from commencing, taking, applying for or issuing or continuing any and all steps or proceedings, including without limitation, administrative hearings and orders, declarations or assessments, commenced, taken or proceeded with or that may be commenced, taken or proceeded with against any Released Party in respect of all Released Claims and any matter which is released pursuant to Article 9 of the Plan.

29. Each Affected Creditor and each Person holding a Released Claim is hereby deemed to have (i) consented to all of the provisions of the Plan, in its entirety, and (ii) executed and delivered to the Plan Entities and any other Released Party all consents, releases, assignments and waivers, statutory or otherwise, required to implement and carry out the Plan in its entirety.

30. The procedure for determining the validity and quantum of the Affected Claims and for resolving the Disputed Claims for voting and distribution purposes under the Plan shall be governed by the Claims Procedure Order, the Meeting Order, the CCAA, the Plan and any further order of the Court. Without limiting the provisions of the Claims Procedure Order, any Person that did not file a Proof of Claim, a Notice of Dispute or a Notice of Dispute of Revision or Disallowance (each as defined in the Claims Procedure Order), as applicable, by the Claims Bar Date (as defined in the Plan, the Claims Procedure Order, or as amended in a subsequent Order) or such other date provided for in the Claims Procedure Order, as applicable, whether or not such Affected Creditor received direct notice of the claims process established by the Claims Procedure Order, shall be and is hereby forever barred from making any Claim and shall not be entitled to any distribution under the Plan, and such Person's Claim shall be and is hereby forever barred and extinguished. Nothing in the Plan extends or shall be interpreted as extending or amending the Claims Bar Date or any other bar date deadline provided for in the Claims Procedure Order or subsequent

Order or the Plan, or gives or shall be interpreted as giving any rights to any Person in respect of Claims that have been barred or extinguished pursuant to the Claims Procedure Order, the Plan, or the Sanction Order.

31. An Affected Creditor with a Disputed Claim shall not be entitled to receive a distribution under the Plan in respect of such Disputed Claim or any portion thereof unless and until such Disputed Claim becomes an Allowed Affected Claim in accordance with the Meeting Order and the Claims Procedure Order.

32. As of the Implementation Date, all debentures, notes, certificates, agreements, invoices and other instruments evidencing Affected Claims shall not entitle any holder thereof to any compensation or participation and shall be and are hereby deemed to be cancelled and shall be and are hereby deemed to be null and void.

33. Pursuant to and in accordance with the terms of the Plan, following delivery of the Monitor's Certificate, any and all liens, encumbrances, security interests and registrations in favour of any Affected Creditor or which any Affected Creditor holds by way of subrogation, including, but not limited to, all registrations made in accordance with the *Personal Property Security Act*, RSA 2000, c P-7, the *Land Titles Act*, RSA 2000, c L-4, c M-17, the *Prompt Payment and Construction Lien Act,* RSA 2000, c P-26.4, the *Garage Keepers' Lien Act*, RSA 2000, c G2, the *Law of Property Act*, RSA 2000, c L-7, or any other similar legislation in any jurisdiction against the interests of the Plan Entities, other than in respect of an Unaffected Claim, are hereby wholly terminated, discharged and extinguished as against the Plan Entities and all of their business, assets and undertakings.

34. The Plan Entities and their counsel, MLT Aikins LLP, are hereby authorized and permitted to file discharges and full terminations of all filings referred to in paragraph 33 above (whether pursuant to personal property security legislation or otherwise) against the Plan Entities in any jurisdiction without any further action or consent required whatsoever.

35. The Registrar of all governmental authorities are hereby authorized, requested, and directed to accept delivery of the Monitor's Certificate and a certified copy of this Sanction Order as though they were originals and to register such discharges and discharge statements as may be required to give effect to this Order.

36. Section 36.1 of the CCAA and sections 38 and 95 to 101 of the *Bankruptcy and Insolvency*

Act RSC 1985, c. B-3 (Canada) (the "**BIA**") and any other federal or provincial law relating to preferences, fraudulent conveyances or transfers at undervalue, shall not apply to the Plan or to any transactions, distributions or payments made in connection with transactions entered into by or on behalf of the Plan Entities, whether before or after the Filing Date, including to any and all of the payments, distributions and transactions contemplated by and to be implemented pursuant to the Plan.

37. Except as provided in the Plan, all obligations, agreements, or leases to which the Plan Entities are a party to on the Implementation Date, including all Continuing Contracts, shall be and remain in full force and effect, unamended except as they have been amended by agreements of the parties thereto subsequent to the Filing Date, and no party to any such obligation or agreement shall on or following the Implementation Date, accelerate, terminate, refuse to renew, rescind, refuse to perform or otherwise disclaim or resiliate its obligations thereunder, or enforce or exercise (or purport to enforce or exercise) any right (including any right of set-off, option, dilution or other remedy) or remedy under or in respect of any such obligation or agreement, by reason of:

(a) any event which occurred prior to, and is not continuing after, the Implementation Date, or which is or continues to be suspended or waived under the Plan which would have entitled such party to enforce those rights or remedies;

(b) that the Plan Entities have ought or obtained relief or have taken steps as part of the Plan or under the CCAA, or that the Plan has been implemented;

(c) any default or event of default arising as a result of the financial condition or insolvency of the Plan Entities;

(d) the effect upon the Plan Entities of the completion of any transactions contemplated by the Plan, including any change of control of the Plan Entities arising from the implementation of the transactions contemplated by the Plan; or

(e) of any compromises, settlements, restructuring, recapitalizations, reorganizations or steps effected pursuant to the Plan.

38. No Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any non-competition agreement or obligation, provided that such agreement shall terminate or expire in accordance with the terms thereof or as otherwise

agreed by the Plan Entities and the applicable Persons.

ESTABLISHMENT OF PLAN IMPLEMENTATION FUND

39. On or prior to the Implementation Date, the Plan Sponsor shall deliver to the Monitor, an amount equal to the Creditor Cash Pool, together with funding sufficient to satisfy the Allowed Affected Claims of Convenience Creditors (the "**Plan Implementation Fund**").

40. The Plan Implementation Fund shall be held by the Monitor in a segregated account of the Monitor, and shall be used by the Monitor to pay, on behalf of the Plan Sponsor and the Plan Entities, all amounts payable to Eligible Voting Creditors and Convenience Creditors under the Plan.

ESTABLISHMENT OF DISPUTED AMOUNT ACCOUNT

41. If a Final Order determining the portion of the Disputed Amount that is due and payable to SNDL pursuant to the SNDL 2L Claim has not been issued on or prior to the Implementation Date, then the Plan Entities or the Plan Sponsor may elect to pay the Disputed Amount to the Monitor to be held in trust by the Monitor, in a segregated account (the "**Disputed Amount Account**") on the condition that, immediately upon a Final Order being issued, the Monitor will, and the Monitor is hereby directed and authorized to, distribute the Disputed Amount to the Plan Entities and SNDL Inc., in accordance with the terms of such Final Order.

42. Upon receipt of the Disputed Amount by the Monitor in accordance with paragraph 41 above, the security held by SNDL and the obligations of the Plan Entities with respect to the SNDL 2L Claim will automatically attached to the Disputed Amount and the Plan Entities' respective obligations relative to the SNDL 2L Claim will be deemed to have been fully performed and discharged, and, for certainty, the security held by SNDL in respect of the SNDL 2L Claim will be released and discharged as against the property and assets of the Plan Entities and Bio-Tech.

CHARGES

43. Upon payment of the amounts referred to in paragraph 5.4(c)(i) and effective as of the Implementation Date, the Administration Charge shall be and shall be deemed to be fully and finally satisfied and discharged from and against any and all assets of the Plan Entities and the Plan Implementation Fund.

44. As of the Implementation Date, the Directors' Charge shall be and be deemed to be fully and finally discharged from and against the Plan Implementation Fund.

45. As of the Implementation Date, the Interim Lenders' Charge shall be discharged from and against any and all assets of the Applicants and the Plan Implementation Fund.

46. Upon payment of the amounts referred to in paragraph 5.4(c)(iv) and effective as of the Implementation Date, the KERP Charge shall be and shall be deemed to be fully and finally satisfied and discharged from and against any and all assets of the Plan Entities and the Plan Implementation Fund.

47. As of the Implementation Date, the Plan Sponsor Protection Charge shall be and be deemed to be fully and finally discharged from and against any and all assets of the Plan Entities and the Plan Implementation Fund.

48. The Plan Sponsor shall pay the KERP Prepayment to the Monitor, upon which the KERP Charge shall be fully and finally satisfied and discharged from and against any and all assets of the Applicants and the Plan Implementation Fund.

THE MONITOR

49. In addition to its prescribed rights and obligations under the CCAA and all Orders of the Court made in these CCAA Proceedings, the Monitor is granted the powers, duties and protections contemplated by and required under the Plan and the Monitor shall be and is hereby authorized, entitled and empowered to perform its duties and fulfill its obligations under the Plan to facilitate the implementation thereof.

50. In no circumstances will the Monitor have any liability for any Claims against the Plan Entities, including but not limited to, any Claims with respect to tax liabilities regardless of how or when such Claims may have arisen.

51. In carrying out the terms of this Sanction Order and the Plan, (i) the Monitor shall have all the protections given to it by the CCAA, the Initial Order, any other Orders of this Court in the CCAA proceedings, and as an officer of the Court, including the stay of proceedings in its favour; (ii) the Monitor shall incur no liability, save and except for any gross negligence or wilful misconduct on its part; (iii) the Monitor shall be entitled to rely on the books and records of the Applicants and any information provided by the Applicants

without independent investigation; and (iv) the Monitor shall not be liable for any claims or damages resulting from any errors or omissions in such books, records or information. In no circumstance will the Monitor have any liability for any Person's tax liabilities regardless of how or when such liabilities may have arisen.

GENERAL PROVISIONS

52. As of the date on which the Monitor's Certificate is filed, the CCAA Proceeding with respect to the Plan Entities shall be terminated without any other act or formality and the Monitor shall be discharged with respect to the Plan Entities without any other act or formality.

53. For greater certainty, the Monitor shall continue to have the benefit of all of the protections and priorities as set out in the Initial Order, the Plan, this Sanction Order, and the CCAA, and any such protections and priorities shall apply to the Monitor in fulfilling its duties under this Order or in carrying out the provisions of this Order or any other Order granted in the CCAA Proceeding, notwithstanding the termination of the CCAA Proceeding.

54. Notwithstanding the termination of the CCAA Proceeding with respect to the Plan Entities, the Court shall remain seized of any matter arising from the CCAA Proceeding, and the Plan Entities and the Monitor shall have the authority from and after the date of this Order to apply to this Court to address any matters ancillary or incidental to the CCAA Proceeding notwithstanding the termination thereof. In completing or addressing any such ancillary or incidental matters, the Monitor shall continue to have the benefit of the provisions of the CCAA and the provisions of all Orders made in the CCAA Proceeding in relation to its capacity as Monitor, including all approvals, protections and stays of proceedings in the Monitor's favour.

55. The Applicants, the Plan Sponsor, or the Monitor may apply to the Court from time to time for advice and direction in respect of any matters arising from or under the Plan and to the extent that any Person seeks any advice or direction with respect to any matter arising from or under the Plan or this Sanction Order, such application shall be brought in the within Action.

56. This Sanction Order shall have full force and effect in all provinces and territories in Canada, outside Canada and against all Persons against whom it may be enforceable. The Plan Entities, the Plan Sponsor, and the Monitor may apply to a Court of competent jurisdiction to recognize the Plan or this Sanction Order and to confirm the Plan and the

Sanction Order as binding and effective in any foreign jurisdiction.

57. This Court hereby requests the aid and recognition of any court, tribunal, regulatory or administrative bodies, having jurisdiction in Canada or in the United States of America, to give effect to this Sanction Order and to assist the Applicants, the Monitor, and the Plan Sponsor, and their respective representatives and agents in carrying out the terms of this Sanction Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicants and the Monitor, as an officer of this Court, as may be reasonably necessary or desirable to give effect to this Sanction Order.

58. This Sanction Order shall be posted on the Monitor's Website at https://www.alvarezandmarsal.com/Delta9 and only be required to be served on the parties on the Service List and those parties who appeared at the hearing of the motion for this Sanction Order.

The Honourable Justice M.A. Marion
Justice of the Court of King's Bench of Alberta

SCHEDULE "A"

PLAN OF COMPROMISE AND ARRANGEMENT

Clerk's stamp:

COURT FILE NUMBER	2401-09688
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
APPLICANT	IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT,* RSC 1985, c C-36, as amended AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF DELTA 9 CANNABIS INC., DELTA 9 LOGISTICS INC., DELTA 9 BIO-TECH INC., DELTA 9 CANNABIS STORE INC., and DELTA 9 LIFESTYLE CANNABIS CLINIC INC.
DOCUMENT	**PLAN OF COMPROMISE OR ARRANGEMENT**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**MILLER THOMSON LLP** Suite 5800, 40 King Street West Toronto, Ontario M5H 3S1 43rd Floor, 525 – 8th Avenue SW Calgary, Alberta T2P 1G1 Attention: Larry Ellis / James Reid Telephone: (416) 597-4311 / (403) 298-2418 Email: lellis@millerthomson.com / jwreid@millerthomson.com

PLAN OF COMPROMISE OR ARRANGEMENT
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PLAN OF COMPROMISE OR ARRANGEMENT

WHEREAS:

A. Pursuant to the order of the Honourable Justice D.R. Mah of the Court of King's Bench of Alberta (the "**Court**") issued July 15, 2024 (as amended and restated on July 24, 2024, and as may be further amended and restated, the "**Initial Order**"), Delta 9 Cannabis Inc. ("**Delta Parent**"), Delta 9 Cannabis Store Inc. ("**Delta Retail**") and Delta 9 Lifestyle Cannabis Clinic Inc. ("**Delta Lifestyle**" and together with Delta Retail and Delta Parent, the "**Applicants**"), *inter alios*, commenced proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") and Alvarez & Marsal Canada Inc. was appointed Monitor of the Applicants (in such capacity, the "**Monitor**") for the proceedings commenced by the Initial Order (the "**CCAA Proceedings**").

B. Delta 9 Logistics Inc. ("**Delta Logistics**"), a wholly owned subsidiary of Delta Parent, is subject to the CCAA Proceedings but is in the process of being wound down and will make an assignment into bankruptcy under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "**BIA**").

C. Delta 9 Bio-Tech Inc. ("**Bio-Tech**"), a wholly owned subsidiary of Delta Parent, is a licensed producer of cannabis and is subject to the CCAA Proceedings. Bio-Tech has generated losses of approximately $26 million over the past two years. On July 24, 2024, the Court issued an order approving, and authorizing the Monitor to conduct, a sales and investment solicitation process for the business and/or assets of Bio-Tech (the "**Bio-Tech-SISP**").

D. The Applicants, Delta Logistics and Bio-Tech are parties to a binding term sheet dated July 12, 2024, pursuant to which 2759054 Ontario Inc. o/a Fika Herbal Goods (the "**Plan Sponsor**") agreed to develop, submit and present a plan of compromise or arrangement to the Applicants' creditors for the purpose of, among other things, effecting a transaction whereby the Plan Sponsor would provide consideration of approximately $51,000,000 to the creditors and stakeholders of the Applicants and Bio-Tech and acquire 100% of the issued and outstanding equity of the Applicants, along with the proceeds of sale resulting from the monetization of Bio-Tech's business and/or assets (through the Bio-Tech SISP or otherwise).

E. The Plan Sponsor hereby proposes and presents this Plan to the Affected Creditors (as defined below) under and pursuant to the CCAA.

ARTICLE 1
INTERPRETATION

Section 1.1 Definitions

In this Plan, including the recitals herein, unless otherwise stated or unless the subject matter otherwise requires, all capitalized terms used shall have the meanings, and grammatical variations of such words and phrases shall have the corresponding meanings, set out below:

"**Administration Charge**" has the meaning set out in the Initial Order.

"**Administration Expenses**" has the meaning set out in Section 4.2.

"**Administrative Expense Reserve**" means an amount to be determined as between the Plan Sponsor and the Monitor, each acting reasonably.

"**Affected Claim**" means any Claim that is not an Unaffected Claim.

"**Affected Creditor**" means any Creditor of the Applicants with an Affected Claim, but only with respect to and to the extent of such Affected Claim.

"**Affected Creditor Class**" means the class consisting of the Affected Creditors established under and for the purposes of the Plan, including voting in respect thereof.

"**Allowed Affected Claims**" means any Affected Claim of a Creditor against the Applicants, or such portion thereof, that is not barred by any provision of the Claims Procedure Order and which has been finally accepted and allowed for the purposes of voting at the Meeting and receiving distributions under the Plan, in accordance with the provisions of the Claims Procedure Order or any other Final Order of the Court in the CCAA Proceedings.

"**Applicable Law**" means any law, statute, order, decree, judgment, rule, regulation, ordinance or other pronouncement having the effect of law whether in Canada or any other country, or any domestic or foreign state, county, province, city or other political subdivision of any Governmental Entity.

"**Applicants**" has the meaning set out in the recitals hereto.

"**Articles**" means the articles of incorporation of the Applicants, as applicable.

"**Assessments**" means Claims of His Majesty the King in Right of Canada or of any Province or Territory or Municipality or any other taxation authority in any Canadian or foreign jurisdiction, including, without limitation, amounts which may arise or have arisen under any notice of assessment, notice of reassessment, notice of appeal, audit, investigation, demand or similar request from any taxation authority.

"**BIA**" has the meaning set out in the recitals hereto.

"**Bio-Tech**" has the meaning set out in the recitals hereto.

"**Bio-Tech SISP**" has the meaning set out in the recitals hereto.

"**Business Day**" means a day on which banks are open for business in Calgary, Alberta, but does not include a Saturday, Sunday or statutory holiday in the Province of Alberta.

"**Bylaws**" means the bylaws of the Applicants, as applicable.

"**Canadian Tax Act**" means the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp), as amended.

"**Cash Payment**" means the entitlement of an Eligible Voting Creditor to receive such Creditor's Pro-Rata Share of the Creditor Cash Pool.

"**CCAA**" has the meaning set out in the recitals hereto.

"**CCAA Proceedings**" has the meaning set out in the recitals hereto.

"**Charges**" means the Administration Charge, the Directors' Charge, the KERP Charge, the Interim Lender's Charge and the Plan Sponsor Protection Charge.

"**Claim**" means any or all Pre-Filing Claims, Restructuring Period Claims and D&O Claims, including any Claim arising through subrogation against any Applicant or any Director or Officer.

"**Claims Bar Date**" has the meaning provided for in the Claims Procedure Order.

"**Claims Procedure Order**" means the Order of the Court granted on July 24, 2024, establishing a claims procedure in respect of the Applicants, as same may be further amended, restated or varied from time to time.

"**Conditions Precedent**" has the meaning set out in Section 8.1.

"**Continuing Contract**" means a contract, arrangement, or other agreement (oral or written) for which a notice of disclaimer pursuant to section 32 of the CCAA has not been sent by any of the Applicants.

"**Convenience Amount**" means, in respect of any Allowed Affected Claim that is a Convenience Claim, the lesser of: (a) a cash amount equal to $4,000; and (b) the amount of such Allowed Affected Claim.

"**Convenience Claim**" means any Affected Claim that is equal to or less than $4,000, provided that: (a) any Claim denominated in a foreign currency will be converted to Canadian dollars at the Bank of Canada noon spot exchange rate (if available) or the spot exchange rate in effect on the Filing Date for the sole purpose of determining whether or not it is less than or equal to$4,000; (b) Creditors shall not be entitled to divide a Claim for the purpose of qualifying such Claim as a Convenience Claim; and (c) Creditors shall be permitted to make a Convenience Election to reduce the amount of their Allowed Affected Claim to $4,000 to qualify as a Convenience Claim and shall be deemed to have released and waived the balance of any such Allowed Affected Claim.

"**Convenience Creditor**" means an Affected Creditor having a Convenience Claim.

"**Convenience Election**" means an election made by an Affected Creditor with an Allowed Affected Claim greater than $4,000 by delivery of a duly completed and executed Convenience Election Notice to the Plan Sponsor, the Applicants and the Monitor by no later than the Convenience Election Deadline, electing to receive the Convenience Amount in full satisfaction of its Allowed Affected Claim.

"**Convenience Election Deadline**" has the meaning ascribed thereto in the Meeting Order.

"**Convenience Election Notice**" means a notice substantially in the form attached to the Meeting Order.

"**Court**" has the meaning set out in the recitals hereto.

"**Creditor**" means any Person having a Claim, but only with respect to and to the extent of such Claim, including the transferee or assignee of a transferred Claim that is recognized as a Creditor in accordance with the Claims Procedure Order or a trustee, executor, liquidator, receiver, receiver and manager, or other Person acting on behalf of or through such Person.

"**Creditor Cash Pool**" means the amount of $750,000.

"**Creditor Equity Payment**" means the entitlement of an Eligible Voting Creditor to receive such Creditor's Pro-Rata Share of the equity comprising the Creditor Equity Pool.

"**Creditor Equity Pool**" means 270,270 Class "A" voting common shares in the capital of the Plan Sponsor.

"**CRO**" has the meaning set out in the Initial Order.

"**Crown Claims**" means any Claim of His Majesty in Right of Canada or any Governmental Entity of a kind that could be subject to demand under section 6(3) of the CCAA that were outstanding at the Filing Date and which have not been paid by the Implementation Date.

"**D&O Claims**" means any or all Pre-Filing D&O Claims and Restructuring Period D&O Claims.

"**D&O Indemnity Claims**" means any existing or future right of any Director or Officer against any of the Applicants which arose or arises as a result of any D&O Claim for which such Director or Officer is entitled to be indemnified by any of the Applicants.

"**Delta Lifestyle**" has the meaning set out in the recitals hereto.

"**Delta Lifestyle Shares**" means all of the issued and outstanding shares of Delta Lifestyle that are owned by Bio-Tech and the Plan Sponsor.

"**Delta Logistics**" has the meaning set out in the recitals hereto.

"**Delta Parent**" has the meaning set out in the recitals hereto.

"**Delta Retail**" has the meaning set out in the recitals hereto.

"**Delta Retail Shares**" means all of the issued and outstanding shares of Delta Retail that are owned by Delta Parent.

"**Disallowed Claims**" means any Claim of a Creditor against the Applicants, or such portion thereof, that has been barred or finally disallowed in accordance with the Claims Procedure Order or any other Final Order of the Court in the CCAA Proceedings.

"**Disputed Amount**" means the difference between the amounts that SNDL and the Applicants claim is due, owing and outstanding under the SNDL 2L Claim, plus all accrued and accruing interest and costs in respect of such amount.

"**Disputed Amount Account**" has the meaning set out in Section 3.7(b).

"**Directors**" means anyone who is or was or may be deemed to be or have been, whether by statute, operation of law or otherwise, a director or *de facto* director of any of the Applicants.

"**Directors' Charge**" has the meaning set out in the Initial Order.

"**Disputed Claim**" means an Affected Claim (including a contingent Affected Claim that may crystallize upon the occurrence of an event or events occurring after the Filing Date) or such portion thereof which is not barred by any provision of the Claims Procedure Order, which has not been allowed as an Allowed Affected Claim, which is validly disputed for distribution purposes in accordance with the Claims Procedure Order and which remains subject to adjudication for distribution purposes in accordance with the Claims Procedure Order.

"**Effective Time**" means 12:01 a.m. (Calgary time) on the Implementation Date or such other time on such date as the Plan Sponsor may determine.

"**Eligible Voting Creditors**" means Affected Creditors with Allowed Affected Claims that are not Convenience Claims.

"**Employee**" means an individual who is employed by an Applicant, whether on a full-time or a part-time basis, and includes an employee on disability leave.

"**Employee Priority Claims**" means:

(a) Claims equal to the amounts that such Employees and former employees would have been entitled to receive under paragraph 136(l)(d) of the BIA if the Applicants had become bankrupt on the Filing Date; and

(b) Claims for wages, salaries, commissions or compensation for services rendered by such Employees and former employees after the Filing Date and on or before the Implementation Date together with disbursements properly incurred by them in and about the Applicants' business during the same period.

"**Employment Agreements**" means, collectively, the employment agreements, the management compensation plans, and indemnification agreements of, or for the benefit of, the Directors, Officers, and employees of any of the Applicants that were in effect as at the Filing Date.

"**Encumbrance**" means any security interest, lien, claim, charge, hypothec, reservation of ownership, pledge, encumbrance, mortgage, adverse claim or right of a third party of any nature or kind whatsoever and any agreement, option or privilege (whether by law, contract or otherwise) capable of becoming any of the foregoing, (including any conditional sale or title retention agreement, or any capital or financing lease).

"**Equity Claims**" means any or all Claims that meet the definition of "equity claim" in section 2(1) of the CCAA.

"**Equity Claimant**" means any Person with an Equity Claim, in such capacity.

"**Equity Interest**" has the meaning ascribed thereto in section 2(1) of the CCAA but, for certainty, does not include the Purchased Retail Common Shares or the New Delta Parent Common Shares.

"**Existing Equity**" means: (a) any and all common shares in the capital of the Applicants that are duly issued and outstanding immediately prior to the Effective Time, save and except for the Purchased Retail Common Shares and the New Delta Parent Common Shares; (b) all other Equity Interests in the Applicants, including all options, warrants, rights, or similar instruments, derived from, relating to, or exercisable, convertible, or exchangeable therefor; and (c) all instruments whose value is based upon or determined by reference to any Equity Interest in the Applicants, whether or not such instrument is exercisable, convertible, or exchangeable for such an Equity Interest, and, in all such cases, which are issued and outstanding immediately prior to the Effective Time.

"**Filing Date**" means July 15, 2024.

"**Final Order**" means any order, ruling or judgment of the Court, or any other court of competent jurisdiction: (a) that is in full force and effect; (b) that has not been reversed, modified or vacated and is not subject to any stay; and (c) in respect of which all applicable appeal periods have expired and any appeals therefrom have been finally disposed of, leaving such order, ruling or judgment wholly operable.

"**Governmental Entity**" means any domestic or foreign government, whether federal, provincial, state, territorial or municipal; and any governmental agency, ministry, department, court (including the Court), tribunal, commission, stock exchange, bureau, board or other instrumentality exercising or purporting to

exercise legislative, judicial, regulatory or administrative functions of, or pertaining to, government or securities market regulation.

"**Implementation Date**" means the Business Day on which the Plan becomes effective, which shall be the Business Day on which, pursuant to Section 8.5, the Plan Sponsor (or its counsel) delivers written notice to the Applicants (or their counsel) and the Monitor (or its counsel) that the Plan Sponsor Conditions Precedent set out in Section 8.1 have been satisfied or waived in accordance with the terms hereof.

"**Initial Order**" has the meaning set out in the recitals hereto.

"**Intercompany Claim**" means any claim that may be asserted against any of the Applicants by or on behalf of any other Applicant or any of their affiliated companies, partnerships, or other corporate entities.

"**Interim Lender's Charge**" has the meaning set out in the Initial Order.

"**KERP**" has the meaning set out in the Initial Order.

"**KERP Charge**" has the meaning set out in the Initial Order.

"**KERP Prepayment**" has the meaning set out in Section 5.4(c)(iv).

"**List of Claims**" has the meaning set out in the Meeting Order.

"**Material**" means a fact, circumstance, change, effect, matter, action, condition, event, occurrence or development that, individually or in the aggregate, is, or would reasonably be expected to be, material to the business, affairs, results of operations or financial condition of the Applicants, taken as a whole.

"**Meeting**" means a meeting of Affected Creditors to be held on the Meeting Date called for the purpose of considering and voting on the Plan pursuant to the CCAA, and includes any adjournment, postponement or other rescheduling of such meeting in accordance with the Meeting Order.

"**Meeting Date**" means the date on which the Meeting is held in accordance with the Meeting Order.

"**Meeting Order**" means the Order of the Court granted in these CCAA Proceedings, among other things, setting the date for the Meeting, as same may be amended, restated or varied from time to time, in form and substance satisfactory to the Plan Sponsor.

"**Monitor**" has the meaning set out in the recitals hereto.

"**Monitor's Website**" means www.AlvarezandMarsal.com/Delta9.

"**New Boards**" means the board of directors of the Applicants, as applicable, to be appointed on the Implementation Date, as determined by the Plan Sponsor in its sole discretion.

"**New Delta Parent Common Shares**" means the Common Shares issued by Delta Parent to the Plan Sponsor pursuant to the Plan and the Restructuring Steps Supplement, which will constitute all of the issued and outstanding shares of Delta Parent from and after the Effective Time.

"**Notice to Known Claimants**" means a notice that shall be referred to in the Claims Procedure Order, advising each known Creditor of its Claim against an Applicant as determined by the Monitor based on the books and records of the Applicants.

"**Officers**" means anyone who is or was or may be deemed to be or have been, whether by statute, operation of law or otherwise, an officer or *de facto* officer of any of the Applicants, in such capacity.

"**Order**" means any order of the Court made in connection with the CCAA Proceeding.

"**Ordered Amount**" has the meaning set out in Section 3.7(b).

"**Outside Date**" means January 31, 2025, or such later date as agreed to by the Applicants and the Plan Sponsor, with the consent of the Monitor.

"**Person**" means any individual, partnership, limited partnership, limited liability company, joint venture, syndicate, sole proprietorship, company or corporation with or without share capital, unincorporated association, trust, trustee, receiver, liquidator, monitor, executor, administrator or other legal personal representative, Governmental Authority or other entity however designated or constituted.

"**Plan**" means this Plan of Compromise or Arrangement filed by the Plan Sponsor pursuant to the CCAA, as it may be amended, supplemented or restated from time to time in accordance with the terms hereof.

"**Plan Implementation Fund**" has the meaning set out in Section 4.1.

"**Plan Sponsor**" has the meaning set out in the recitals hereto.

"**Plan Sponsor Protection Charge**" has the meaning set out in the Initial Order.

"**Post-Filing Claim**" means any or all indebtedness, liability, or obligation of the Applicants of any kind that arises during and in respect of the period commencing on the Filing Date and ending on the day immediately preceding the Implementation Date in respect of services rendered or supplies provided to the Applicants during such period or under or in accordance with any Continuing Contract; provided that, for certainty, such amounts are not a Restructuring Period Claim or a Restructuring Period D&O Claim.

"**Pre-Filing Claim**" means any or all right or claim of any Person against any of the Applicants, whether or not asserted, in connection with any indebtedness, liability or obligation of any kind whatsoever of any such Applicant to such Person, in existence on the Filing Date, whether or not such right or claim is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, unsecured, perfected, unperfected, present, future, known or unknown, by guarantee, surety or otherwise, and whether or not such right is executory or anticipatory in nature, including any right or claim with respect to any Assessment, or contract, or by reason of any Equity Interest, right of ownership of or title to property or assets or right to a trust or deemed trust (statutory, express, implied, resulting, constructive or otherwise), and any right or ability of any Person to advance a claim for contribution or indemnity or otherwise against any of the Applicants with respect to any matter, action, cause or chose in action, whether existing at present or commenced in the future, which right or claim, including in connection with indebtedness, liability or obligation, is based in whole or in part on facts that existed prior to the Filing Date, including for greater certainty any Equity Claim, any claim brought by any proposed or confirmed representative plaintiff on behalf of a class in a class action, and any D&O Indemnity Claim.

"**Pre-Filing D&O Claim**" means any or all right or claim of any Person against one or more of the Directors and/or Officers arising based in whole or in part on facts that existed prior to the Filing Date, whether or not such right or claim is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, unsecured, perfected, unperfected, present, future, known, or unknown, by guarantee, surety or otherwise, and whether or not such right is executory or anticipatory in nature, including any Assessments, any claim brought by any proposed or confirmed

representative plaintiff on behalf of a class in a class action, and any right or ability of any Person to advance a claim for contribution, indemnity or otherwise against any of the Directors and/or Officers with respect to any matter, action, cause or chose in action, whether existing at present or arising or commenced in the future, for which any Director or Officer is alleged to be, by statute or otherwise by law or equity, liable to pay in his or her capacity as a Director or Officer.

"**Pro-Rata Share**" means, as at any relevant date of determination, the percentage that each Eligible Voting Creditor's Allowed Affected Claim bears to the aggregate of all Allowed Affected Claims and Disputed Claims (for certainty, valued at the amounts asserted by the Affected Creditors holding such Disputed Claims).

"**Proof of Claim**" means the Proof of Claim referred to in the Claims Procedure Order to be filed by unknown Creditors.

"**Purchased Retail Common Shares**" means the Delta Lifestyle Shares and the Delta Retail Shares, which will constitute all of the issued and outstanding shares of such entities from and after the Effective Time.

"**Released Claims**" has the meaning set out in Section 9.2.

"**Released Parties**" means, collectively, and in their capacities as such: (a) the Applicants; (b) the past and current employees, legal and financial advisors, and other representatives of the Applicants; (c) the Directors and Officers; (d) the Monitor and its legal advisors; (e) the Plan Sponsor; and (f) any other Person who is the beneficiary of a release under the Plan.

"**Required Majority**" means a majority in number of Affected Creditors representing at least two thirds in value of the Allowed Affected Claims of Affected Creditors who are entitled to vote at the Meeting in accordance with the Meeting Order and who are present and voting in person or by proxy on the resolution approving the Plan at the Meeting.

"**Restructuring Period Claim**" means any or all right or claim of any Person against any of the Applicants in connection with any indebtedness, liability or obligation of any kind whatsoever owed by any such Applicant to such Person arising out of the restructuring, disclaimer, resiliation, termination or breach by such Applicant on or after the Filing Date of any contract, lease or other agreement, whether written or oral, and including any right or claim with respect to any Assessment.

"**Restructuring Period D&O Claim**" means any or all right or claim of any Person against one or more of the Directors and/or Officers arising after the Filing Date, whether or not such right or claim is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, unsecured, perfected, unperfected, present, future, known, or unknown, by guarantee, surety or otherwise, and whether or not such right is executory or anticipatory in nature, including any Assessments and any right or ability of any Person to advance a claim for contribution, indemnity or otherwise against any of the Directors and/or Officers with respect to any matter, action, cause or chose in action, whether existing at present or arising or commenced in the future, for which any Director or Officer is alleged to be, by statute or otherwise by law or equity, liable to pay in his or her capacity as a Director or Officer.

"**Restructuring Steps Supplement**" has the meaning set out in Section 6.2.

"**Sanction Order**" means an Order of the Court sanctioning and approving the Plan, as it may be amended by the Court, in form and substance satisfactory to the Plan Sponsor.

"**Secured Claim**" means any or all Claims, as against an Applicant, by a "secured creditor" as defined in section 2(1) of the CCAA which, for clarity, includes the SNDL Claims.

"**SNDL Claims**" means, collectively: (a) the SNDL 1L Claim; and (b) the SNDL 2L Claim.

"**SNDL 1L Claim**" means all amounts owing by the Applicants and Bio-Tech, individually or collectively, to SNDL Inc. under the Commitment Letter dated February 1, 2022 among Connect First Credit Union Ltd., as lender, Delta Parent, as borrower, and Bio-Tech, Delta Lifestyle and Delta Retail, as guarantors, as assigned to SNDL Inc. on July 5, 2024.

"**SNDL 2L Claim**" means all amounts owing by the Applicants and Bio-Tech, individually or collectively, to SNDL Inc. under: (a) the Note Purchase Agreement dated March 30, 2022, between SNDL Inc., and Delta Parent; (b) the 10% Senior Secured Second-Lien Convertible Debenture dated March 30, 2022, between SNDL Inc. and Delta Parent; (c) the Side Letter in respect of the 10% Senior Secured Second-Lien Convertible Debenture, dated March 9, 2022; and (d) the Unlimited Guarantee and Postponements granted by Bio-Tech, Delta Retail and Delta Lifestyle in favour of SNDL Inc., each dated March 22, 2022.

"**Stalking Horse Purchase Agreement**" means a stalking horse purchase agreement to be negotiated among the Applicants and the Plan Sponsor, to be settled no later than 15 days prior to the Meeting Date and to be attached hereto as Schedule "**B**".

"**Unaffected Claims**" means any and all:

(a) Claims against Bio-Tech in accordance with Section 2.6;

(b) Claims against Delta Logistics in accordance with Section 2.7;

(c) Post-Filing Claims;

(d) Crown Claims;

(e) Secured Claims including the SNDL Claims;

(f) Claims secured by a Charge;

(g) Employee Priority Claims;

(h) Intercompany Claims, subject to Section 5.4(e);

(i) D&O Claims that cannot be compromised pursuant to the provisions of Section 5.1(2) of the CCAA; and

(j) Claims that cannot be compromised pursuant to the provisions of section 19(2) of the CCAA.

and for certainty, shall include any Unaffected Claim arising through subrogation.

"**Unaffected Creditor**" means a Creditor who has an Unaffected Claim, but only in respect of and to the extent of such Unaffected Claim.

"**Undeliverable Distribution**" has the meaning set out in Section 5.9.

"**Voting Trust**" means an equity voting trust to be established by the Plan Sponsor into which the Creditor Equity Pool shall be deposited and held by the Voting Trustee for the benefit of the Eligible Voting Creditors.

"**Voting Trustee**" means a Person agreed upon by the Applicants and the Plan Sponsor, to act as trustee of the Voting Trust.

"**Withholding Obligation**" has the meaning set out in Section 5.11.

Section 1.2 Interpretation Not Affected by Headings, etc.

The division of this Plan into sections and the insertion of headings are for convenience of reference only and shall not affect the construction or interpretation of this Plan.

Section 1.3 General Construction.

The terms "this Plan", "hereof", "herein" and "hereunder" and similar expressions refer to this Plan and not to any particular section hereof. The expression "Section" or reference to another subdivision followed by a number mean and refer to the specified Section or other subdivision of this Plan.

Section 1.4 Extended Meanings

Words importing the singular include the plural and vice versa and words importing gender include all genders. The term "including" means "including, without limitation," and such terms as "includes" have similar meanings.

Section 1.5 Currency

All references in this Plan to dollars, monetary amounts or to $ are expressed in the lawful currency of Canada unless otherwise specifically indicated.

Section 1.6 Statutes

Except as otherwise provided in this Plan, any reference in this Plan to a statute refers to such statute and all rules, regulations and interpretations made under it, as it or they may have been or may from time to time be modified, amended or re-enacted.

Section 1.7 Date and Time for any Action

For purposes of the Plan:

(a) in the event that any date on which any action is required to be taken under the Plan by any Person is not a Business Day, that action shall be required to be taken on the next succeeding day which is a Business Day, and any reference to an event occurring on a Business Day shall mean prior to 5:00 p.m. on such Business Day; and

(b) unless otherwise specified, time periods within or following which any payment is to be made or act is to be done shall be calculated by excluding the day on which the period commences and including the day on which the period ends and by extending the period to the next succeeding Business Day if the last day of the period is not a Business Day.

Section 1.8 Schedules

The following Schedules are incorporated in and form part of this Plan:

Schedule "**A**"	Restructuring Steps Supplement
Schedule "**B**"	Stalking Horse Purchase Agreement

ARTICLE 2
PURPOSE AND EFFECT OF PLAN

Section 2.1 Purpose

(a) The purpose of the Plan is to ensure that Persons with a valid economic interest in the Applicants will, collectively, derive a greater benefit from the implementation of this Plan than they would derive from a bankruptcy or liquidation of the Applicants by:

(i) implementing a restructuring of the Applicants, whereby the Plan Sponsor will acquire 100% ownership of the Applicants in accordance with the terms and conditions of this Plan, the Restructuring Steps Supplement and the Sanction Order;

(ii) effecting a compromise, settlement, release and discharge of all Affected Claims in exchange for distributions to Affected Creditors with Allowed Affected Claims;

(iii) facilitating the distribution of the Creditor Cash Pool and the Creditor Equity Pool to Affected Creditors with Allowed Affected Claims; and

(iv) ensuring the continuation of the operations of the Applicants.

(b) The Monitor will report to Affected Creditors and the Court regarding the Plan prior to the date Affected Creditors are to vote on the Plan. Creditors wishing to review copies of Court orders and other materials filed in these proceedings, including copies of the Monitor's reports, are directed to the Monitor's Website.

(c) All Creditors should review this Plan and the Monitor's report on the Plan before voting to accept or to reject this Plan.

Section 2.2 Persons Affected

(a) The Plan provides for, among other things, the compromise, discharge and release of all Affected Claims, and the settlement of, and consideration for, all Allowed Affected Claims.

(b) The Plan will become effective at the Effective Time on the Implementation Date in accordance with the terms and conditions contained herein, and in the sequence set forth in the Restructuring Steps Supplement, and shall be binding on and enure to the benefit of the Applicants, the Affected Creditors, the Plan Sponsor and all other Persons directly or indirectly named, referred to in, subject to, or receiving the benefit of, the Plan, and each of their respective heirs, executors, administrators, legal representatives, successors and assigns in accordance with the terms hereof.

Section 2.3 Persons Not Affected by the Plan

This Plan does not affect:

(a) the Unaffected Creditors with respect to and to the extent of their Unaffected Claims. Nothing in this Plan shall affect the Applicants' rights and defences, both legal and equitable, with respect to any Unaffected Claims including all rights with respect to legal and equitable defences or entitlements to set-offs or recoupments against such Unaffected Claims; and

(b) the SNDL Claims.

Section 2.4 Equity Claimants

(a) On the Implementation Date, the Plan will be binding on all Equity Claimants. Notwithstanding any other provision of this Plan, Equity Claimants shall not be entitled to vote on the Plan in respect of their Equity Claims or attend the Meeting.

(b) On the Implementation Date, in accordance with the steps and sequences set forth in the Restructuring Steps Supplement, all Existing Equity (other than, for certainty, the Purchased Retail Common Shares and the New Delta Parent Common Shares purchased and subscribed for by the Plan Sponsor on the Implementation Date in accordance with the Restructuring Steps Supplement) shall be cancelled and extinguished and all Equity Claims shall be fully, finally, irrevocably and forever compromised, released, discharged and barred without any compensation of any kind whatsoever.

Section 2.5 Treatment of Employment Agreements

Unless otherwise expressly required by the terms of this Plan or agreed to in writing by and between the Plan Sponsor and the applicable Employee (or Employees) affected by any change or modification, each of the Employment Agreements that have not been disclaimed prior to the Implementation Date will remain in place from and after the Implementation Date.

Section 2.6 Bio-Tech

As a result of the decision to sell or liquidate Bio-Tech, creditors of Bio-Tech shall not be considered Creditors for the purposes of this Plan, and shall not be entitled to vote on this Plan.

Section 2.7 Delta Logistics

As a result of the decision to wind-down Delta Logistics and make an assignment into bankruptcy under the BIA, creditors of Delta Logistics shall not be considered Creditors for the purposes of this Plan, and shall not be entitled to vote on this Plan.

ARTICLE 3
CLASSIFICATION OF CREDITORS, VOTING AND TREATMENT OF CLAIMS

Section 3.1 Claims Procedure

The procedure for determining the validity and quantum of the Affected Claims and for resolving Disputed Claims for voting and distribution purposes under the Plan shall be governed by the Claims Procedure Order, the Meeting Order, the CCAA, the Plan and any further Order of the Court.

Section 3.2 Classification of Creditors

In accordance with the Meeting Order, for the purposes of considering and voting on the Plan and receiving a distribution hereunder, the Affected Creditors shall constitute one class of Creditors, being the Affected Creditors Class.

Section 3.3 Meeting

The Meeting shall be held in accordance with the Plan, the Meeting Order, the Claims Procedure Order and any further Order of the Court in the CCAA Proceedings. The only Persons entitled to attend the Meeting, are representatives of the Applicants, the Monitor, the Plan Sponsor and their respective legal counsel and advisors, and Eligible Voting Creditors or their respective duly appointed proxyholders and their respective legal counsel and advisors. Any other Person may be admitted on invitation of the chair of the Meeting or as permitted under the Meeting Order or any further Order of the Court.

Section 3.4 Voting

Pursuant to and in accordance with the Meeting Order, each of the following Creditors shall be entitled to vote on the Plan at the Meeting for the Affected Creditors Class:

(a) Convenience Creditors. Each Affected Creditor with an Allowed Affected Claim or a Disputed Claim that constitutes a Convenience Claim, including Affected Creditors that have made a Convenience Election, shall be deemed to vote in favour of the Plan.

(b) Affected Creditors Class. Each Affected Creditor with an Allowed Affected Claim that does not constitute a Convenience Claim shall be entitled to one vote for the purpose of determining a majority in number, in the amount equal to such Creditor's Allowed Affected Claim. For voting purposes only, the dollar value of an Allowed Affected Claim held by an Affected Creditor shall be:

(i) the amount shown as owing to such Affected Creditor as of the Filing Date (to the extent such amount continues to remain unpaid), as set out in the List of Claims;

(ii) if the Affected Creditor does not appear on the List of Claims, then the amount shown on the applicable Applicant's books and records as currently due or which but for the Plan would become due to such Affected Creditor as a Restructuring Period Claim as a result of the disclaimer or resiliation by an Applicant of any agreement to which such Applicant is a party, as applicable; or

(iii) the amount agreed to between such Affected Creditor and the Applicants, and consented to by the Monitor.

Section 3.5 Treatment of Affected Claims

An Affected Creditor shall receive distributions as set forth below only to the extent that such Affected Creditor's Claim is an Allowed Affected Claim and has not been paid, released, or otherwise satisfied prior to the Implementation Date. In accordance with the steps and sequence set forth in the Restructuring Steps Supplement, under the supervision of the Monitor, and in full and final satisfaction of all Affected Claims, each Affected Creditor with an Allowed Affected Claim will receive the following consideration:

(a) with respect to Affected Creditors with Allowed Affected Claims that constitute Convenience Claims, including Affected Creditors that have made a Convenience Election, each such Convenience Creditor shall receive a cash payment on the Implementation Date equal to the Convenience Amount; and

(b) with respect to Affected Creditors with Allowed Affected Claims that do not constitute Convenience Claims, each such Eligible Voting Creditor shall receive a Cash Payment and a Creditor Equity Payment on the Implementation Date.

All Affected Claims shall be fully, finally, irrevocably and forever compromised, released, discharged, cancelled and barred on the Implementation Date.

Section 3.6 Treatment of Unaffected Claims

Unaffected Claims shall not be compromised, released, discharged, cancelled or barred by the Plan. Unaffected Creditors will not receive any consideration or distributions under the Plan in respect of their Unaffected Claims, unless specifically provided for under and pursuant to the Plan, and they shall not be entitled to vote on the Plan at the Meeting in respect of their Unaffected Claims.

Section 3.7 Treatment of SNDL Claims

(a) SNDL 1L Claim

On or before the Implementation Date, the SNDL 1L Claim will be indefeasibly repaid in full in cash and, following such repayment, all obligations thereunder shall be deemed to have been fully performed and discharged and the underlying loan and security agreements will automatically terminate, including any obligations to extend credit of any sort to the Applicants or any other party.

(b) SNDL 2L Claim

The Plan Sponsor, on behalf of the Applicants, repaid the undisputed portion of the SNDL 2L Claim on September 12, 2024. The portion of the Disputed Amount that is due and payable to SNDL Inc., if any, is scheduled to be determined by the Court on January 10, 2025 (the "**Ordered Amount**"). If a Final Order determining the Ordered Amount has been issued on or prior to the Implementation Date, then, on or before the Implementation Date, the SNDL 2L Claim will be indefeasibly repaid in full in cash and all obligations thereunder will be performed in full. If a Final Order has not been issued on or prior to the Implementation Date, then the Applicants or the Plan Sponsor may elect to pay the Disputed Amount to the Monitor to be held in escrow by the Monitor, in a segregated account (the "**Disputed Amount Account**"), on the condition that, immediately upon a Final Order being issued, the Monitor will distribute the Disputed Amount to the Applicants and SNDL Inc. in accordance with the terms of such Final Order. Upon certification by the Monitor that it has received the Disputed Amount, the security held by SNDL Inc. and the obligations of the Applicants in respect of the SNDL 2L Claim will automatically attach to the Disputed Amount and the Applicants' respective obligations relative to the SNDL 2L Claim will be deemed to have been fully performed and discharged, and, for certainty, the security held by SNDL Inc. in respect of the SNDL 2L Claim will be released and discharged as against the property and assets of the Applicants and Bio-Tech.

Section 3.8 Treatment of Intercompany Claims

On the Implementation Date and in accordance with the steps and sequence as set forth herein, all Intercompany Claims shall be preserved or extinguished at the election of the Plan Sponsor. For certainty, if the Plan Sponsor elects to extinguish the Intercompany Claims, the structure for extinguishing such claims shall be at the discretion of the Plan Sponsor.

Section 3.9 Treatment of D&O Claims

All D&O Claims shall be fully, finally, and irrevocably compromised, released, discharged, cancelled, extinguished and barred on the Implementation Date. All D&O Indemnity Claims shall be treated for all purposes under the Plan as Pre-Filing Claims and shall be fully, finally, and irrevocably compromised, released, discharged, cancelled, extinguished and barred on the Implementation Date. Any D&O Claims that cannot be compromised pursuant to the provisions of Section 5.1(2) of the CCAA shall constitute Unaffected Claims and shall continue to exist against the Directors or Officers of the Applicants, as applicable; provided that in no event shall such D&O Claims become obligations or liabilities of the Applicants or the Plan Sponsor.

Section 3.10 Disputed Claims

An Affected Creditor with a Disputed Claim shall not be entitled to receive a distribution under the Plan in respect of such Disputed Claim or any portion thereof unless and until, and then only to the extent that, such Disputed Claim becomes an Allowed Affected Claim in accordance with the Meeting Order and the Claims Procedure Order. Distributions pursuant to and in accordance with this Plan shall be paid or distributed in respect of any Disputed Claim that is finally determined to be an Allowed Affected Claim in accordance with this Plan and the Meeting Order.

Section 3.11 Extinguishment of Claims

On the Implementation Date, in accordance with the terms and in the steps and sequence set forth in the Restructuring Steps Supplement and in accordance with the provisions of the Sanction Order, the treatment of Affected Claims, as set forth herein, shall be final and binding on the Applicants and all Affected Creditors (and, in each case, their respective heirs, executors, administrators, legal personal representatives, successors and assigns), and all Affected Claims shall be fully, finally, irrevocably and forever released, discharged, cancelled and barred, and the Applicants shall thereupon have no further obligation whatsoever in respect of the Affected Claims; provided that nothing herein releases the Applicants or any other Person from their obligations to make distributions in the manner and to the extent provided for in the Plan and provided further that such discharge and release of the Applicants shall be without prejudice to the right of a Creditor in respect of a Disputed Claim to prove such Disputed Claim in accordance with the Claims Procedure Order so that such Disputed Claim may become an Allowed Affected Claim entitled to receive consideration under Section 3.5 hereof.

Section 3.12 Guarantees and Similar Covenants

No Person who has a Claim under any guarantee, surety, indemnity or similar covenant in respect of any Claim that is compromised and released under the Plan, or who has any right to claim over in respect of or to be subrogated to the rights of any Person in respect of a Claim that is compromised under the Plan, shall be entitled to any greater rights than the Person whose Claim is compromised under the Plan.

Section 3.13 Multiple Affected Claims

Without limiting the provisions of any Applicable Law prohibiting double recovery, for voting and distribution purposes, in respect of all Affected Creditors and their rights in respect of Affected Claims: (a) all guarantees of an Applicant of the payment or performance by another Applicant with respect to any Affected Claim will be recognized; (b) each Affected Claim and all guarantees by an Applicant of such Affected Claim will be treated as multiple Affected Claims against the Applicants; and (c) any joint obligation of any Applicant with another Applicant will be treated as two separate Affected Claims against the Applicants; provided, however, that: (x) Creditors with multiple Affected Claims against the Applicants shall only be entitled to one vote; and (y) the aggregate recovery on account of any Allowed Affected Claim from all sources shall not exceed 100% of the underlying indebtedness, liability or obligation giving rise to such Claim.

Section 3.14 Set-Off

The law of set-off applies to all Affected Claims.

ARTICLE 4
PLAN IMPLEMENTATION FUND; ADMINISTRATIVE EXPENSE RESERVE

Section 4.1 Plan Implementation Fund

On or prior to the Implementation Date, the Plan Sponsor shall deliver, or cause to be delivered, to the Monitor, an amount equal to the Creditor Cash Pool, together with funding sufficient to satisfy the Allowed Affected Claims of Convenience Creditors (the "**Plan Implementation Fund**"). The Plan Implementation Fund shall be held by the Monitor in a segregated account of the Monitor, and shall be used by the Monitor to pay, on behalf of the Plan Sponsor and the Applicants, all amounts payable to Eligible Voting Creditors and Convenience Creditors under the Plan.

Section 4.2 Administrative Expense Reserve

On or prior to the Implementation Date, the Plan Sponsor shall pay to the Monitor the Administrative Expense Reserve. From and after the Implementation Date, the Monitor shall pay from the Administrative Expense Reserve, the reasonable and documented fees and disbursements (plus any applicable taxes thereon) for any post-Implementation Date services incurred by the Applicants, Delta Logistics, Bio-Tech and their legal counsel, the CRO, the Monitor, its legal counsel, and any other Persons from time to time retained or engaged by the Monitor, in connection with administrative and estate matters (collectively, the "**Administration Expenses**"). Any unused portion of the Administrative Expense Reserve shall be transferred by the Monitor to the Plan Sponsor.

ARTICLE 5
DISTRIBUTIONS AND PAYMENTS

Section 5.1 Distributions Generally

All distributions to be effected pursuant to the Plan shall be made pursuant to this Article 5 and shall occur in the manner set forth herein. All cash distributions to be made under the Plan to Convenience Creditors and Eligible Voting Creditors shall be made by the Monitor on behalf of the Plan Sponsor and the Applicants by cheque or by wire transfer and: (a) in the case of a cheque, will be sent, via regular mail, to such Creditor to the address specified in the Proof of Claim filed by such Creditor or such other address as the Creditor may from time to time notify the Monitor in writing in accordance with Section 10.9; or (b) in

the case of a wire transfer, shall be sent to an account specified by such Creditor to the Monitor in writing to the satisfaction of the Monitor. Notwithstanding any other provision of the Plan, an Affected Creditor holding a Disputed Claim shall not be entitled to receive a distribution under the Plan in respect of any portion thereof unless and until such Disputed Claim becomes an Allowed Affected Claim.

Section 5.2 Distributions to Convenience Creditors

If the Plan is approved by the Required Majority of the Affected Creditor Class and the Sanction Order is granted by the Court, then the Monitor, on behalf of the Plan Sponsor and the Applicants, shall make a payment to each Convenience Creditor on the Implementation Date equal to such Convenience Creditor's Convenience Amount, and such payment shall be in full consideration for the irrevocable, full and final compromise and satisfaction of such Convenience Creditor's Affected Claim.

Section 5.3 Distributions to Eligible Voting Creditors

If the Plan is approved by the Required Majority of the Affected Creditor Class and the Sanction Order is granted by the Court, then each Eligible Voting Creditor shall be entitled to receive their Cash Payment and Creditor Equity Payment on the Implementation Date, and such distributions shall be in full consideration for the irrevocable, full and final compromise and satisfaction of such Affected Creditor's Affected Claim. All shares issued on account of Creditor Equity Payments will be deposited into the Voting Trust on the Implementation Date; provided that Eligible Voting Creditors shall have the opportunity to opt out of receiving their Creditor Equity Payment prior to the Implementation Date.

Section 5.4 Distributions, Payments and Settlements of Unaffected Claims

(a) Post-Filing Claims;

All Post-Filing Claims outstanding as of the Implementation Date, if any, shall be paid by the applicable Applicant in the ordinary course consistent with past practice.

(b) Crown Claims;

On or as soon as reasonably practicable following the Implementation Date, the applicable Applicant shall pay or cause to be paid in full all Crown Claims, if any, outstanding as at the Filing Date or related to the period ending on the Filing Date, to the applicable Governmental Entity.

(c) Claims secured by a Charge;

(i) Administration Charge

On the Implementation Date, in accordance with the steps and sequences set forth in the Restructuring Steps Supplement, all outstanding obligations, liabilities, fees, and disbursements secured by the Administration Charge which are evidenced by invoices of the beneficiaries thereof delivered to the Plan Sponsor as at the Implementation Date, shall be fully paid by the Plan Sponsor. Following such payment, the Administration Charge shall be and be deemed to be fully and finally satisfied and discharged from and against any and all assets of the Applicants and the Plan Implementation Fund. Following the Implementation Date, Administration Expenses shall be paid from the Administrative Expense Reserve.

(ii) Directors Charge

On the Implementation Date, all D&O Claims shall be fully, finally, and irrevocably compromised, released, discharged, cancelled, extinguished, and barred in accordance with Article 9 and the Directors' Charge shall be and be deemed to be fully and finally discharged from and against the Plan Implementation Fund.

(iii) Interim Lender's Charge

On the Implementation Date, all outstanding amounts secured by the Interim Lender's Charge shall remain in place, unaffected by the Plan, and the Interim Lenders' Charge shall be discharged from and against any and all assets of the Applicants and the Plan Implementation Fund.

(iv) KERP Charge

On the Implementation Date, the Plan Sponsor will pay the lesser of $655,000 and the maximum possible payment remaining pursuant to the KERP, to the Monitor, in trust (the "**KERP Prepayment**"), and following such payment the KERP Charge shall be and be deemed to be fully and finally satisfied and discharged from and against any and all assets of the Applicants and the Plan Implementation Fund. The Monitor shall, from the KERP Prepayment, make all KERP Payments, as defined in the KERP, upon such payments becoming due and payable under the KERP. Any unused portion of the KERP Prepayment shall be transferred by the Monitor to the Plan Sponsor.

(v) Plan Sponsor Protection Charge

Upon the Implementation Date, the Plan Sponsor Protection Charge shall be and be deemed to be fully and finally satisfied and discharged from and against any and all assets of the Applicants and the Plan Implementation Fund.

(d) Employee Priority Claims

On the Implementation Date, applicable Applicants shall pay or cause to be paid in full all Employee Priority Claims due and accrued to the Implementation Date, to each holder of an Employee Priority Claim to the full amount of his, her, or their respective Employee Priority Claim.

(e) Intercompany Claims

On or prior to the Implementation Date, Intercompany Claims shall be set-off, cancelled, maintained, re-instated, contributed or distributed, or otherwise addressed, in each case, as set forth on the books and records of, and/or in documents executed by, the applicable Applicant (provided that any such documents shall be in form and substance satisfactory to the Plan Sponsor, acting reasonably), and in accordance with the terms and in the steps and sequences set forth in the Restructuring Steps Supplement, all of which, in the manner directed by the Plan Sponsor.

Section 5.5 Fractional Interests

No fractional interests of shares will be issued or allocated to Eligible Voting Creditors on account of the Creditor Equity Pool, and any legal, equitable, contractual and any other rights or claims of any Person with respect to any fractional interest shall be rounded down to the nearest whole number without compensation therefor.

Section 5.6 Cancellation of Instruments Evidencing Affected Claims

On the Implementation Date, in accordance with the terms and in the steps and sequences set forth in the Restructuring Steps Supplement, except as otherwise expressly provided for herein, all debentures, indentures, notes, certificates, agreements, invoices, guarantees, pledges and other instruments evidencing Affected Claims and Existing Equity shall: (a) not entitle any holder thereof to any compensation or participation other than as expressly provided for in the Plan; and (b) be cancelled and will be null and void (other than, for certainty, the Purchased Retail Common Shares and the New Delta Parent Common Shares). Notwithstanding the foregoing, the Continuing Contracts shall continue in full force and effect in accordance with the terms hereof.

Section 5.7 Interest

Interest shall not accrue or be paid on Affected Claims on or after the Filing Date, and no holder of an Affected Claim shall be entitled to interest accruing on or after the Filing Date.

Section 5.8 Allocation of Distributions

All distributions made to Affected Creditors pursuant to the Plan shall be allocated first towards the repayment of the principal amount in respect of such Affected Creditor's Claim and second, if any, towards the repayment of all accrued but unpaid interest in respect of such Affected Creditor's Claim.

Section 5.9 Treatment of Undeliverable Distributions

If any Creditor's distribution under this Article 6 is returned as undeliverable or is not cashed (an "**Undeliverable Distribution**"), no further distributions to such Creditor shall be made unless and until the Applicants and the Monitor are notified by such Creditor of such Creditor's current address, at which time all past distributions shall be made to such Creditor. All claims for Undeliverable Distributions must be made on or before the date that is six months following the Implementation Date, after which date any entitlement with respect to such Undeliverable Distribution shall be forever discharged and forever barred, without any compensation therefor, notwithstanding any federal, state or provincial laws to the contrary, at which time any such Undeliverable Distributions shall be returned to the relevant Applicant. Nothing contained in the Plan shall require the Applicants or the Monitor to attempt to locate any Person to whom a distribution is payable. No interest is payable in respect of an Undeliverable Distribution.

Section 5.10 Assignment of Claims for Voting and Distribution Purposes

(a) Assignment of Claims Prior to Meeting

Subject to any restrictions contained in Applicable Laws, Affected Creditors may transfer or assign the whole of their Claims prior to the Meeting provided that the Applicants, the Plan Sponsor and the Monitor shall not be obliged to deal with any transferee or assignee as an Affected Creditor in respect thereof unless and until actual notice of the transfer or assignment, together with satisfactory evidence of such transfer or assignment has been given to the Applicants, the Plan Sponsor and the Monitor prior to the commencement of the Meeting. In the event of such notice of transfer or assignment prior to the Meeting, the transferee or assignee shall, for all purposes, be treated as the Affected Creditor of the assigned or transferred Claim, will be bound by any and all notices previously given to the transferor or assignor in respect of such Claim and shall be bound, in all respects, by any and all notices given and by the Orders of the Court in the CCAA Proceeding. For greater certainty, other than as described above, the Applicants shall not recognize partial transfers or assignments of Claims.

(b) Assignment of Claims Subsequent to Meeting

Subject to any restrictions contained in Applicable Laws, Affected Creditors may transfer or assign the whole of their Claims after the Meeting provided that the Applicants, the Plan Sponsor and the Monitor shall not be obliged to deal with any transferee or assignee as an Affected Creditor and the Monitor shall not be obliged to make any distributions to the transferee or assignee in respect thereof unless and until actual notice of the transfer or assignment, together with evidence of the transfer or assignment and a letter of direction executed by the transferor or assignor, all satisfactory to the Applicants, the Plan Sponsor and the Monitor, has been given to the Applicants, the Plan Sponsor and the Monitor by 5:00 p.m. on the day that is at least one (1) Business Day immediately prior to the Implementation Date, or such other date as the Monitor may agree. Thereafter, the transferee or assignee shall, for all purposes, be treated as the Affected Creditor of the assigned or transferred Claim, will be bound by any notices previously given to the transferor or assignor in respect of such Claim and shall be bound, in all respects, by notices given and steps taken, and by the orders of the Court in the CCAA Proceedings.

Section 5.11 Withholding Rights

The Applicants, the Plan Sponsor and the Monitor shall be entitled to deduct and withhold consideration otherwise payable to an Affected Creditor in such amounts (a "**Withholding Obligation**") as the Applicants, the Plan Sponsor or Monitor, as the case may be, is required or entitled to deduct and withhold with respect to such payment under the Canadian Tax Act or any other provision of any Applicable Law. To the extent that amounts are so deducted or withheld and remitted to the applicable Governmental Entity or as required by Applicable Law, such amounts deducted or withheld shall be treated for all purposes of the Plan as having been paid to such Person as the remainder of the payment in respect of which such withholding and deduction were made. For greater certainty, and notwithstanding any other provision of the Plan: (a) each Affected Creditor that is to receive a distribution pursuant to the Plan shall have sole and exclusive responsibility for the satisfaction and payment of any Withholding Obligations imposed by any Governmental Entity on account of such distribution; and (b) no consideration shall be paid to or on behalf of a holder of an Allowed Affected Claim pursuant to the Plan unless and until such Person has made arrangements satisfactory to the Applicants, the Plan Sponsor or the Monitor, as the case may be, for the payment and satisfaction of any Withholding Obligations imposed on the Applicants, the Plan Sponsor or the Monitor by any Governmental Entity.

ARTICLE 6
RESTRUCTURING TRANSACTION

Section 6.1 Corporate Actions

The adoption, execution, delivery, implementation and consummation of all matters contemplated under the Plan involving corporate actions of the Applicants will occur and be effective as of the Implementation Date (or such later date as may be contemplated by the Plan or the Restructuring Steps Supplement), and shall be deemed to be authorized and approved under the Plan and by the Court as part of the Sanction Order in all respects and for all purposes without any requirement of further action by the shareholders, Directors or Officers of the Applicants. All necessary approvals to take such actions shall be deemed to have been obtained from the Directors, Officers or the shareholders of the Applicants, as applicable, including the deemed passing by any class of shareholders of any resolution or special resolution and any shareholders' agreement or agreement between a shareholder and another Person limiting in any way the right to vote shares held by such shareholder or shareholders with respect to any of the steps contemplated by the Plan shall be deemed to have no force or effect.

Section 6.2 Implementation Date Transactions

The steps and compromises and releases to be effected in the implementation of the Plan shall occur, and be deemed to have occurred in the order and manner to be set out in Schedule "**A**", attached hereto (the "**Restructuring Steps Supplement**") (which shall be finalized on or before the date that is 15 days prior to the Meeting Date). The Restructuring Steps Supplement may be updated by the Plan Sponsor prior to the Implementation Date in accordance with Section 10.3, without any further act or formality, provided that in no event will any revision to the Restructuring Steps Supplement be materially prejudicial to the interests of any Creditors under the other sections of this Plan.

Section 6.3 Issuance Free and Clear

Any transfer or issuance of any securities or other consideration pursuant to the Plan, including the Purchased Retail Common Shares and the New Delta Parent Common Shares, will be free and clear of any Encumbrances, except as otherwise provided herein.

ARTICLE 7
COURT SANCTION

Section 7.1 Application for Sanction Order

If the Required Majority of Affected Creditors approves the Plan, the Applicants shall apply to the Court for the Sanction Order.

Section 7.2 Sanction Order

The Applicants shall seek a Sanction Order that is in form and substance satisfactory to the Plan Sponsor and, among other things:

(a) declares that the Meeting was duly called and held in accordance with the Meeting Order;

(b) declares that the Plan Sponsor was authorized to present the Plan;

(c) declares that: (i) the Plan has been approved by the Required Majority in conformity with the CCAA; (ii) the activities of the Applicants have been in good faith and in reasonable compliance with the provisions of the CCAA and the Orders of the Court made in this CCAA Proceedings in all respects; (iii) the Court is satisfied that the Applicants have not done or purported to do anything that is not authorized by the CCAA; and (iv) the Plan and the transactions contemplated thereby are fair and reasonable;

(d) declares that as of the Effective Time, the Plan and all associated steps, compromises, transactions, arrangements, releases and reorganizations effected thereby are approved pursuant to section 6 of the CCAA, binding and effective as herein set out upon and with respect to the Applicants, the Plan Sponsor, all Affected Creditors, the Directors and Officers and all other Persons named or referred to in or subject to the Plan and their respective heirs, executors, administrators and other legal representatives, successors and assigns;

(e) declares that the steps to be taken and the compromises and releases to be effective on the Implementation Date are deemed to occur and be effected in the sequential order

contemplated by the Restructuring Steps Supplement on the Implementation Date, beginning at the Effective Time;

(f) declares that the releases effected by this Plan shall be approved and declared to be binding and effective as of the Implementation Date upon all Affected Creditors and all other Persons affected by this Plan and shall enure to the benefit of such Persons;

(g) declares that, except as provided in the Plan (including in respect of the SNDL Claims which will paid and performed in accordance with the provisions of Section 3.7), all obligations, agreements or leases to which the Applicants are a party on the Implementation Date, including all Continuing Contracts, shall be and remain in full force and effect, unamended, as at the Implementation Date, except as they may have been amended by the parties thereto subsequent to the Filing Date, and no party to any such obligation or agreement shall on or following the Implementation Date, accelerate, terminate, refuse to renew, rescind, refuse to perform or otherwise disclaim or resiliate its obligations thereunder, or enforce or exercise (or purport to enforce or exercise) any right (including any right of set-off, option, dilution or other remedy) or remedy under or in respect of any such obligation or agreement, by reason:

(i) of any event which occurred prior to, and is not continuing after, the Implementation Date, or which is or continues to be suspended or waived under the Plan, which would have entitled such party to enforce those rights or remedies;

(ii) that the Applicants have sought or obtained relief or have taken steps as part of the Plan or under the CCAA, or that the Plan has been implemented;

(iii) of any default or event of default arising as a result of the financial condition or insolvency of the Applicants;

(iv) of the effect upon the Applicants of the completion of any of the transactions contemplated by the Plan, including any change of control of the Applicants arising from the implementation of the transactions contemplated by the Plan; or

(v) of any compromises, settlements, restructuring, recapitalizations, reorganizations or steps effected pursuant to the Plan;

and declares that no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any non-competition agreement or obligation, provided that such agreement shall terminate or expire in accordance with the terms thereof or as otherwise agreed by the Applicants and the applicable Persons;

(h) authorizes the establishment of the Plan Implementation Fund with the Monitor and authorizes the Monitor to perform its functions and fulfil its obligations under the Plan and to facilitate the implementation of the Plan on and after the Implementation Date, including matters relating to the resolution of the Disputed Claims, distributions and payments from the Plan Implementation Fund and the termination of the CCAA Proceedings;

(i) authorizes the establishment of the Disputed Amount Account with the Monitor and authorizes the Monitor to perform its functions and fulfil its obligations in respect of the Disputed Amount Account;

(j) subject to payment of any amounts secured thereby, declares that each of the Charges shall be dealt with as set out in Section 5.4(c) effective on the Implementation Date;

(k) declares all Allowed Affected Claims and Disallowed Claims determined in accordance with the Claims Procedure Order are final and binding on the Applicants and all Creditors and that all Encumbrances of Affected Creditors (other than Encumbrances in respect of Unaffected Claims), including all security registrations in respect thereof, are discharged and extinguished, and the Applicants or their counsel shall be authorized and permitted to file discharges and full terminations of all related filings (whether pursuant to personal property security legislation or otherwise) against the Applicants in any jurisdiction without any further action or consent required whatsoever;

(l) confirms the releases contemplated in Article 9;

(m) declares that the Plan Sponsor, the Applicants or the Monitor may apply to the Court for advice and direction in respect of any matters arising from or under the Plan; and

(n) such other relief which the Plan Sponsor, the Applicants or the Monitor may request.

ARTICLE 8
CONDITIONS PRECEDENT & IMPLEMENTATION

Section 8.1 Conditions Precedent to Plan Implementation in favour of Plan Sponsor

The implementation of the Plan shall be conditional upon the satisfaction of the following conditions (the "**Plan Sponsor Conditions Precedent**") prior to or at the Effective Time, each of which is for the benefit of the Plan Sponsor and may be waived only by the Plan Sponsor in writing:

(a) the Plan shall have been approved by the Required Majority in accordance with the CCAA;

(b) the Restructuring Steps Supplement and the treatment of the Intercompany Claims pursuant to the Plan shall have been finally determined by the Plan Sponsor in its sole discretion;

(c) the Sanction Order shall have been issued by the Court on terms acceptable to the Plan Sponsor, and it shall have become a Final Order by a date acceptable to the Plan Sponsor;

(d) the transaction resulting from the Successful Bid (as defined in the Bio-Tech SISP) in the Bio-Tech SISP shall have closed;

(e) there shall not be in effect any preliminary or final decision, order or decree by a Governmental Entity, no application shall have been made to any Governmental Entity, and no action or investigation shall have been announced, threatened or commenced by any Governmental Entity, in consequence of or in connection with the Plan that restrains, impedes or prohibits (or if granted could reasonably be expected to restrain, impede or inhibit) the Plan or any part thereof or requires or purports to require a variation of the Plan;

(f) all agreements, resolutions, documents, and other instruments, which are reasonably necessary to be executed and delivered by the Applicants in order to implement the Plan or perform their respective obligations under the Plan or the Sanction Order, shall have been executed and delivered, and shall be in form and in content satisfactory to the Plan Sponsor;

(g) all Material filings under Applicable Laws shall have been made and any regulatory consents or approvals that are required in connection with the Plan shall have been obtained and, in the case of waiting or suspensory periods, such waiting or suspensory periods shall have expired or been terminated, and the Plan Sponsor shall be satisfied that the Applicants have the requisite approvals, permissions and authorizations to operate subsequent to the Implementation Date and in accordance with the Plan; and

(h) the New Boards shall have been appointed.

Section 8.2 Conditions Precedent to Plan Implementation in favour of Applicants

The implementation of the Plan shall be conditional upon the satisfaction of the following conditions precedent (the "**Applicants' Conditions Precedent**" and together with the Plan Sponsor Conditions Precedent, collectively, the "**Conditions Precedent**") prior to or at the Effective Time, each of which is for the benefit of the Applicants and may be waived only by the Applicants in writing:

(a) the Plan shall have been approved by the Required Majority in accordance with the CCAA;

(b) the Sanction Order shall have been issued by the Court, and it shall have become a Final Order;

(c) the Plan Implementation Fund and Administrative Expense Reserve shall have been paid to the Monitor;

(d) the Voting Trust and Creditor Equity Pool shall have been established to the satisfaction of the Applicants and such shares shall be authorized for issuance on the Implementation Date;

(e) there shall not be in effect any preliminary or final decision, order or decree by a Governmental Entity, no application shall have been made to any Governmental Entity, and no action or investigation shall have been announced, threatened or commenced by any Governmental Entity, in consequence of or in connection with the Plan that restrains, impedes or prohibits (or if granted could reasonably be expected to restrain, impede or inhibit) the Plan or any part thereof or requires or purports to require a variation of the Plan;

(f) all agreements, resolutions, documents, and other instruments, which are reasonably necessary to be executed and delivered by the Plan Sponsor in order to implement the Plan or perform its respective obligations under the Plan or the Sanction Order, shall have been executed and delivered, and shall be in form and in content satisfactory to the Applicants; and

(g) all Material filings under Applicable Laws shall have been made and any regulatory consents or approvals that are required in connection with the Plan shall have been obtained and, in the case of waiting or suspensory periods, such waiting or suspensory periods shall have expired or been terminated, and the Applicants shall be satisfied that the Applicants or Plan Sponsor, as applicable, each have the requisite approvals, permissions and authorizations to operate subsequent to the Implementation Date and in accordance with the Plan.

Section 8.3 Conditions Precedent to Plan Implementation in favour of SNDL Inc.

The implementation of the Plan shall be conditional upon the satisfaction of the following conditions precedent prior to or at the Effective Time, each of which is for the benefit of SNDL Inc. and may be waived only by SNDL Inc. in writing:

(a) the SNDL 1L Claim shall have been indefeasibly repaid in cash, in full, and following such repayment, all obligations thereunder shall be deemed to have been fully performed and discharged; and

(b) if the SNDL 2L Claim has not been (or deemed to have been) indefeasibly repaid in cash, in full, then the Applicants will:

(i) execute and deliver an acknowledgment in favour of SNDL Inc. acknowledging that the loan and security held by SNDL Inc. in respect of the SNDL 2L Claim will continue in full force, amended only to provide that the Ordered Amount will be due and payable within 5 days of a Final Order determining same; or

(ii) pay the Disputed Amount into the Disputed Amount Account in accordance with Section 3.7(b).

Section 8.4 Failure to Satisfy Conditions Precedent

If the Conditions Precedent are not satisfied or waived on or before the Outside Date, or if the Plan Sponsor determines that the satisfaction of any Condition Precedent is not achievable, the applicable Party may provide written notice to the other Party and the Monitor that such Party is revoking or withdrawing the Plan and, upon delivery of such notice: (a) the Plan shall be null and void in all respects; (b) any settlement or compromise embodied in the Plan and any document or agreement executed pursuant to the Plan shall be deemed null and void; and (c) in the case that the Plan Sponsor is the revoking party, the Plan Sponsor and the Applicants shall execute the Stalking Horse Purchase Agreement and shall pursue a Court-supervised sale and investment solicitation process in respect of the Applicants.

Section 8.5 Monitor's Certificate

Upon delivery of written notice from each party confirming the satisfaction or waiver of the conditions set out in Section 8.1, Section 8.2 and Section 8.3, the Monitor shall forthwith deliver to the Plan Sponsor and the Applicants a certificate stating that the Implementation Date has occurred and that the Plan is effective in accordance with its terms and the terms of the Sanction Order. As soon as practicable following the Implementation Date, the Monitor shall file such certificate with the Court.

ARTICLE 9
EFFECT OF PLAN; RELEASES

Section 9.1 Binding Effect of the Plan

The Plan (including, without limitation, the releases and injunctions contained herein), upon being sanctioned and approved by the Court pursuant to the Sanction Order, will become effective and binding at the Effective Time, and the sequence of steps set out in the Restructuring Steps Supplement will be implemented, and the Plan will be binding on all Persons irrespective of the jurisdiction in which the Persons reside or in which the Claims arose and shall constitute:

(a) full, final and absolute settlement of all rights of any Affected Creditor; and

(b) an absolute release, extinguishment and discharge of all indebtedness, liabilities and obligations of the Applicants in respect of any Affected Creditor, except as otherwise provided herein.

Section 9.2 Released Parties

Subject to Section 9.3, in consideration of the distribution described herein to Affected Creditors, and other good and valuable consideration from the Applicants and the Plan Sponsor pursuant, or in relation, to this Plan, from and after the Effective Time, each of the Released Parties will be released and discharged from any and all demands, claims, actions, causes of action, counterclaims, suits, debts, sums of money, accounts, covenants, damages, judgments, expenses, executions, liens and other recoveries on account of any indebtedness, liability, obligation, demand or cause of action of whatever nature that any Affected Creditors (including any Person who may claim contribution or indemnification against or from them) may be entitled to assert, including any and all claims in respect of statutory liabilities of Directors and Officers other than as set out in Section 9.3 below, whether known or unknown, matured or unmatured, direct, indirect or derivative, foreseen or unforeseen, existing or hereafter arising, based in whole or in part on any act or omission, transaction, dealing or other occurrence existing or taking place on or prior to the Effective Time or, with respect to the time of such matters, relating to, arising out of or in connection with any claim, including without limitation any claim arising out of: (i) the restructuring, disclaimer, resiliation, breach or termination of any contract, lease, agreement or other arrangement, whether written or oral, by the Applicants; (ii) the business of the Applicants; (iii) the Plan, including any transaction referenced in and relating to the Plan; and (iv) the CCAA Proceedings (collectively, the "**Released Claims**").

Except for those claims described in Section 9.3, from and after the Effective Time, in accordance with the steps and sequences set forth in the Restructuring Steps Supplement, all Persons, along with their respective affiliates, present and former officers, directors, employees, partners, associated individuals, auditors, financial advisors, legal counsel, other professionals, sureties, insurers, indemnities, agents, dependents, heirs, representatives and assigns, as applicable, are permanently and forever barred, estopped, stayed, and enjoined, on and after the Effective Time, with respect to any and all Released Claims against the Released Parties, from:

(c) commencing, conducting or continuing in any manner, directly or indirectly, any action, claim, suit, demand or other proceedings of any nature or kind whatsoever (including, without limitation, any proceeding in a judicial, arbitral, administrative or other forum) against the Released Parties;

(d) enforcing, levying, attaching, collecting or otherwise recovering or enforcing by any manner or means, directly or indirectly, any judgment, award, decree or order against the Released Parties or their property;

(e) commencing, conducting or continuing in any manner, directly or indirectly, any action, claim, suit or demand, including without limitation by way of contribution or indemnity or other relief, in common law, or in equity, breach of trust or breach of fiduciary duty or under the provisions of any statute or regulation, or other proceedings of any nature or kind whatsoever (including, without limitation, any proceeding in a judicial, arbitral, administrative or other forum) against any Person who makes such a claim or might reasonably be expected to make such a claim in any manner or forum, against one or more of the Released Parties;

(f) creating, perfecting, asserting or otherwise enforcing, directly or indirectly, any Lien or Encumbrance of any kind against the Released Parties or their property; or

(g) taking any actions to interfere with the implementation or consummation of the Plan or the transactions contemplated therein.

All Persons who have previously commenced a Released Claim in any court, which has not been finally determined, discontinued or dismissed prior to the Effective Time shall, forthwith after the Effective Time take all steps necessary to discontinue or dismiss such Released Claim, without costs.

Section 9.3 Claims Not Released

For clarity, nothing in Sections 9.1 and 9.2 will release or discharge:

(a) the Applicants from or in respect of any Unaffected Claim or its obligations to Affected Creditors under the Plan or under any order of the Court made in the CCAA Proceedings;

(b) SNDL Inc.'s claims, rights and entitlement to the Disputed Amount;

(c) a Released Party if,

(i) in connection with a Released Claim, the Released Party is adjudged by the express terms of a judgment rendered on a final determination on the merits to have committed a breach of trust (whether common law or statutory), fraud or willful misconduct or to have been grossly negligent; or

(ii) in the case of Directors, in respect of any claim referred to in Section 5.1(2) of the CCAA.

Section 9.4 Consents and Agreements at the Effective Time

At the Effective Time, each Affected Creditor will be deemed to have consented and agreed to all of the provisions of the Plan, in its entirety. Without limitation to the foregoing, each Affected Creditor will be deemed:

(a) to have executed and delivered to the Applicant all consents, assignments, releases and waivers, statutory or otherwise, required to implement and carry out the Plan in its entirety;

(b) to have waived any default by or rescinded any demand for payment against the Applicant that has occurred on or prior to the Effective Time; and

(c) to have agreed that, if there is any conflict between the provisions, express or implied, of any agreement or other arrangement, written or oral, existing between such Affected Creditor and the Applicant with respect to an Affected Claim as at the Effective Time and the provisions of the Plan, then the provisions of the Plan take precedence and priority and the provisions of such agreement or other arrangement are amended accordingly.

Section 9.5 Waiver of Defaults

From and after the Implementation Date, all Persons, other than SNDL Inc. solely in respect of the Disputed Amount, shall be deemed to have waived any and all defaults of the Applicants (except under the Plan) then existing or previously committed or caused by the Applicants, or any Applicant, the commencement

of the CCAA Proceedings, any matter pertaining to the CCAA Proceedings, any of the provisions in the Plan or steps or transactions contemplated in the Plan, or any non-compliance with any covenant, warranty, representation, term, provision, condition or obligation, expressed or implied, in any contract, instrument, credit document, indenture, note, lease, guarantee, agreement for sale or other agreement, written or oral, and any and all amendments or supplements thereto, existing between such Person and the Applicants, or any Applicant, and any and all notices of default and demands for payment or any step or proceeding taken or commenced in connection therewith shall be deemed to have been rescinded and of no further force or effect, provided that nothing shall be deemed to excuse the Applicants from performing their obligations under the Plan or be a waiver of defaults by the Applicants under the Plan and the related documents.

ARTICLE 10
GENERAL

Section 10.1 Claims Bar Date

Nothing in this Plan extends or shall be interpreted as extending or amending the Claims Bar Date or gives or shall be interpreted as giving any rights to any Person in respect of Affected Claims that have been barred or extinguished pursuant to the Claims Procedure Order.

Section 10.2 Deeming Provisions

In the Plan, the deeming provisions are not rebuttable and are conclusive and irrevocable.

Section 10.3 Modification of the Plan

(a) The Plan Sponsor reserves the right, at any time and from time to time, to amend, restate, modify and/or supplement the Plan with the agreement of the Applicants, the Monitor, and SNDL Inc. solely insofar as any such amendment, restatement, modification and/or supplement to the Plan affects or purports to affect the SNDL Claims in any way, provided that any such amendment, restatement, modification or supplement must be contained in a written document which is filed with the Court and: (i) if made prior to or at the Meeting, communicated to the Affected Creditors prior to or at the Meeting; and (ii) if made following the Meeting, approved by the Court following notice to the Affected Creditors. For certainty, the Plan Sponsor may increase the consideration payable or otherwise provided under this Plan upon notice to the Applicants and Monitor and without their consent.

(b) Notwithstanding Section 10.3(a), any amendment, restatement, modification or supplement may be made by the Plan Sponsor with the consent of the Applicants and Monitor, without further Court Order or approval, provided that it: (i) concerns a matter which, in the opinion of the Plan Sponsor, acting reasonably, is of an administrative nature required to better give effect to the implementation of the Plan and the Sanction Order; (ii) cures any errors, omissions or ambiguities and is not materially adverse to the financial or economic interests of the Affected Creditors; or (iii) increases the consideration payable or otherwise provided to one or more Affected Creditors hereunder and does not decrease any consideration payable or otherwise provided to any Affected Creditor.

(c) Any amended, restated, modified or supplementary plan or plans of compromise or arrangement filed with the Court and, if required by this Section, approved by the Court, shall, for all purposes, be and be deemed to constitute the Plan.

(d) Subject to the terms herein, in the event that this Plan is amended, the Monitor shall post such amended Plan on the Monitor's Website and such posting shall constitute adequate notice of such amendment.

Section 10.4 Paramountcy

From and after the Effective Time, any conflict between:

(a) the Plan or any Order in the CCAA Proceeding; and

(b) the covenants, warranties, representations, terms, conditions, provisions or obligations, expressed or implied, of any contract, mortgage, security agreement, indenture, trust indenture, note, loan agreement, commitment letter, agreement for sale, lease or other agreement, written or oral and any and all amendments or supplements thereto existing between one or more of the Affected Creditors and the Applicants as at the Implementation Date or the Articles or Bylaws of the applicable Applicant at the Implementation Date,

will be deemed to be governed by the terms, conditions and provisions of the Plan, which shall take precedence and priority, provided that any settlement agreement executed by any applicable Applicant and any Person asserting a Claim that was entered into from and after the Filing Date shall be read and interpreted in a manner that assumes such settlement agreement is intended to operate congruously with, and not in conflict with, the Plan.

Section 10.5 Severability of Plan Provisions

If, prior to the date of the Sanction Order, any term or provision of the Plan is held by the Court to be invalid, void or unenforceable, the Court, at the request of the Plan Sponsor and Applicants, shall have the power to either: (a) sever such term or provision from the balance of the Plan and provide the Plan Sponsor and the Applicants with the option to proceed with the implementation of the balance of the Plan as of and with effect from the Implementation Date; or (b) alter and interpret such term or provision to make it valid or enforceable to the maximum extent practicable, consistent with the original purpose of the term or provision held to be invalid, void or unenforceable, and such term or provision shall then be applicable as altered or interpreted. Notwithstanding any such holding, alteration or interpretation, and provided that the Plan Sponsor and the Applicants proceed with the implementation of the Plan, the remainder of the terms and provisions of the Plan shall remain in full force and effect and shall in no way be affected, impaired or invalidated by such holding, alteration or interpretation.

Section 10.6 Reviewable Transactions

Section 36.1 of the CCAA, Sections 38 and 95 to 101 of the BIA and any other federal or provincial law relating to preferences, fraudulent conveyances or transfers at undervalue, shall not apply to this Plan or to any payments made in connection with transactions entered into by the Applicants or the Plan Sponsor after the Filing Date, including to any and all of the payments and transactions contemplated by and to be implemented pursuant to this Plan.

Section 10.7 Responsibilities of the Monitor

Alvarez & Marsal Canada Inc. is acting in its capacity as Monitor in the CCAA Proceeding with respect to the Applicants, the CCAA Proceeding and this Plan and not in its personal or corporate capacity, and will not be responsible or liable for any obligations of the Applicants or the Plan Sponsor under the Plan or otherwise.

Section 10.8 Different Capacities

Persons who are affected by the Plan may be affected in more than one capacity. Unless expressly provided to the contrary herein, a Person will be entitled to participate hereunder in each such capacity. Any action taken by a Person in one capacity will not affect such Person in any other capacity, unless expressly agreed by the Applicants and the Person in writing or unless its Claims overlap or are otherwise duplicative.

Section 10.9 Notice

(a) Any notice or other communication under this Agreement shall be in writing and may be delivered personally, by courier or by email, addressed:

If to the Applicants:

Delta 9 Cannabis Inc.
PO Box 68096 Osborne Village
Winnipeg, MB R3L 2V9

Attention: John Arbuthnot
Email: john.arbuthnot@delta9.ca

with a copy to:

MLT Aikins LLP
2100 Livingston Place
222 3 Ave SW
Calgary, AB T2P 0B4

Attention: Ryan Zahara / Chris Nyberg
Email: rzahara@mltaikins.com / cnyberg@mltaikins.com

If to the Monitor:

Alvarez & Marsal Canada Inc.
202 6 Ave SW
Calgary, AB T2P 2R9

Attention: Orest Konowalchuk
Email: okonowalchuk@alvarezandmarsal.com

with a copy to:

Burnet, Duckworth & Palmer LLP
525 8 Ave SW #2400
Calgary, AB T2P 1G1

Attention: David LeGeyt / Ryan Algar
Email: dlegeyt@bdplaw.com / ralgar@bdplaw.com

If to the Plan Sponsor:

2759054 Ontario Inc. o/a Fika Herbal Goods
40 King Street West, Suite 3410
Toronto, ON M5H 3Y2

Attention: Mark Vasey
Email: mark.vasey@fikasupply.com

with a copy to:

Miller Thomson LLP
40 King Street West, Suite 5800
Toronto, ON M5H 3S1

Attention: Larry Ellis / Sam Massie
Email: lellis@millerthomson.com / smassie@millerthomson.com

If to an Affected Creditor:

To the mailing address, facsimile address or email address provided on such Affected Creditor's Notice to Known Claimants or Proof of Claim;

or to such other address as any party may from time to time notify the others in accordance with this Section.

(b) Any such notice or other communication, if given by personal delivery or by courier, will be deemed to have been given on the day of actual delivery thereof and, if transmitted by email before 5:00 p.m. (Calgary time) on a Business Day, will be deemed to have been given on such Business Day, and if transmitted by email after 5:00 p.m. (Calgary time) on a Business Day, will be deemed to have been given on the Business Day after the date of the transmission.

(c) Sending a copy of a notice or other communication to a Party's legal counsel as contemplated above is for information purposes only and does not constitute delivery of the notice or other communication to that Party. The failure to send a copy of a notice or other communication to legal counsel does not invalidate delivery of that notice or other communication to a Party.

(d) If, during any period during which notices or other communications are being given pursuant to this Plan, a postal strike or postal work stoppage of general application should occur, such notices or other communications sent by ordinary mail and then not received shall not, absent further Order of the Court, be effective and notices and other communications given hereunder during the course of any such postal strike or work stoppage of general application shall only be effective if given by courier, personal delivery or electronic or digital transmission in accordance with this Section.

Section 10.10 Further Assurances

Each of the Persons directly or indirectly named or referred to in, or subject to, this Plan will execute and deliver all such documents and instruments and do all such acts and things as may be necessary or desirable

to carry out the full intent and meaning of the Plan and to give effect to the transactions contemplated herein.

DATED as of the 25th day of November, 2024.

SCHEDULE "A"
RESTRUCTURING STEPS SUPPLEMENT

To be completed and finalized on or before the date that is 15 days prior to the Meeting Date.

SCHEDULE "B"
STALKING HORSE PURCHASE AGREEMENT

To be completed and finalized on or before the date that is 15 days prior to the Meeting Date.

SCHEDULE "2"

NOTICE TO AFFECTED CREDITORS

IN THE MATTER OF *THE COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, as amended

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF DELTA 9 CANNABIS INC., DELTA 9 LOGISTICS INC., DELTA 9 BIO-TECH INC., DELTA 9 LIFESTYLE CANNABIS CLINIC INC. and DELTA 9 CANNABIS STORE INC.

PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT

NOTICE OF CREDITORS' MEETING

TO: The Affected Creditors of Delta 9 Cannabis Inc. ("**Delta Parent**"), Delta 9 Cannabis Store Inc. ("**Delta Retail**"), and / or Delta 9 Lifestyle Cannabis Clinic Inc. ("**Delta Lifestyle**" and together with Delta Parent and Delta Retail the "**Delta 9 Group**")

NOTICE IS HEREBY GIVEN that a virtual meeting (not an "in person" meeting) of the Affected Creditor Class will be held on December 20, 2024 at 2:00 p.m. (Calgary time) by live audio webcast online or by telephone at:

Dial in by phone: +1 647-749-7010

Phone conference ID: 789 278 331#

(the "**Creditors' Meeting**") for the following purposes:

to consider and, if deemed advisable, to pass, with or without variation, a resolution of the Affected Creditors (the "**CCAA Plan Resolution**") approving the Plan of Compromise or Arrangement of the Delta 9 Group pursuant to the *Companies' Creditors Arrangement Act* (Canada) (the "**CCAA**") dated November 25, 2024 (as may be amended, restated, supplemented or modified from time to time in accordance with the terms thereof, the "**CCAA Plan**"); and

to transact such other business as may properly come before the Creditors' Meeting or any adjournment or postponement thereof.

The Creditors' Meeting is being held pursuant to an order (the "**Creditors' Meeting Order**") of the Court of King's Bench of Alberta (the "**Court**") made on December 2, 2024. Capitalized but undefined terms are defined in the CCAA Plan or the Creditors' Meeting Order.

The CCAA Plan contemplates a compromise or arrangement of the Claims of Affected Creditors. The Creditors' Meeting Order has established that quorum for the Creditors' Meeting is the presence, in person (by electronic means) or by proxy of at least one member of the Affected Creditor Class with an Allowed Affected Claim.

In order for the CCAA Plan to be approved and binding in accordance with the CCAA, the CCAA Plan Resolution must be approved by a required majority of the Affected Creditor Class who validly vote, in person "virtually", or by proxy, or were deemed to do so, at the Creditors' Meeting. Each Affected Creditor with an Allowed Affected Claim that does not constitute a Convenience Claim shall be entitled to one vote for the purpose of determining a majority in number, in the

amount equal to such Creditor's Allowed Affected Claim.[1]

If the CCAA Plan is approved at the Creditors' Meeting, the CCAA Plan must then be sanctioned by the Court before it can be implemented. Subject to Court sanction and the satisfaction of the other conditions precedent to implementation of the CCAA Plan, all Affected Creditors will then receive the treatment set forth in the CCAA Plan.

Attendance at the Creditors' Meeting

The Creditors' Meeting will be a virtual meeting, rather than an "in person" meeting, conducted by way of live audio webcast online or by telephone at**:**

Dial in by phone: +1 647-749-7010

Phone conference ID: 789 278 331#

Affected Creditors with an Allowed Affected Claim and a duly appointed proxy holder will be able to attend the virtual meeting, submit questions and vote in real time, provided they are connected by telephone.

It is the Affected Creditors' and proxy holders' responsibility to ensure internet and/or phone connectivity for the duration of the Creditors' Meeting and you should allow ample time to log in to the meeting online or dial into the meeting by phone before it begins.

Proxy Form

An Affected Creditor entitled to vote at the Creditors' Meeting may attend at the applicable Creditors' Meeting using the information above or may appoint another person as its proxyholder by inserting the name of such person in the space provided in the form of proxy (the "Affected Creditor Proxy" or "Affected Creditor Proxies") provided to Affected Creditors by the Monitor. Persons appointed as proxyholders need not be Affected Creditors.

In order to be effective, Affected Creditor Proxies must be received by the Monitor by 5:00 p.m. (Calgary time) on the day that is two (2) Business Days before the Creditors' Meeting.
The address of the Monitor is:

Alvarez & Marsal Canada Inc.
Bow Valley Square IV
Suite 1110, 250 – 6th Avenue SW
Calgary, Alberta T2P 3H7
Attention: Orest Konowalchuk
Duncan MacRae

E-mail: okonowalchuk@alvarezandmarsal.com
dmacrae@alvarezandmarsal.com

If an Affected Creditor specifies a choice with respect to voting on the CCAA Plan Resolution on a Affected Creditor Proxy, the Affected Creditor Proxy will be voted in accordance with the

[1] Each Affected Creditor with an Allowed Affected Claim or a Disputed Claim that constitutes a Convenience Claim, including Affected Creditors that have made a Convenience Election, shall be deemed to vote in favour of the Plan.

specification so made. **In absence of such specification, an Affected Creditor Proxy will be voted FOR the CCAA Plan Resolution provided that the proxyholder does not otherwise exercise its right to vote at the Creditors' Meeting.**

NOTICE IS ALSO HEREBY GIVEN that if the CCAA Plan is approved at the Creditors' Meeting, the Delta 9 Group intends to bring an application before the Court on January 10, 2024 at 10:00AM (Calgary time) or such later date (the "**Sanction Hearing Date**") as may be posted on the Monitor's Website, at the Court of King's Bench by Zoom or Webex, for which a virtual courtroom link will be circulated to the Service List at a later date. The application will seek an order sanctioning the CCAA Plan under the CCAA and ancillary relief consequent upon such sanction ("**Plan Sanction Order**"). Any Affected Creditor that wishes to oppose the sanctioning of the CCAA Plan pursuant to the Sanction Order must serve on the Delta 9 Group, the Monitor and the Service List for the Delta 9 Group's CCAA Proceedings a notice setting out the basis for such opposition and a copy of the materials to be used to oppose the application no later than 4:00pm (Calgary time) on the date that is 2 Business Days prior to the Sanction Hearing Date.

This Notice is given by the Delta 9 Group pursuant to the Creditors' Meeting Order.
You may view copies of the documents relating to this process on the Monitor's website at https://www.alvarezandmarsal.com/Delta9.

DATED this __ day of December, 2024.

SCHEDULE "3"

FORM OF AFFECTED CREDITOR PROXY

PROXY AND INSTRUCTIONS

FOR AFFECTED CREDITORS

IN THE MATTER OF THE PROPOSED

PLAN OF COMPROMISE OR ARRANGEMENT OF

DELTA 9 CANNABIS INC., DELTA 9 LOGISTICS INC.,

DELTA 9 BIO-TECH INC., DELTA 9 LIFESTYLE CANNABIS CLINIC INC.

AND DELTA 9 CANNABIS STORE INC.

MEETING OF THE AFFECTED CREDITOR CLASS

to be held pursuant to an Order of the Court of King's Bench of Alberta (the "**Court**") made on December 2, 2024 (the "**Creditors' Meeting Order**") in connection with the Plan of Compromise or Arrangement of Delta 9 Cannabis Inc. ("**Delta Parent**"), Delta 9 Cannabis Store Inc. ("**Delta Retail**"), and Delta 9 Lifestyle Cannabis Clinic Inc. ("**Delta Lifestyle**" and together with Delta Parent and Delta Retail, the "**Delta 9 Group**") dated November 25, 2024 (as amended, restated, modified and/or supplemented from time to time, the "**CCAA Plan**"), on December 20, 2024 at 10:00 a.m. (Calgary time) by live audio webcast or telephone at:

Dial in by phone: +1 647-749-7010

Phone conference ID: 789 278 331#

and / or at any adjournment, postponement or other rescheduling thereof (the "**Creditors' Meeting**").

PLEASE COMPLETE, SIGN AND DATE THIS PROXY (THE "**PROXY**" OR "**PROXIES**") AND RETURN IT TO ALVAREZ & MARSAL CANADA INC., IN ITS CAPACITY AS THE MONITOR OF THE DELTA 9 GROUP (THE "**MONITOR**") BY 5:00 P.M. (CALGARY TIME) ON DECEMBER 17, 2024, OR AT LEAST TWO (2) BUSINESS DAYS PRIOR TO ANY ADJOURNED, POSTPONED OR RESCHEDULED CREDITORS' MEETING (THE "**PROXY DEADLINE**"). PLEASE RETURN OR SEND YOUR ORIGINAL PROXY SO THAT IT IS ACTUALLY RECEIVED BY THE MONITOR ON OR BEFORE THE PROXY DEADLINE.

Please use this Proxy form if you do not wish to attend the Creditors' Meeting to vote in person "virtually" but wish to appoint a proxyholder to attend the Creditors' Meeting "virtually", vote the aggregate amount of your Allowed Affected Claim to accept or reject the CCAA Plan and otherwise act for and on your behalf at the Creditors' Meeting and any adjournment(s), postponement(s) or rescheduling(s) thereof.

A copy of the CCAA Plan is attached as Schedule 1 to the Creditors' Meeting Order. Capitalized but undefined terms are defined the CCAA Plan or the Creditors' Meeting Order.

You should review the CCAA Plan before you vote. In addition, on December 2, 2024, the Court issued the Creditors' Meeting Order establishing certain procedures for the conduct of the Creditors' Meeting. A copy of the Creditors' Meeting Order was included with the meeting materials set to you along with this form of Proxy and is also available on the Monitor's website at https://www.alvarezandmarsal.com/Delta9. The Creditors' Meeting Order contains important information regarding the voting process. Please read the Creditors' Meeting Order and the instructions sent with this Proxy prior to submitting this Proxy.

If the CCAA Plan is approved by the Required Majority and is sanctioned by the Court, it will be binding on you whether or not you vote.

APPOINTMENT OF PROXYHOLDER AND VOTE

By checking one of the two boxes below, the undersigned Affected Creditor hereby revokes all proxies previously given and nominates, constitutes and appoints either (*if no box is checked or the information listed below is not sufficiently provided, the Monitor will act as your proxyholder*):

□ _____ (name of proxyholder)
_____ (telephone of proxyholder)
_____ (email address of proxyholder)

or

a representative of Alvarez & Marsal Canada Inc., in its capacity as Monitor of the Delta 9 Group

as proxyholder, with full power of substitution, to attend, vote and otherwise act for and on behalf of the undersigned at the Creditors' Meeting and at adjournment(s), postponement(s) and rescheduling(s) thereof, and to vote the amount of the Affected Creditor's Allowed Affected Claim. Without limiting the generality of the power hereby conferred, the person named as proxyholder is specifically directed to vote as shown below. The person named as proxyholder is also directed to vote at the proxyholder's discretion and otherwise act for and on behalf of the undersigned with respect to any amendments or variations to the CCAA Plan and to any matters that may come before the Creditors' Meeting or at any adjournment, postponement or rescheduling thereof and to vote the amount of the Affected Creditor's Allowed Affected Claim as follows (*mark only one*):

Vote **FOR** the approval of the CCAA Plan, or
Vote **AGAINST** the approval of the CCAA Plan

Please note that if no specification is made above, the Affected Creditor will be deemed to have voted FOR approval of the CCAA Plan at the Creditors' Meeting provided the Affected Creditor does not otherwise exercise its right to vote at the Creditors' Meeting.

The proxyholder can log in and attend the Creditors' Meeting by using either the link or telephone number provided above.

DATED this __ day of _____, 2024.

AFFECTED CREDITOR'S SIGNATURE:

_____
(Print Legal Name of Affected Creditor)

_____
(Print Legal Name of Assignee, if applicable)

_____
(Signature of the Affected Creditor/Assignee or an Authorized Signing Officer of the Affected Creditor/Assignee)

_____
(Print Name and Title of Authorized Signing Officer of the Affected Creditor/Assignee, if applicable)

_____
(Mailing Address of the Affected Creditor/Assignee)

_____
(Telephone Number and E-mail of the Affected Creditor/Assignee or Authorized Signing Officer of the Affected Creditor/Assignee)

YOUR PROXY MUST BE <u>RECEIVED</u> BY THE MONITOR BY MAIL, COURIER, EMAIL OR FACSIMILE AT THE ADDRESS LISTED BELOW BEFORE THE PROXY DEADLINE.

Alvarez & Marsal Canada Inc.
Bow Valley Square IV
Suite 1110, 250 – 6th Avenue SW
Calgary, Alberta T2P 3H7
Attention: Orest Konowalchuk
Duncan MacRae

E-mail: okonowalchuk@alvarezandmarsal.com
dmacrae@alvarezandmarsal.com

IF YOU HAVE ANY QUESTIONS REGARDING THIS PROXY OR THE VOTING PROCEDURES, OR IF YOU NEED AN ADDITIONAL COPY OR ADDITIONAL COPIES OF THE ENCLOSED MATERIALS, PLEASE CONTACT THE MONITOR AT THE ADDRESS ABOVE OR VISIT THE MONITOR'S WEBSITE AT: https://www.alvarezandmarsal.com/delta9.

INSTRUCTIONS FOR COMPLETION OF PROXY

All capitalized terms used but not defined in this Proxy shall have the meanings given to such terms in the CCAA Plan (a copy of which is attached as Schedule "1" to the Creditors' Meeting Order) or the Creditors' Meeting Order

Please read and follow these instructions carefully. Your Proxy must actually be received by the Monitor at:

Alvarez & Marsal Canada Inc.
Bow Valley Square IV
Suite 1110, 250 – 6th Avenue SW
Calgary, Alberta T2P 3H7
Attention: Orest Konowalchuk
Duncan MacRae

E-mail: okonowalchuk@alvarezandmarsal.com
dmacrae@alvarezandmarsal.com

prior to **5:00 p.m. (Calgary time) on December 17, 2024**, or at least two (2) Business Days prior to the time of any adjournment, postponement or rescheduling of the Creditors' Meeting. If your Proxy is not received by the Proxy Deadline, unless such time is extended, your Proxy will not be counted.

Your Allowed Affected Claim will be the amount as determined by the Monitor in accordance with the Claims Procedure Order and the Creditors' Meeting Order. This Proxy may only be used to vote the amount of your Allowed Affected Claim.

Each Affected Creditor who has a right to vote at the Creditors' Meeting has the right to appoint a person (who need not be an Affected Creditor) to attend, act and vote for and on behalf of the Affected Creditor and such right may be exercised by inserting in the space provided the name, telephone and email address of the person to be appointed, or to select a representative of the Monitor as its proxyholder. If no proxyholder is selected, or if the contact information for such proxyholder is not sufficiently provided, the Affected Creditor will be deemed to have appointed an officer of Alvarez & Marsal Canada Inc., in its capacity as Monitor, or such other person as Alvarez & Marsal Canada Inc. may designate, as proxyholder of the Affected Creditor, with power of substitution, to attend on behalf of and act for the Affected Creditor at the Creditors' Meeting to be held in connection with the CCAA Plan and at any and all adjournments, postponements or other rescheduling thereof. The proxyholder will be able to log in and attend the Creditors' Meeting using the link or telephone numbers provided in the Affected Creditor Proxy.

Check the appropriate box to vote for or against the CCAA Plan. **If you do not check either box, you will be deemed to have voted FOR approval of the CCAA Plan provided you do not otherwise exercise your right to vote at the Creditors' Meeting.**

Sign the Proxy – your original signature is required on the Proxy to appoint a proxyholder and vote at the Creditors' Meeting. An electronic signature will be accepted and deemed to be an original with respect to any Proxy submitted by email or facsimile. If you are completing the Proxy as a duly authorized representative of a corporation or other entity, indicate your relationship with such corporation or other entity and the capacity in which you are signing and, if subsequently requested, provide proof of your authorization to so sign. In addition, please provide your name, mailing address, telephone number and e-mail address.

If you need additional Proxies, please immediately contact the Monitor.

If multiple Proxies are received from the same person with respect to the same Claims prior to the Proxy Deadline, the latest dated, validly executed Proxy timely received will supersede and revoke any earlier received Proxy. However, if a holder of Claims casts Proxies received by the Monitor dated with the same date, but which are voted inconsistently, such Proxies will not be counted. If a Proxy is not dated in the space provided, it shall be deemed dated as of the date it is received by the Monitor.

If an Affected Creditor validly submits a Proxy to the Monitor and subsequently "virtually" attends and votes at the Creditors' Meeting, it will be revoking the earlier received Proxy. If an Affected Creditor wishes to attend the Creditors' Meeting but does not wish to revoke its Proxy, it may log in and decline to vote at the Creditors' Meeting when prompted to do so.

Proxies may be accepted for purposes of an adjourned, postponed or other rescheduled Creditors' Meeting if received by the Monitor by the Proxy Deadline.

Any Proxy that is illegible or contains insufficient information to permit the identification of the claimant will not be counted.

After the Proxy Deadline, no Proxy may be withdrawn or modified, except by a General Unsecured Creditor voting in person "virtually" at the Creditors' Meeting, without the prior consent of the Monitor and the Delta 9 Group.

IF YOU HAVE ANY QUESTIONS REGARDING THIS PROXY OR THE VOTING PROCEDURES, OR IF YOU NEED AN ADDITIONAL COPY OR ADDITIONAL COPIES OF THIS PROXY, PLEASE CONTACT THE MONITOR AT THE ADDRESS LISTED IN THE PROXY FORM OR VISIT THE MONITOR'S WEBSITE AT:

https://www.alvarezandmarsal.com/delta9.

SCHEDULE "4"
CONVENIENCE ELECTION

TO: ALVAREZ & MARSAL CANADA INC., in its capacity as Court-appointed Monitor of Delta 9 Cannabis Inc. ("Delta Parent"), Delta 9 Cannabis Store Inc. ("Delta Retail"), and Delta 9 Lifestyle Cannabis Clinic Inc. ("Delta Lifestyle" and together with Delta Parent, Delta Retail and Delta Lifestyle, the "Delta 9 Group")

In connection with the Plan of Compromise or Arrangement of the Delta 9 Group pursuant to the *Companies' Creditors Arrangement Act* (Canada) (as may be amended, restated, modified or supplemented from time to time, the "**Plan**") filed with the Court of King's Bench of Alberta, Affected Creditors with one or more Allowed Affected Claims in an amount in excess of CA$4,000 may file a Convenience Election pursuant to which such Affected Creditor elects to be treated as a Convenience Creditor and thereby receive only the Convenience Amount of CA$4,000 and be deemed thereby to vote in favour of the Plan.

By submitting this Convenience Election, the undersigned hereby elects to be treated as a Convenience Creditor and receive the Convenience Amount which is the lesser of (i) a cash amount equal to $4,000; and (ii) the amount of such Allowed Affected Claim, in full and final satisfaction of the Allowed Affected Claim of the undersigned, and hereby acknowledges that the undersigned shall be deemed to vote its Allowed Affected Claim in favour of the Plan at the Creditors' Meeting.

For the purposes of this election, capitalized but undefined terms are defined in the Plan.

Please complete, sign and date this Convenience Election and return it to Alvarez & Marsal Canada Inc. at the address below by 5:00 p.m. (Calgary time) on December 17, 2024.

Dated this _____ day of ____,

AFFECTED CREDITOR'S SIGNATURE:

_____
(Print Legal Name of Affected Creditor)

_____
(Signature of the Affected Creditor or an Authorized Signing Officer of the Affected Creditor, if applicable)

_____
(Print Name and Title of Authorized Signing Officer of the Affected Creditor, if applicable)

_____
(Mailing Address of the Affected Creditor)

_____
(Telephone Number of the Affected Creditor)

_____
(E-mail Address of the Affected Creditor)

YOUR CONVENIENCE ELECTION MUST BE <u>RECEIVED</u> BY THE MONITOR AT THE ADDRESS LISTED BELOW BEFORE THE PROXY DEADLINE.

Alvarez & Marsal Canada Inc., in its capacity as court appointed officer of Delta 9 Cannabis Inc., Delta 9 Cannabis Store Inc., and Delta 9 Lifestyle Cannabis Clinic Inc.

Bow Valley Square IV
Suite 1110, 250 – 6th Avenue SW
Calgary, Alberta T2P 3H7
Attention: Orest Konowalchuk
Duncan MacRae

E-mail: okonowalchuk@alvarezandmarsal.com
dmacrae@alvarezandmarsal.com

SCHEDULE "B"

FORM OF MONITOR'S CERTIFICATE

COURT FILE NUMBER	2401-09688
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
	IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, RSC 1985, c C-36, AS AMENDED AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF DELTA 9 CANNABIS INC., DELTA 9 LOGISTICS INC., DELTA 9 BIO-TECH INC., DELTA 9 LIFESTYLE CANNABIS CLINIC INC. and DELTA 9 CANNABIS STORE INC.
APPLICANTS	DELTA 9 CANNABIS INC., DELTA 9 LOGISTICS INC., DELTA 9 BIO-TECH INC., DELTA 9 LIFESTYLE CANNABIS CLINIC INC. and DELTA 9 CANNABIS STORE INC.
DOCUMENT	**MONITOR'S CERTIFICATE**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**MLT AIKINS LLP** Barristers and Solicitors #2100 – 222 3rd Ave SW Calgary, AB T2P 0B4 Attention: Ryan Zahara / Molly McIntosh Telephone: (403) 693-5420 / (780) 969-3501 Email: rzahara@mltaikins.com mmcintosh@mltaikins.com File No. 0136555.00034

MONITOR'S CERTIFICATE

(PLAN IMPLEMENTATION)

All capitalized terms used herein that are not otherwise defined have the meaning ascribed to them in the Plan of Compromise and Arrangement dated November 25, 2024, as may be further amended, varied or supplemented from time to time in accordance with the terms thereof (the "**Plan**");

Pursuant to paragraph 24 of the Order of the Honourable Justice M. A. Marion made in

these proceedings on January 10, 2025 (the "**Sanction Order**") and Section 8.5 of the Plan, Alvarez & Marsal Canada Inc., in its capacity as the Court-appointed Monitor of the Plan Entities (the "**Monitor**") delivers to the Plan Entities this certificate and hereby certifies that:

1. The Monitor has received written notice from the Plan Entities, the Plan Sponsor and SNDL that the conditions precedent in sections 8.1., 8.2, and 8.3 of the Plan have been satisfied or waived in accordance with the terms of the Plan; and

2. the Implementation Date has occurred and the Plan is effective in accordance with its terms and the terms of the Sanction Order.

DATED at the City of Calgary, in the Province of Alberta, this ___ day of _____, 2025.

ALVAREZ & MARSAL CANADA INC., solely in its capacity as Court-appointed Monitor of the Delta 9 Group. and not in its personal or corporate capacity.

By: _____
Name:
Title:

Court File No. CV-15-10832-00CL

ONTARIO

SUPERIOR COURT OF JUSTICE

COMMERCIAL LIST

THE HONOURABLE	)	THURSDAY, THE 2ND
REGIONAL SENIOR JUSTICE	)	DAY OF JUNE, 2016
MORAWETZ	)	

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TARGET CANADA CO., TARGET CANADA HEALTH CO., TARGET CANADA MOBILE GP CO., TARGET CANADA PHARMACY (BC) CORP., TARGET CANADA PHARMACY (ONTARIO) CORP., TARGET CANADA PHARMACY CORP., TARGET CANADA PHARMACY (SK) CORP., and TARGET CANADA PROPERTY LLC (collectively the "**Applicants**")

SANCTION AND VESTING ORDER

THIS MOTION, made by the Applicants and the partnerships listed on Schedule "A" hereto (together with the Applicants, the "**Target Canada Entities**") for an order pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**"), *inter alia*: (a) sanctioning the Second Amended and Restated Joint Plan of Compromise and Arrangement dated May 19, 2016 (as amended, varied or supplemented from time to time in accordance with the terms thereof, and together with all schedules thereto, the "**Plan**"), which Plan is attached as Schedule "B" hereto; and (b) vesting all of the Target Canada Entities' right, title and interest in and to the IP Assets (as defined in the Plan) was heard this day at 393 University Avenue, Toronto, Ontario.

ON READING the Notice of Motion, the Affidavit of Mark J. Wong sworn May 26, 2016 (the "**Wong Affidavit**"), the Twenty-Seventh Report of Alvarez & Marsal Canada Inc. in its capacity as monitor of the Target Canada Entities (the "**Monitor**") dated May 11, 2016, the

Twenty-Eighth Report of the Monitor dated May 27, 2016, and on hearing the submissions of respective counsel for the Target Canada Entities, the Monitor, and such other counsel as were present, and on being advised that the Service List was served with the Motion Record herein:

DEFINED TERMS

1. **THIS COURT ORDERS** that any capitalized terms not otherwise defined in this Order shall have the meanings ascribed to such terms in the Plan.

SERVICE, NOTICE AND MEETINGS

2. **THIS COURT ORDERS** that the time for service of the Notice of Motion and the Motion Record is hereby abridged and validated so that this Motion is properly returnable today and that service thereof upon any interested party other than the persons served with the Motion Record is hereby dispensed with.

3. **THIS COURT ORDERS AND DECLARES** that there has been good and sufficient notice, service and delivery of the Meeting Materials (as defined in the Meeting Order granted by this Court on April 13, 2016 (the "**Meeting Order**")) and that the Creditors' Meeting was duly called, convened, held and conducted, all in conformity with the CCAA and the Orders of this Court made in the CCAA Proceedings, including, without limitation, the Meeting Order.

SANCTION OF THE PLAN

4. **THIS COURT ORDERS AND DECLARES** that:

(a) the Plan has been approved by the Required Majority of Affected Creditors with Proven Claims as required by the Meeting Order, and in conformity with the CCAA;

(b) the Target Canada Entities have complied with the provisions of the CCAA and the Orders of the Court made in the CCAA Proceedings in all respects;

(c) the Court is satisfied that the Target Canada Entities have not done or purported to do anything that is not authorized by the CCAA; and

(d) the Target Canada Entities have acted in good faith and with due diligence, and the Plan and the Plan Transaction Steps contemplated therein are fair and reasonable.

5. **THIS COURT ORDERS** that the Plan is hereby sanctioned and approved pursuant to Section 6 of the CCAA.

PLAN IMPLEMENTATION

6. **THIS COURT ORDERS** that each of the Target Canada Entities, their respective directors and officers, and the Monitor is authorized and directed to take all steps and actions (including, without limitation, the Plan Transaction Steps), and to do all things, necessary or appropriate to implement the Plan in accordance with its terms and to enter into, execute, deliver, complete, implement and consummate all of the steps, transactions, distributions, disbursements, payments, deliveries, allocations, instruments and agreements contemplated pursuant to the Plan, and such steps and actions are hereby authorized, ratified and approved. None of the Target Canada Entities, their respective directors and officers or the Monitor shall incur any liability as a result of acting in accordance with the terms of the Plan and this Order, other than any liability arising out of or in connection with the gross negligence or wilful misconduct of such parties.

7. **THIS COURT ORDERS AND DECLARES** that the Plan and all associated steps, compromises, transactions, arrangements, releases and reorganizations effected thereby (including, without limitation, the Plan Transaction Steps) are hereby approved, shall be deemed to be implemented and shall be binding and effective as of the Effective Time in accordance with the terms of the Plan or at such other time, times or manner as may be set forth in the Plan in the sequence provided therein, and shall enure to the benefit of and be binding and effective upon the Target Canada Entities, the Plan Sponsor, all Affected Creditors, the Released Parties and all other Persons and parties named or referred to in, affected by, or subject to the Plan.

8. **THIS COURT ORDERS** that upon delivery to the Monitor of written notice from the Target Canada Entities and the Plan Sponsor of the fulfilment or waiver of the conditions precedent to implementation of the Plan as set out in section 8.3 of the Plan, the Monitor shall deliver to the Target Canada Entities a certificate signed by the Monitor substantially in the form attached as Schedule "C" hereto confirming that all of the conditions precedent set out in section 8.3 of the Plan have been satisfied or waived, as applicable, in accordance with the terms of the Plan and that the Plan Implementation Date has occurred and the Plan is effective in accordance with its terms and the terms of this Order (the "**Monitor's Plan Implementation Date**

Certificate"). The Monitor is hereby directed to file the Monitor's Plan Implementation Date Certificate with the Court as soon as reasonably practicable on or forthwith following the Plan Implementation Date after delivery thereof and shall post a copy of same, once filed, on the Website and provide a copy to the Service List.

COMPROMISE OF CLAIMS AND EFFECT OF PLAN

9. **THIS COURT ORDERS** that, pursuant to and in accordance with the terms of the Plan, on the Plan Implementation Date, all Affected Claims shall be fully, finally, irrevocably and forever compromised, discharged and released with prejudice, and the ability of any Person to proceed against the Released Parties in respect of or relating to any such Affected Claims shall be and shall be deemed forever discharged, extinguished, released and restrained, and all proceedings with respect to, in connection with or relating to such Affected Claims shall permanently be stayed against the Released Parties, subject only to the right of Affected Creditors to receive the distributions pursuant to the Plan and this Order in respect of their Affected Claims, in the manner and to the extent provided for in the Plan.

10. **THIS COURT ORDERS** that the determination of Proven Claims in accordance with the Claims Procedure Order and Plan shall be final and binding on the Target Canada Entities and all Affected Creditors.

11. **THIS COURT ORDERS** that an Affected Creditor holding a Disputed Claim shall not be entitled to receive a distribution under the Plan in respect of any portion thereof unless and until such Disputed Claim becomes a Proven Claim in accordance with the Claims Procedure Order and Plan.

12. **THIS COURT ORDERS** that nothing in the Plan extends to or shall be interpreted as extending or amending the Claims Bar Date or gives or shall be interpreted as giving any rights to any Person in respect of Claims that have been barred or extinguished pursuant to the Claims Procedure Order. Any Affected Claim, any Propco Unaffected Claim and any Property LP Unaffected Claim for which a Proof of Claim has not been filed by the Claims Bar Date in accordance with the Claims Procedure Order, whether or not the holder of such Affected Claim, Propco Unaffected Claim or Property LP Unaffected Claim has received personal notification of

the claims process established by the Claims Procedure Order, shall be and are hereby forever barred, extinguished and released with prejudice.

13. **THIS COURT ORDERS** that each Person named or referred to in, or subject to, the Plan shall be and is hereby deemed to have consented and agreed to all of the provisions in the Plan, in its entirety, and each Person named or referred to in, or subject to, the Plan shall be and is hereby deemed to have executed and delivered to the Target Group Entities all consents, releases, assignments and waivers, statutory or otherwise, required to implement and carry out the Plan in its entirety.

14. **THIS COURT ORDERS AND DECLARES** that all distributions or payments by TCC, in each case on behalf of the Target Canada Entities, to Affected Creditors with Proven Claims, to Propco Unaffected Creditors and to Property LP Unaffected Creditors under the Plan are for the account of the Target Canada Entities and the fulfillment of their respective obligations under the Plan.

15. **THIS COURT ORDERS** that sections 95 to 101 of the BIA and any other federal or provincial law relating to preferences, fraudulent conveyances or transfers at undervalue, shall not apply to the Plan or to any transactions, distributions or settlement payments implemented pursuant to the Plan.

16. **THIS COURT ORDERS AND DECLARES** that TCC shall be authorized, in connection with the making of any payment or distribution, and in connection with the taking of any step or transaction or performance of any function under or in connection with the Plan, to apply to any Governmental Authority for any consent, authorization, certificate or approval in connection therewith.

17. **THIS COURT ORDERS** that the Target Canada Entities are authorized to take any and all such actions as may be necessary or appropriate to comply with applicable Tax withholding and reporting requirements. All amounts withheld on account of Taxes shall be treated for all purposes as having been paid to the Affected Creditors, Propco Unaffected Creditors or Property LP Unaffected Creditors in respect of which such withholding was made, provided such withheld amounts be remitted to the appropriate Governmental Authority.

18. **THIS COURT ORDERS AND DECLARES** that any distributions, disbursements or payments made under the Plan or this Order (including without limitation distributions made to or for the benefit of the Affected Creditors, Propco Unaffected Creditors or Property LP Unaffected Creditors) shall not constitute a "distribution" by any person for the purposes of section 107 of the *Corporations Tax Act* (Ontario), section 22 of the *Retail Sales Tax Act* (Ontario), section 117 of the *Taxation Act*, 2007 (Ontario), section 34 of the *Income Tax Act* (British Columbia), section 104 of the *Social Service Tax Act* (British Columbia), section 49 of the *Alberta Corporate Tax Act*, section 22 of the *Income Tax Act* (Manitoba), section 73 of *The Tax Administration and Miscellaneous Taxes Act* (Manitoba), section 14 of *An Act respecting the Ministere du Revenu* (Quebec), section 85 of *The Income Tax Act*, 2000 (Saskatchewan), section 48 *of The Revenue and Financial Services Act* (Saskatchewan), section 56 of the *Income Tax Act* (Nova Scotia), section 159 of the *Income Tax Act* (Canada), section 270 of the *Excise Tax Act* (Canada), section 46 of the *Employment Insurance Act* (Canada), or any other similar federal, provincial or territorial tax legislation (collectively, the "**Tax Statutes**"), and TCC, in making any such distributions, disbursements or payments, as applicable, is merely a disbursing agent under the Plan and is not exercising any discretion in making payments under the Plan and no person is "distributing" such funds for the purpose of the Tax Statutes, and TCC and any other person shall not incur any liability under the Tax Statutes in respect of distributions, disbursements or payments made by it and TCC and any other person is hereby forever released, remised and discharged from any claims against it under or pursuant to the Tax Statutes or otherwise at law, arising in respect of or as a result of distributions, disbursements or payments made by it in accordance with the Plan and this Order and any claims of this nature are hereby forever barred.

ESTABLISHMENT OF CASH RESERVES

19. **THIS COURT ORDERS** that on the Plan Implementation Date, TCC shall be and is hereby authorized and directed to fund the Administrative Reserve out of the TCC Cash Pool in an aggregate amount to be agreed upon by TCC, the Monitor and the Plan Sponsor three (3) Business Days prior to the Plan Implementation Date.

20. **THIS COURT ORDERS** that, pursuant to and in accordance with the Plan, TCC is hereby authorized to establish the Propco Disputed Claims Reserve on the Plan

Implementation Date from the Propco Cash Pool for the benefit of Propco in an amount equal to the face value of disputed Claims of the Propco Creditors and the Property LP Creditors (excluding Landlord Restructuring Period Claims but not excluding any disputed Property LP Unaffected Claims held by Landlords).

21. **THIS COURT ORDERS** that, pursuant to and in accordance with the Plan, TCC is hereby authorized to establish the TCC Disputed Claims Reserve on the Plan Implementation Date from the TCC Cash Pool in an amount equal to the expected distributions to be made to all Creditors with Disputed Claims (based on the face value of each Disputed Claim) as such amount is agreed to between TCC, the Monitor and the Plan Sponsor three (3) Business Days prior to the Plan Implementation Date.

VESTING

22. **THIS COURT ORDERS** that on the Plan Implementation Date, all of the Target Canada Entities' right, title and interest in and to the IP Assets listed on Schedule "D" shall vest absolutely in 3293849 Nova Scotia Company and all of the Target Canada Entities' right, title and interest in and to the IP Assets listed on Schedule "E" shall vest absolutely in Target Brands Inc., in each case free and clear of and from any and all security interests (whether contractual, statutory, or otherwise), hypothecs, mortgages, trusts or deemed trusts (whether contractual, statutory, or otherwise), liens, executions, levies, charges, Claims (as defined in the Plan), or other financial or monetary claims, whether or not they have attached or been perfected, registered or filed and whether secured, unsecured or otherwise (collectively, the "**IP Asset Claims**"), including, without limiting the generality of the foregoing:

(a) the Administration Charge, the KERP Charge, the Directors' Charge, the Financial Advisor Subordinated Charge, the DIP Lender's Charge, and the Agent's Charge and Security Interest (as defined in the Approval Order - Agency Agreement dated February 4, 2015); and

(b) all charges, security interests or claims evidenced by registrations pursuant to the *Personal Property Security Act* (Ontario) or any other personal property registry system;

(all of which are collectively referred to as the "**Encumbrances**")

and, for greater certainty, this Court orders that all of the IP Asset Claims and Encumbrances affecting or relating to the IP Assets are hereby expunged and discharged as against the IP Assets.

23. **THIS COURT ORDERS** that, notwithstanding:

(a) the pendency of these proceedings;

(b) any applications for a bankruptcy order now or hereafter issued pursuant to the *Bankruptcy and Insolvency Act* (Canada) in respect of any of the Target Canada Entities and any bankruptcy order issued pursuant to any such applications; and

(c) any assignment in bankruptcy made in respect of any of the Target Canada Entities;

the vesting of the IP Assets in 3293849 Nova Scotia Company and Target Brands Inc. pursuant to this Order shall be binding on any trustee in bankruptcy that may be appointed in respect of any of the Target Canada Entities and shall not be void or voidable by creditors of the Target Canada Entities, nor shall it constitute nor be deemed to be a fraudulent preference, assignment, fraudulent conveyance, transfer at undervalue, or other reviewable transaction under the *Bankruptcy and Insolvency Act* (Canada) or any other applicable federal or provincial legislation, nor shall it constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

24. **THIS COURT ORDERS** that the transfer of the IP Assets is exempt from the application of the *Bulk Sales Act* (Ontario).

EMPLOYEE TRUST

25. **THIS COURT ORDERS** that the form of Employee Trust Termination Certificate attached as Schedule "F" to the Plan and Employee Trust Property Joint Direction attached as Schedule "G" to the Plan are each hereby approved.

26. **THIS COURT ORDERS** that the Employee Trust Trustee and the Employee Trust Administrator shall be and are hereby authorized and directed to perform their functions and fulfill their obligations under the Plan without liability to facilitate the implementation and administration of the Plan, as necessary, pursuant to and in accordance with the terms of the

Plan, including without limitation to remit the balance of the Employee Trust Property, net of the payments set out in Sections 6.3(v)(ii) and 6.3(v)(iii) and any applicable Withholding Obligations, to the Plan Sponsor or its designee upon delivery by the Employee Trust Trustee and the Employee Trust Administrator of an Employee Trust Property Joint Direction to The Royal Bank of Canada, and such performance of their functions and fulfillment of their obligations are hereby authorized, ratified and approved.

27. **THIS COURT ORDERS** that upon the delivery of the Employee Trust Termination Certificate from the Employee Trust Trustee to the Monitor:

(a) any remaining Trustee Fees, Trustee Expenses, Administrator Fees and Administrator Expenses (each as defined in the Employee Trust Agreement) shall be paid from any remaining Employee Trust Property to the Employee Trust Trustee and the Employee Trust Administrator, as applicable;

(b) the Employee Trust Trustee shall satisfy any commitments to pay Eligible Employee Claims (as defined in the Employee Trust Agreement) made under Article 2 of the Employee Trust Agreement with the assistance of the Employee Trust Administrator;

(c) the Employee Trust Trustee and the Employee Trust Administrator shall deliver the Employee Trust Property Joint Direction to The Royal Bank of Canada in accordance with Section 6.3(v)(iv) of the Plan;

(d) the Employee Trust Trustee and the Employee Trust Administrator shall be and shall be deemed to be fully and finally released and discharged from all of their respective obligations under the Employee Trust Agreement and from all claims relating to their activities as Employee Trust Trustee and Employee Trust Administrator, respectively; and

(e) the Employee Trust shall be and shall be deemed to be wound-up and terminated.

28. **THIS COURT ORDERS** that the Monitor is hereby directed to file the Employee Trust Termination Certificate with the Court as soon as reasonably practicable after delivery thereof and shall post a copy of same, once filed, on the Website and provide a copy to the Service List.

RELEASES

29. **THIS COURT ORDERS AND DECLARES** that the compromises and releases set out in Article 7 of the Plan are approved and shall be binding and effective as at the Plan Implementation Date, provided that the releases in favour of an Employee Trust Released Party shall be effective immediately upon delivery of the Employee Trust Termination Certificate to the Monitor in accordance with the Plan.

30. **THIS COURT ORDERS** that from and after the Plan Implementation Date (and in respect of an Employee Trust Released Party, from and after the delivery of the Employee Trust Termination Certificate to the Monitor) any and all Persons shall be and are hereby forever barred, estopped, stayed and enjoined from commencing, taking, applying for or issuing or continuing any and all steps or proceedings, whether directly, derivatively or otherwise, and including without limitation, administrative hearings and orders, declarations or assessments, commenced, taken or proceeded with or that may be commenced, taken or proceeded with against any Released Party in respect of all Claims, Propco Unaffected Claims, Property LP Unaffected Claims and matters which are released pursuant to paragraph 29 of this Order and Article 7 of the Plan or discharged, compromised or terminated pursuant to the Plan.

DIRECTORS AND OFFICERS

31. **THIS COURT ORDERS** that the remaining Directors and Officers of the Target Canada Entities (other than the current Directors of TCC or Target Canada Pharmacy (Ontario) Corp.) shall be deemed to have resigned without replacement at the Effective Time on the Plan Implementation Date, unless such Persons affirmatively elect to remain as a Director or Officer in order to facilitate any Plan Transaction Steps in connection with the wind-down of any of the Target Canada Entities.

32. **THIS COURT ORDERS** that the Directors of Target Canada Pharmacy (Ontario) Corp. shall be deemed to have resigned in accordance with Section 6.3(r) of the Plan.

PLAN CHARGES

33. **THIS COURT ORDERS** that each of the Financial Advisor Subordinated Charge, the DIP Lender's Charge, the Liquidation Agent's Charge and Security Interest and the KERP

Charge is hereby terminated, released and discharged on the Plan Implementation Date and each of the Administration Charge and the Directors' Charge shall continue and shall attach solely against the Propco Cash Pool and the TCC Cash Pool and the Cash Reserves from and after the Plan Implementation Date.

THE MONITOR

34. **THIS COURT ORDERS** that in addition to its prescribed rights and obligations under the CCAA and the Orders of the Court made in these CCAA Proceedings, the Monitor is granted the powers, duties and protections contemplated by and required under the Plan and that the Monitor be and is hereby authorized, entitled and empowered to perform its duties and fulfil its obligations under the Plan to facilitate the implementation thereof, including without limitation:

(a) to take all such actions to market and sell any remaining assets and pursue any outstanding accounts receivable owing to any of the Target Canada Entities, or to assist the Target Canada Entities with respect thereto;

(b) to act, if required, as trustee in bankruptcy, liquidator, receiver or a similar official of the Target Canada Entities; and

(c) apply to this Court for any orders necessary or advisable to carry out its powers and obligations under any other Order granted by this Court including for advice and directions with respect to any matter arising from or under the Plan.

35. **THIS COURT ORDERS** that, without limiting the provisions of the Initial Order or the provisions of any other Order granted in the CCAA Proceeding, including this Order, the Target Canada Entities shall remain in possession and control of the Property (each as defined in the Initial Order) and that the Monitor shall not take possession or be deemed to be in possession and/or control of the Property.

36. **THIS COURT ORDERS AND DECLARES** that the Monitor shall be authorized, in connection with the taking of any step or transaction or performance of any function under or in connection with the Plan, to apply to any Governmental Authority for any consent, authorization, certificate or approval in connection therewith.

37. **THIS COURT ORDERS** that the Plan Sponsor shall be and is hereby directed to maintain the books and records of the Target Canada Entities for purposes of assisting the Monitor in the completion of the resolution of the Disputed Claims and Claims of the Propco Creditors and the Property LP Creditors and the orderly wind-down of the Target Canada Entities.

38. **THIS COURT ORDERS AND DECLARES** that: (i) in carrying out the terms of this Order and the Plan, the Monitor shall have all the protections given to it by the CCAA, the Initial Order, and as an officer of the Court, including the Stay of Proceedings in its favour; (ii) the Monitor shall incur no liability or obligation as a result of carrying out the provisions of this Order and/or the Plan, other than any liability arising out of or in connection with the gross negligence or wilful misconduct of the Monitor; (iii) the Monitor shall be entitled to rely on the books and records of the Target Canada Entities and any information provided by the Target Canada Entities without independent investigation; and (iv) the Monitor shall not be liable for any claims or damages resulting from any errors or omissions in such books, records or information.

39. **THIS COURT ORDERS AND DECLARES** that in no circumstance will the Monitor have any liability for any of the Target Canada Entities' tax liabilities regardless of how or when such liability may have arisen.

40. **THIS COURT ORDERS** that the Monitor shall publish a notice to Affected Creditors, substantially in the form attached as Schedule "F" hereto (the "**Notice of Final Distribution**"), at least thirty (30) days in advance of the Final Distribution Date in *The Globe and Mail* (National Edition), *La Presse* and *The Wall Street Journal* notifying Affected Creditors of the Final Distribution Date.

41. **THIS COURT ORDERS** that the form of Monitor's Plan Completion Certificate attached as Schedule "G" hereto is hereby approved and declares that the Monitor, in its capacity as Monitor, following receipt of a written notice from TCC pursuant to section 5.12(d) of the Plan that TCC has completed its duties to effect distributions, disbursements and payments in accordance with the Plan, shall file the Monitor's Plan Completion Certificate with this Court stating that all of its duties and the Target Canada Entities' duties under the Plan and the Orders have been completed, and thereafter the Monitor shall seek an Order, *inter alia*, (a) approving its

final fees and disbursements and those of its counsel; (b) discharging the Monitor from its duties as Monitor in the CCAA Proceedings, (c) terminating, releasing and discharging the Administration Charge (subject to payment of final fees and disbursements) and the Directors' Charge, and (d) releasing the Target Canada Entities, the Monitor and any Directors and Officers holding such office following the Plan Implementation Date and their advisors, from all claims relating to the implementation of the Plan.

42. **THIS COURT ORDERS** that the Monitor is hereby directed to post a copy of the Monitor's Plan Completion Certificate, once filed, on the Website and provide a copy to the Service List.

STAY EXTENSION

43. **THIS COURT ORDERS** that the Stay Period in the Initial Order be and is hereby extended until and including September 26, 2016, or such later date as this Court may order.

EXTENSION OF NOTICE OF OBJECTION BAR DATE

44. **THIS COURT ORDERS** that the definition of "Notice of Objection Bar Date" set out in paragraph 3(aa) of the Claims Procedure Order (issued by Regional Senior Justice Morawetz on June 11, 2015, as amended) is hereby amended to extend the Notice of Objection Bar Date to the Plan Implementation Date and that the Notice of Objection Bar Date will expire on the Plan Implementation Date.

DISCHARGE OF THE CONSULTATIVE COMMITTEE

45. **THIS COURT ORDERS** that, effective immediately upon delivery of the Monitor's Plan Implementation Date Certificate, the Consultative Committee and each Member thereof shall be and is hereby discharged and the Members shall no longer be entitled to payments of $5,000 plus HST per month, and such payments shall cease, subject to payment by the Target Canada Entities of any such monthly amounts then outstanding to Members.

GENERAL

46. **THIS COURT ORDERS** that the Target Canada Entities and the Monitor may apply to this Court from time to time for advice and direction with respect to any matter arising from or under the Plan or this Order.

47. **THIS COURT ORDERS** that this Order shall have full force and effect in all provinces and territories of Canada and abroad as against all persons and parties against whom it may otherwise be enforced.

48. **THIS COURT ORDERS** that the Target Canada Entities (at their sole election) are hereby authorized to seek an order of any court of competent jurisdiction to recognize the Plan and this Order, to confirm the Plan and this Order as binding and effective in any appropriate foreign jurisdiction, and to assist the Target Canada Entities, the Monitor and their respective agents in carrying out the terms of the Plan and this Order.

49. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court or any judicial, regulatory or administrative body having jurisdiction in Canada, the United States, or in any other foreign jurisdiction, to recognize and give effect to the Plan and this Order, to confirm the Plan and this Order as binding and effective in any appropriate foreign jurisdiction, and to assist the Target Canada Entities, the Monitor and their respective agents in carrying out the terms of the Plan and this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Target Canada Entities and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Target Canada Entities and the Monitor and their respective agents in carrying out the terms of this Order.

RSJ

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO:

JUN 0 2 2016

PER / PAR: RW

SCHEDULE "A"
PARTNERSHIPS

Target Canada Pharmacy Franchising LP
Target Canada Mobile LP
Target Canada Property LP

SCHEDULE "B"
SECOND AMENDED AND RESTATED PLAN

Court File No. CV-15-10832-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TARGET CANADA CO., TARGET CANADA HEALTH CO., TARGET CANADA MOBILE GP CO., TARGET CANADA PHARMACY (BC) CORP., TARGET CANADA PHARMACY (ONTARIO) CORP., TARGET CANADA PHARMACY CORP., TARGET CANADA PHARMACY (SK) CORP., and TARGET CANADA PROPERTY LLC (collectively the "**Applicants**")

SECOND AMENDED AND RESTATED JOINT PLAN OF COMPROMISE AND ARRANGEMENT

pursuant to the *Companies' Creditors Arrangement Act*

May 19, 2016

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SECOND AMENDED AND RESTATED JOINT PLAN OF COMPROMISE AND ARRANGEMENT

WHEREAS:

A. Target Canada Co., Target Canada Health Co., Target Canada Mobile GP Co., Target Canada Pharmacy (BC) Corp., Target Canada Pharmacy (Ontario) Corp., Target Canada Pharmacy Corp., Target Canada Pharmacy (SK) Corp. and Target Canada Property LLC (collectively, the "**Applicants**") are insolvent;

B. The Applicants filed for and obtained protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") pursuant to an Order of the Ontario Superior Court of Justice (Commercial List) on January 15, 2015, as amended and restated on February 11, 2015 (and as further amended, restated or varied from time to time, the "**Initial Order**");

C. The Initial Order declared that, although not Applicants, each of Target Canada Pharmacy Franchising LP, Target Canada Mobile LP and Target Canada Property LP shall enjoy the protections and authorizations provided by the Initial Order (together with the Applicants, the "**Target Canada Entities**");

D. Pursuant to the Initial Order, the Applicants have the authority to file with the Court, individually or collectively, a plan of compromise or arrangement, which plan will provide, among other things, a method of distribution to Creditors with Proven Claims and the framework for the completion of the orderly wind-down of the Target Canada Entities' Business;

E. The Target Canada Entities brought a motion before the Court heard on December 21 and 22, 2015 for an Order, *inter alia*, accepting the filing of a Joint Plan of Compromise and Arrangement dated November 27, 2015 (the "**Original Plan**") and authorizing the Target Canada Entities to hold a meeting of Affected Creditors to consider and vote on a resolution to approve the Original Plan;

F. The Court declined to grant the relief for the reasons set out in the Endorsement of Regional Senior Justice Morawetz dated January 15, 2016 (the "**January 15 Endorsement**"); and

G. The Target Canada Entities amended and restated the Original Plan in the form of an Amended and Restated Joint Plan of Compromise and Arrangement under and pursuant to the CCAA dated April 6, 2016 to, among other things, comply with the January 15 Endorsement (the "**Amended Plan**").

H. On April 13, 2016, the Court issued an Order (the "**April 13 Order**"), *inter alia*, accepting the filing of the Amended Plan and authorizing the Target Canada Entities to hold a meeting of Affected Creditors to consider and vote on a resolution to approve the Amended Plan.

I. Pursuant to and in accordance with the April 13 Order, the Target Canada Entities hereby propose and present this Second Amended and Restated Joint Plan of Compromise and Arrangement under and pursuant to the CCAA, which includes certain administrative

amendments to the Amended Plan, that have been consented to by the Plan Sponsor and the Monitor, to better give effect to the implementation of the Amended Plan.

ARTICLE 1
INTERPRETATION

1.1 Definitions

In the Plan, unless otherwise stated or unless the subject matter or context otherwise requires:

"**A&M**" means Alvarez & Marsal Canada Inc. and its affiliates;

"**Administration Charge**" means the charge over the Property created by paragraph 54 of the Initial Order, and having the priority provided in paragraphs 63 and 65 of such Order;

"**Administrative Reserve**" means a Cash reserve from the TCC Cash Pool approved by the Court pursuant to the Sanction and Vesting Order, in an amount to be agreed by the Monitor, the Target Canada Entities and the Plan Sponsor three (3) Business Days prior to the Plan Implementation Date, to be deposited by TCC into the Administrative Reserve Account for the purpose of paying the Administrative Reserve Costs, which Administrative Reserve shall be subject to the Administrative Reserve Adjustment;

"**Administrative Reserve Account**" means a segregated interest-bearing trust account established by TCC to hold the Administrative Reserve;

"**Administrative Reserve Adjustment**" means, on or after the Plan Implementation Date, an increase in the Administrative Reserve in such amount as the Monitor may determine to be necessary or desirable, in consultation with the Target Canada Entities and the Plan Sponsor, which increase shall be funded from the TCC Cash Pool Account;

"**Administrative Reserve Costs**" means costs incurred and payments to be made on or after the Plan Implementation Date (including costs incurred prior to the Plan Implementation Date which remain outstanding as of the Plan Implementation Date) in respect of (a) the Monitor's fees and disbursements (including of its legal counsel and other consultants and advisors) in connection with the performance of its duties under the Plan and in the CCAA Proceedings, including without limitation all costs associated with resolving Disputed Claims; (b) the Plan Sponsor's fees and disbursements (including of its legal counsel and other consultants and advisors) in connection with maintaining the books and records of the Target Canada Entities for purposes of assisting the Monitor in the completion of the resolution of the Disputed Claims and Claims of the Propco Creditors and the Property LP Creditors and the wind-down of the Target Canada Entities; (c) costs of any shared services (including in connection with the performance of TCC's duties under the Plan, including without limitation administering distributions, disbursements and payments under the Plan) and employee-related expenses of the Target Canada Entities, including retention payments due to its employees; (d) any third-party fees incurred in connection with the administration of distributions, disbursements and payments under the Plan (including, without limitation, Bank of America); (e) any fees incurred in connection with the dissolution under corporate law or otherwise of a Target Canada Entity; (f) Post-Filing Trade Payables; (g) the lawyer, consultant and advisor fees and disbursements of the

Target Canada Entities (including the fees and disbursements of Northwest); (h) the fees and disbursements of Employee Representative Counsel; (i) the fees and disbursements of any claims officer appointed under the Claims Procedure Order or the Employee Trust Claims Resolution Order; (j) Excluded Claims, Government Priority Claims, Employee Priority Claims, to the extent such amounts have not been satisfied from the Employee Trust, and TCC Secured Construction Lien Claims; and (k) any other reasonable amounts in respect of any other determinable contingency as the Monitor may determine in its sole discretion;

"**Affected Claim**" means all Claims other than Unaffected Claims;

"**Affected Creditor**" means a Creditor who has an Affected Claim;

"**Applicable Law**" means any law (including any principle of civil law, common law or equity), statute, Order, decree, judgment, rule, regulation, ordinance, or other pronouncement having the effect of law, whether in Canada or any other country or any domestic or foreign province, state, city, county or other political subdivision;

"**Applicants**" has the meaning ascribed thereto in the Recitals;

"**Assessments**" means Claims of Her Majesty the Queen in Right of Canada or of Her Majesty the Queen in Right of any province or territory or of any municipality or of any other Taxing Authority in any Canadian or other jurisdictions, including without limitation amounts which may arise or have arisen under any notice of assessment, notice of objection, notice of reassessment, notice of appeal, audit, investigation, demand or similar request from any Taxing Authority;

"**BIA**" means the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended;

"**Business**" means the direct and indirect operations and activities formerly carried on by the Target Canada Entities;

"**Business Day**" means a day on which banks are open for business in the City of Toronto, Ontario, Canada, but does not include a Saturday, Sunday or a statutory holiday in the Province of Ontario;

"**Cash**" means cash, certificates of deposit, bank deposits, commercial paper, treasury bills and other cash equivalents;

"**Cash Elected Amount**" means **$25,000**;

"**Cash Management Lender Claim**" means any claim of Royal Bank of Canada, The Toronto-Dominion Bank, Bank of America and JPMorgan Chase Bank, National Association in connection with the provision of cash management services to any of the Target Canada Entities and for greater certainty shall include any such claims which have been assigned to the Plan Sponsor or in respect of which the Plan Sponsor has a subrogated claim;

"**Cash Reserves**" means the Administrative Reserve, the TCC Disputed Claims Reserve and the Propco Disputed Claims Reserve;

"**CCAA**" has the meaning ascribed thereto in the Recitals;

"**CCAA Charges**" means the Administration Charge, the KERP Charge, the Directors' Charge, the Financial Advisor Subordinated Charge, the DIP Lender's Charge and the Liquidation Agent's Charge and Security Interest;

"**CCAA Proceedings**" means the CCAA proceedings in respect of the Target Canada Entities commenced pursuant to the Initial Order;

"**Claim**" means a Pre-filing Claim, a Restructuring Period Claim, a Landlord Restructuring Period Claim and a D&O Claim, provided however that "**Claim**" shall not include a Landlord Guarantee Claim or an Excluded Claim, but for greater certainty, shall include any Claim arising through subrogation or assignment against any Target Canada Entity or Director or Officer;

"**Claims Bar Date**" means: (a) in respect of a Pre-filing Claim or a D&O Claim, 5:00 p.m. on August 31, 2015; and (b) in respect of a Restructuring Period Claim (which for purposes of the "**Claims Bar Date**" includes a Landlord Restructuring Period Claim), the later of (i) 45 days after the date on which the Monitor sends a Claims Package (as defined in the Claims Procedure Order) with respect to such Claim, and (ii) 5:00 p.m. on August 31, 2015;

"**Claims Procedure Order**" means the Order of the Court made June 11, 2015 (including all schedules and appendices thereto) approving and implementing the claims procedure in respect of the Target Canada Entities and the Directors and Officers, as amended on September 21, 2015, October 30, 2015, December 8, 2015, February 1, 2016 and March 14, 2016 and as may be further amended, restated or varied from time to time;

"**Conditions Precedent**" means the conditions precedent to Plan implementation set out in Section 8.3;

"**Consultative Committee Members**" means the "Members" as defined in the Revised Consultative Committee Protocol approved by Order of the Court made November 18, 2015;

"**Contributed Claim Amount**" means that amount of the Property LP (Propco) Intercompany Claim equal to the amount of the Property LP Unaffected Claims;

"**Convenience Class Claim**" excludes a Disputed Claim and means: (a) an Affected Creditor with one or more Proven Claims that are less than or equal to **$25,000** in the aggregate; and (b) an Affected Creditor with one or more Proven Claims in an amount in excess of **$25,000** in the aggregate that such Affected Creditor has validly elected to value at **$25,000** for purposes of the Plan by filing a Convenience Class Claim Election by the Election/Proxy Deadline;

"**Convenience Class Claim Election**" means an election pursuant to which an Affected Creditor with one or more Proven Claims that are in an amount in excess of **$25,000** in the aggregate has elected by the Election/Proxy Deadline to receive only the Cash Elected Amount and is thereby deemed to vote in favour of the Plan in respect of such Proven Claims and to receive no other entitlements under the Plan;

"**Convenience Class Creditor**" means a Person having a Convenience Class Claim;

"**Court**" means the Ontario Superior Court of Justice (Commercial List) or any appellate court seized with jurisdiction in the CCAA Proceedings, as the case may be;

"**Creditor**" means any Person asserting an Affected Claim or an Unaffected Claim and may, where the context requires, include the assignee of such Claim or a personal representative, agent, litigation guardian, mandatary, trustee, interim receiver, receiver, receiver and manager, liquidator or other Person acting on behalf of such Person;

"**Creditors' Meeting**" means the meeting of Affected Creditors to be called and held pursuant to the Meeting Order for the purpose of considering and voting upon the Plan, and includes any adjournment, postponement or rescheduling of such meeting;

"**D&O Claim**" means any right or claim of any Person against one or more of the Directors and/or Officers howsoever arising, whether or not such right or claim is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, unsecured, perfected, unperfected, present, future, known or unknown, by guarantee, surety or otherwise, and whether or not such right is executory or anticipatory in nature, including any Assessments and any right or ability of any Person to advance a claim for contribution, indemnity or otherwise against any of the Directors and/or Officers with respect to any matter, action, cause or chose in action, whether existing at present or commenced in the future, for which any Director or Officer is alleged to be, by statute or otherwise by law or equity, liable to pay in his or her capacity as a Director or Officer;

"**DIP Lender's Charge**" means the charge over the DIP Property created by paragraph 60 of the Initial Order, and having the priority provided in paragraphs 63 and 65 of such Order;

"**DIP Property**" means the Property of the Target Canada Entities (other than Propco and Property LP) described in paragraph 7 of the Initial Order;

"**Director**" means anyone who is or was or may be deemed to be or have been, whether by statute, operation of law or otherwise, a director or *de facto* director of any of the Target Canada Entities, in such capacity;

"**Directors' Charge**" means the charge over the Property created by paragraph 40 of the Initial Order, and having the priority provided in paragraphs 63 and 65 of such Order;

"**Disputed Claim**" means that portion of an Affected Claim of an Affected Creditor in respect of which a Proof of Claim has been filed in accordance with the Claims Procedure Order that has not been finally determined to be a Proven Claim in whole or in part in accordance with the Claims Procedure Order, the Meeting Order, or any other Order made in the CCAA Proceedings;

"**Distribution Date**" means the day on which a distribution to Creditors of the Target Canada Entities is made, other than the Initial Distribution Date or the Final Distribution Date;

"**Effective Time**" means 12:01 a.m. on the Plan Implementation Date or such other time on such date as the Target Canada Entities, the Plan Sponsor and the Monitor shall determine or as otherwise ordered by the Court;

"**Election/Proxy Deadline**" means the deadline for making a Convenience Class Claim Election and for submitting Proxies in accordance with the Meeting Order;

"**Employee Priority Claims**" means the following claims of Employees:

(a) claims equal to the amounts that such Employees would have been qualified to receive under paragraph 136(1)(d) of the BIA if the Target Canada Entities had become bankrupt on the Filing Date; and

(b) claims for wages, salaries, commissions or compensation for services rendered by them after the Filing Date and on or before the Plan Implementation Date together with, in the case of travelling salespersons, disbursements properly incurred by them in and about the Business during the same period;

"**Employee Representative Counsel**" means Koskie Minsky LLP, appointed pursuant to paragraph 31 of the Initial Order as counsel for all Employees in the CCAA Proceedings, any proceeding under the BIA or in any other proceeding respecting the insolvency of the Applicants which may be brought before the Court;

"**Employee Representatives**" means the Employees appointed by the Court pursuant to an Order of the Court dated February 11, 2015 to represent all Employees in the CCAA Proceedings;

"**Employee Trust**" means the Employee Trust approved pursuant to paragraph 26 of the Initial Order and governed by the Employee Trust Agreement;

"**Employee Trust Administrator**" means the Monitor, in its capacity as administrator of the Employee Trust;

"**Employee Trust Agreement**" means the Trust Agreement between the Plan Sponsor, the Monitor and the Employee Trust Trustee dated January 14, 2015, as amended, restated, supplemented or varied from time to time;

"**Employee Trust Claims Resolution Order**" means the Order of the Court dated October 21, 2015, as amended, restated or varied from time to time, establishing the procedure for resolving disputes by claimants in respect of their entitlement under the Employee Trust;

"**Employee Trust Property**" means the aggregate amount contributed by the Plan Sponsor (in its capacity as Settlor) to the Employee Trust to be held under the terms of the Employee Trust Agreement together with interest and other revenues generated thereby and any property into which all of the foregoing may be converted less amounts which have been paid or distributed pursuant to the terms of the Employee Trust Agreement (including Trustee Fees (as defined in the Employee Trust Agreement));

"**Employee Trust Property Joint Direction**" has the meaning ascribed thereto in Section 6.3(v);

"**Employee Trust Released Party**" has the meaning ascribed thereto in Section 7.1(d);

"**Employee Trust Termination Certificate**" has the meaning ascribed thereto in Section 6.3(v);

"**Employee Trust Trustee**" means the Hon. John D. Ground, in his capacity as trustee of the Employee Trust;

"**Employees**" means all current and former employees of the Target Canada Entities other than Directors and Officers;

"**Encumbrance**" means any charge, mortgage, lien, pledge, claim, restriction, security interest, security agreement, hypothecation, assignment, deposit arrangement, hypothec, lease, rights of others including without limitation Transfer Restrictions, deed of trust, trust or deemed trust, lien, financing statement, preferential arrangement of any kind or nature whatsoever, including any title retention agreement, or any other arrangement or condition which in substance secures payment or performance of any obligations, action, claim, demand or equity of any nature whatsoever, execution, levy, charge or other financial or monetary claim, whether or not they have attached or been perfected, registered or filed and whether secured, unsecured or otherwise, or other encumbrance, whether created or arising by agreement, statute or otherwise at law, attaching to property, interests or rights and shall be construed in the widest possible terms and principles known under law applicable to such property, interests or rights and whether or not they constitute specific or floating charges as those terms are understood under Applicable Law, including without limiting the generality of the foregoing, the CCAA Charges;

"**Equity Claim**" has the meaning ascribed thereto in section 2 of the CCAA;

"**Excluded Claim**" means any:

(a) Claim secured by any of the CCAA Charges;

(b) Claim enumerated in sections 5.1(2) and 19(2) of the CCAA; and

(c) Cash Management Lender Claim;

"**Filing Date**" means January 15, 2015;

"**Final Distribution Date**" means such date, after all of the Disputed Claims and disputed Claims against Propco and Property LP have been finally resolved, that the Monitor, in consultation with TCC, shall determine or the Court shall otherwise order;

"**Final Order**" means a final Order of the Court, the implementation, operation or effect of which shall not have been stayed, varied, vacated or subject to pending appeal and as to which Order any appeal periods relating thereto shall have expired;

"**Financial Advisor Subordinated Charge**" means the charge over the Property created by paragraph 55 of the Initial Order, and having the priority provided in paragraphs 63 and 65 of such Order;

"**Government Priority Claims**" means all Claims of Governmental Authorities that are enumerated in section 38(3) of the CCAA in respect of amounts that are outstanding and that are of a kind that could be subject to a demand on or before the Final Distribution Date;

"**Governmental Authority**" means any government, including any federal, provincial, territorial or municipal government, and any government department, body, ministry, agency, tribunal, commission, board, court, bureau or other authority exercising or purporting to exercise executive, legislative, judicial, regulatory or administrative functions of, or pertaining to, government including without limitation any Taxing Authority;

"**GST/HST**" means the goods and services tax and harmonized sales tax imposed under the *Excise Tax Act* (Canada), and any equivalent or corresponding tax imposed under any applicable provincial or territorial legislation imposing a similar value added or multi-staged tax;

"**Guarantee**" means any guarantee, indemnity, surety or similar agreement by a Person to guarantee, indemnify or otherwise hold harmless any Person from or against any Indebtedness, losses, Liabilities or damages of that Person, and excludes all Plan Sponsor Guarantees;

"**HBC Entities**" means Zellers Inc. and Hudson's Bay Company and their respective successors and assigns and any predecessors in interest to such Persons;

"**Indebtedness**" means, without duplication:

(a) all debts and liabilities of a Person for borrowed money;

(b) all debts and liabilities of a Person representing the deferred acquisition cost of property and services; and

(c) all Guarantees given by a Person;

"**Initial Distribution Date**" means a date no more than five (5) Business Days after the Plan Implementation Date or such other date as the Target Canada Entities, the Plan Sponsor and the Monitor may agree;

"**Initial Order**" has the meaning ascribed thereto in the Recitals;

"**Input Tax Credit**" means an input tax credit receivable under the *Excise Tax Act* (Canada) or any equivalent or corresponding amount receivable under any applicable provincial or territorial legislation imposing a similar value-added or multi-staged tax, on account of GST/HST paid or payable;

"**Intercompany Claim**" means any Claim filed by any of the Target Canada Entities, or any of their affiliated companies, partnerships, or other corporate entities, including the

Plan Sponsor or any of the Plan Sponsor Subsidiaries in accordance with the terms of the Claims Procedure Order, including the Claims set out on Schedule "A" but excluding any Claim arising through subrogation or assignment;

"**Intercompany Claims Report**" means the Twentieth Report of the Monitor dated August 31, 2015 providing the Monitor's review of the Intercompany Claims pursuant to and in accordance with paragraph 35 of the Claims Procedure Order;

"**IP Assets**" means all rights, title and interest of the Target Canada Entities in intellectual property of any type, including the domain names set out in Schedule "B";

"**ITA**" means the *Income Tax Act* (Canada), R.S.C. 1985, c. 1 (5th Supp.), as amended, and any regulations thereunder;

"**KERP**" means the Key Employees Retention Plan approved by paragraph 24 of the Initial Order;

"**KERP Charge**" means the charge over the Property created by paragraph 25 of the Initial Order, and having the priority provided in paragraphs 63 and 65 of such Order;

"**KERP Claim**" means a claim of any Person under the KERP;

"**Landlord**" means any Person (excluding Propco and Property LP) who in its capacity as lessor was a party to a real property lease with TCC;

"**Landlord Guarantee Claim**" means the rights, remedies and claims of a Landlord against the Plan Sponsor or the HBC Entities arising under a lease, guarantee or indemnity, solely in respect of leases listed on Schedule "D", but excluding however, amounts owing by the Target Canada Entities to the Landlord in respect of its Pre-filing Claim, if any, which amount forms part of a Landlord Guarantee Creditor's Landlord Guarantee Creditor Base Claim Amount;

"**Landlord Guarantee Creditor**" means a Person holding a Landlord Guarantee Claim solely in respect of leases listed on Schedule "D";

"**Landlord Guarantee Creditor Base Claim Amount**" means the amount payable to an individual Landlord Guarantee Creditor on account of its Landlord Restructuring Period Claim and its Pre-filing Claim, if any, as consensually agreed to between such Landlord Guarantee Creditor and TCC in accordance with the Claims Procedure Order, payment of which is dealt with in the Landlord Guarantee Creditor Settlement Agreement;

"**Landlord Guarantee Creditor Base Claim Cash Pool**" means the Cash pool in the aggregate amount equal to the total of the Landlord Guarantee Creditor Base Claim Amounts, being approximately **$140.7 million**;

"**Landlord Guarantee Creditor Base Claim Cash Pool Account**" means a segregated, interest-bearing trust account established by TCC to hold the Landlord Guarantee Creditor Base Claim Cash Pool on behalf of the Target Canada Entities;

"Landlord Guarantee Creditor Settlement Agreement" means an agreement between the Plan Sponsor and all Landlord Guarantee Creditors to settle and release the Landlord Guarantee Claims on a consensual basis and to support the Plan;

"**Landlord Guarantee Enhancement Amount**" means the amount payable to an individual Landlord Guarantee Creditor as consensually agreed between the Plan Sponsor and such Landlord Guarantee Creditor pursuant to the Landlord Guarantee Creditor Settlement Agreement;

"**Landlord Guarantee Enhancement Cash Pool**" means the Cash pool mandated by the Landlord Guarantee Creditor Settlement Agreement in the aggregate amount of **$59.532 million**;

"**Landlord Guarantee Enhancement Cash Pool Account**" means a segregated, interest-bearing trust account established to hold the Landlord Guarantee Enhancement Cash Pool on behalf of the Plan Sponsor as mandated by the Landlord Guarantee Creditor Settlement Agreement;

"**Landlord Non-Guarantee Creditor**" means a Person holding a Landlord Restructuring Period Claim other than a Landlord Guarantee Creditor solely in respect of leases listed on Schedule "E";

"**Landlord Non-Guarantee Creditor Consent and Support Agreement**" means an agreement between TCC and a Landlord Non-Guarantee Creditor to settle the amount of such Landlord's Landlord Restructuring Period Claim and Pre-filing Claim, if any, on a consensual basis in accordance with the Claims Procedure Order and to support the Plan;

"Landlord Non-Guarantee Creditor Equalization Amount" means the amount payable to an individual Landlord Non-Guarantee Creditor as consensually agreed to between such Landlord Non-Guarantee Creditor and TCC in a Landlord Non-Guarantee Creditor Consent and Support Agreement, which in the aggregate shall equal the Landlord Non-Guarantee Creditor Equalization Cash Pool;

"Landlord Non-Guarantee Creditor Equalization Cash Pool" means the Cash pool in the aggregate amount of all of the Landlord Non-Guarantee Creditor Equalization Amounts;

"Landlord Non-Guarantee Creditor Equalization Cash Pool Account" means a segregated, interest-bearing trust account established by TCC to hold the Landlord Non-Guarantee Creditor Equalization Cash Pool;

"Landlord Restructuring Period Claim" means any right or claim of any Landlord against TCC in connection with any Indebtedness, Liability or obligation of any kind whatsoever owed by TCC to such Landlord arising out of the disclaimer, resiliation, termination or breach by TCC, on or after the Filing Date, of any real property lease or other contract or agreement in respect of any real property lease, including a shopping centre lease, whether written or oral, provided that any Landlord whose real property lease was assigned to a Person or returned (subject to any prior settlement agreement to the

contrary) to such Landlord in the CCAA Proceedings shall not have a Landlord Restructuring Period Claim;

"**Lazard**" means Lazard Frères and Co. LLC, Court-appointed financial advisor to TCC in connection with the Real Property Portfolio Sales Process;

"**Liabilities**" means all Indebtedness, obligations and other liabilities of a Person whether absolute, accrued, contingent, fixed or otherwise, or whether due or to become due;

"**Liquidation Agent**" means the contractual joint venture composed of Merchant Retail Solutions ULC, Gordon Brothers Canada ULC and GA Retail Canada, ULC, in its capacity as agent pursuant to the Agency Agreement between the agent and TCC, Target Canada Pharmacy Corp. and Target Canada Pharmacy (Ontario) Corp. dated January 29, 2015, as amended, restated or varied from time to time, in connection with the Liquidation Sale;

"**Liquidation Agent's Charge and Security Interest**" means the charge over a portion of the Property created by, and as more particularly described in, paragraph 19 of the Approval Order – Agency Agreement dated February 4, 2015, and having the priority provided in paragraphs 20 and 22 of such Order;

"**Liquidation Sale**" means the sale of the Target Canada Entities' inventory, furniture, fixtures and equipment that was approved by the Court pursuant to an Order dated February 4, 2015;

"**LPA**" means the Ontario *Limited Partnerships Act*, R.S.O. 1990, c. L. 16, as amended;

"**Meeting Materials**" has the meaning ascribed thereto in the Meeting Order;

"**Meeting Order**" means the Order, substantially in the form set out in Schedule "C" (including all schedules and appendices thereto), to be made by the Court under the CCAA that, among other things, sets the date for the Creditors' Meeting and approves the Meeting Materials, as same may be amended, restated or varied from time to time;

"**Monitor**" means A&M, in its capacity as Court-appointed monitor of the Target Canada Entities and not in its personal capacity;

"**Monitor's Plan Completion Certificate**" means the certificate substantially in the form to be attached to the Sanction and Vesting Order to be filed by the Monitor with the Court upon completion of its duties under the Plan;

"**Monitor's Plan Implementation Date Certificate**" means the certificate substantially in the form to be attached to the Sanction and Vesting Order to be filed by the Monitor with the Court, declaring that all of the Conditions Precedent to implementation of the Plan have been satisfied or waived;

"**NE1**" means Nicollet Enterprise 1 S.à.r.l., a company formed under Luxembourg law and the sole shareholder of TCC;

"**NE1 Intercompany Claim**" means the Intercompany Claim 1 filed by NE1 pursuant to the Claims Procedure Order against TCC in an amount of **$3,068,729,438** and not adjusted

by the Monitor in the Intercompany Claims Report as set out in Schedule "A" and which Intercompany Claim was subordinated pursuant to a subordination and postponement agreement as of January 12, 2015, which subordination and postponement was confirmed in the terms of the Initial Order;

"**Northwest**" means Northwest Atlantic (Canada) Inc., real estate advisor to TCC in connection with the Real Property Portfolio Sales Process;

"**Notice of Final Distribution**" means a notice to Affected Creditors to be published by the Monitor at least 30 days in advance of the Final Distribution Date in The Globe and Mail (National Edition), La Presse and The Wall Street Journal notifying Affected Creditors of the Final Distribution Date, substantially in the form to be attached to the Sanction and Vesting Order;

"**NSCA**" means the Nova Scotia *Companies Act*, R.S.N. 1989, c. 81, as amended;

"**Officer**" means anyone who is or was or may be deemed to be or have been, whether by statute, operation of law or otherwise, an officer or *de facto* officer of any of the Target Canada Entities, in such capacity;

"**Order**" means any order of the Court, or any order, directive, judgment, decree, injunction, decision, ruling, award or writ of any Governmental Authority;

"**Person**" means any individual, firm, corporation, limited or unlimited liability company, general or limited partnership, association, trust (including a real estate investment trust), unincorporated organization, joint venture, government or any agency or instrumentality thereof or any other entity;

"**Pharmacists' Representative Counsel**" means Sutts, Strosberg LLP, appointed pursuant to an Endorsement of the Court dated February 18, 2015, as clarified by Order of the Court dated February 12, 2016, as representative counsel in the CCAA Proceedings for the pharmacist franchisees who operated Target-branded retail pharmacies in TCC stores across Canada;

"**Pharmacy Purchaser**" means the Person who shall have been selected by the Target Canada Entities, in consultation with the Monitor, as the successful bidder for the Pharmacy Shares;

"**Pharmacy Shares**" means all of the issued and outstanding shares of Target Canada Pharmacy (Ontario) Corp.;

"**Pharmacy Share Sale Agreement**" means the binding share sale agreement between the Pharmacy Purchaser and TCC providing for the sale of the Pharmacy Shares to the Pharmacy Purchaser free and clear of all Encumbrances conditional on, *inter alia*, the issuance of the Pharmacy Share Sale Approval and Vesting Order, the Sanction and Vesting Order and the implementation of this Plan;

"**Pharmacy Share Sale Approval and Vesting Order**" means the Order to be sought by the Applicants approving the Pharmacy Share Sale Agreement and vesting all of TCC's

right, title and interest in and to the Pharmacy Shares absolutely in the Pharmacy Purchaser free and clear of all Encumbrances;

"**Plan**" means this amended and restated joint plan of compromise and arrangement under the CCAA, including the Schedules hereto, as amended, supplemented or replaced from time to time;

"**Plan Implementation Date**" means the Business Day or Business Days on which all of the Conditions Precedent to the implementation of the Plan have been fulfilled or, to the extent permitted pursuant to the terms and conditions of the Plan, waived, as evidenced by the Monitor's Plan Implementation Date Certificate to be filed with the Court;

"**Plan Sanction Date**" means the date that the Sanction and Vesting Order issued by the Court becomes a Final Order;

"**Plan Sponsor**" means Target Corporation, a corporation incorporated under Minnesota law;

"**Plan Sponsor GST/HST Contribution Amounts**" has the meaning ascribed thereto in Section 5.17;

"**Plan Sponsor Guarantee**" means any guarantee, indemnity, covenant or surety granted by the Plan Sponsor or the HBC Entities in favour of a Landlord Guarantee Creditor as set out on Schedule "D", and for greater certainty including the Plan Sponsor's or the HBC Entities' guarantee in respect of the real property leases identified in Schedule "D";

"**Plan Sponsor (Propco) Intercompany Claim**" means the Intercompany Claim 4A filed by the Plan Sponsor pursuant to the Claims Procedure Order against Propco in an amount of **US$89,079,107** and not adjusted by the Monitor in the Intercompany Claims Report as set out in Schedule "A";

"**Plan Sponsor Propco Recovery Limit**" means an amount equal to **$23,427,369**;

"**Plan Sponsor Propco Recovery Limit Reserve**" means a Cash reserve in an amount equal to the Plan Sponsor Propco Recovery Limit to be established by TCC for the benefit of Plan Sponsor from the Propco Cash Pool for distribution to the Plan Sponsor in accordance with the Plan;

"**Plan Sponsor Propco Recovery Limit Reserve Account**" means a segregated interest-bearing trust account established by TCC to hold the Plan Sponsor Propco Recovery Limit Reserve on behalf of Plan Sponsor;

"**Plan Sponsor Released Party**" has the meaning ascribed thereto in Section 7.1(c);

"**Plan Sponsor Subrogated Claim**" means any direct or indirect Claim of the Plan Sponsor against any of the Target Canada Entities arising from subrogation or assignment, but for greater certainty excluding any Plan Sponsor subrogated Claims arising as a result of payments to Landlord Guarantee Creditors of their respective Landlord Guarantee Enhancement Amounts, payments to Landlord Non-Guarantee Creditors of their respective Landlord Non-Guarantee Creditor Equalization Amounts and any Cash Management

Lender Claim assigned to the Plan Sponsor or in respect of which the Plan Sponsor has a subrogated claim;

"**Plan Sponsor Subsidiaries**" means all Plan Sponsor subsidiary entities, including corporations and partnerships, other than the Target Canada Entities;

"**Plan Transactions**" has the meaning ascribed thereto in Section 6.3;

"**Plan Transaction Steps**" means the steps or transactions considered necessary or desirable to give effect to the transactions contemplated in the Plan, including those set out in Sections 6.2 and 6.3, and "**Plan Transaction Step**" means any individual transaction step;

"**Post-Filing Trade Payables**" means post-Filing Date trade payables (excluding for greater certainty any Tax Claims) that were incurred by the Target Canada Entities (a) after the Filing Date and before the Plan Implementation Date; (b) in the ordinary course of business; and (c) in compliance with the Initial Order and other Orders issued in connection with the CCAA Proceedings;

"**Pre-filing Claim**" means any right or claim of any Person against any of the Target Canada Entities, whether or not asserted, in connection with any Indebtedness, Liability or obligation of any kind whatsoever of any such Target Canada Entity in existence on the Filing Date, whether or not such right or claim is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, unsecured, perfected, unperfected, present, future, known, or unknown, by guarantee, surety or otherwise, and whether or not such right is executory or anticipatory in nature, including any Assessments and any right or ability of any Person to advance a claim for contribution or indemnity or otherwise against any of the Target Canada Entities with respect to any matter, action, cause or chose in action, whether existing at present or commenced in the future, which Indebtedness, Liability or obligation is based in whole or in part on facts that existed prior to the Filing Date, including for greater certainty any claim against any of the Target Canada Entities for indemnification by any Director or Officer in respect of a D&O Claim (but excluding any such claim for indemnification that is covered by the Directors' Charge);

"**Principal Claim**" has the meaning ascribed thereto in Section 3.9;

"**Pro Rata Share**" means the fraction that is equal to (a) the amount of the Proven Claim of an Affected Creditor who is not a Convenience Class Creditor or a Landlord Guarantee Creditor, divided by (b) the aggregate amount of all Proven Claims held by Affected Creditors who are not Convenience Class Creditors or Landlord Guarantee Creditors;

"**Proof of Claim**" means the form that was to be completed by a Creditor setting forth its applicable Claim and filed by the Claims Bar Date or such later date as the Monitor may have agreed to in its sole discretion, pursuant to the Claims Procedure Order;

"**Propco**" means Target Canada Property LLC, a limited liability company incorporated under Minnesota law;

"**Propco Cash**" means all Cash of Propco as at the Plan Implementation Date;

"**Propco Cash Pool**" means the Cash pool comprised of the Propco Cash;

"**Propco Cash Pool Account**" means a segregated interest-bearing trust account established by TCC to hold the Propco Cash Pool on behalf of Propco;

"**Propco Creditor**" means a Creditor asserting a Claim against Propco;

"**Propco Disputed Claims Reserve**" means the Cash Reserve to be established on the Plan Implementation Date by TCC for the benefit of Propco in an amount equal to the face value of disputed Claims of the Propco Creditors and the Property LP Creditors (excluding Landlord Restructuring Period Claims but not excluding any disputed Property LP Unaffected Claims held by Landlords) and as approved by the Court under the Sanction and Vesting Order, which Cash Reserve shall be held by TCC in the Propco Disputed Claims Reserve Account on behalf of Propco for distribution in accordance with the Plan;

"**Propco Disputed Claims Reserve Account**" means a segregated interest-bearing trust account established by TCC to hold the Propco Disputed Claims Reserve;

"**Propco Intercompany Claim**" means the Intercompany Claim 6B filed by Propco pursuant to the Claims Procedure Order against TCC in an amount of **$1,911,494,242** and adjusted downwards by the Monitor in the Intercompany Claims Report to an amount of **$1,356,756,051** as set out in Schedule "A";

"**Propco (Post-filing TCC) Intercompany Claim**" means the Intercompany Claim 6C filed by Propco pursuant to the Claims Procedure Order against TCC in a gross amount of **$43,651,173** and adjusted downwards by the Monitor in the Intercompany Claims Report to a gross amount of **$43,526,186** as set out in Schedule "A";

"**Propco (Pre-filing TCC) Intercompany Claim**" means the Intercompany Claim 6A filed by Propco pursuant to the Claims Procedure Order against TCC in a gross amount of **$46,873,620** and adjusted downwards by the Monitor in the Intercompany Claims Report to a gross amount of **$45,852,897** as set out in Schedule "A";

"**Propco Unaffected Claim**" means a proven Claim of a Propco Creditor but excluding the balance of the Property LP (Propco) Intercompany Claim in excess of the Contributed Claim Amount, the TCC (Pre-filing Propco) Intercompany Claim, the TCC (Post-filing Propco) Intercompany Claim and the Plan Sponsor (Propco) Intercompany Claim;

"**Propco Unaffected Creditor**" means a Creditor who has a Propco Unaffected Claim;

"**Property**" means all current and future assets, undertakings and properties of the Target Canada Entities, of every nature and kind whatsoever, and wherever situate, including all Cash or other proceeds thereof;

"**Property LP**" means Target Canada Property LP, a limited partnership formed under the LPA;

"**Property LP (Propco) Intercompany Claim**" means the Intercompany Claim 5A filed by Property LP pursuant to the Claims Procedure Order against Propco in an amount of **$1,449,577,927** and not adjusted by the Monitor in the Intercompany Claims Report as set out in Schedule "A";

"**Property LP Creditor**" means a Creditor asserting a Claim against Property LP;

"**Property LP Unaffected Claim**" means a proven Claim of a Property LP Creditor;

"**Property LP Unaffected Creditor**" means a Creditor who has a Property LP Unaffected Claim;

"**Proven Claim**" means a Claim of an Affected Creditor finally determined for distribution purposes in accordance with the Claims Procedure Order and the Plan;

"**Proxy**" means the proxy form enclosed with the Meeting Materials to be delivered to or otherwise made available to the Affected Creditors in accordance with the Meeting Order;

"**Real Property Portfolio Sales Process**" means the sales process conducted in respect of the Target Canada Entities' leased and owned real property assets, which sales process was approved by the Court pursuant to an Order dated February 11, 2015;

"**Released Parties**" means those Persons who are released pursuant to Section 7.1, including the Target Canada Released Parties, the Plan Sponsor Released Parties, the Third Party Released Parties and the Employee Trust Released Parties;

"**Required Majority**" means a majority in number of Affected Creditors who represent at least two-thirds in value of the Voting Claims of such Affected Creditors who actually vote on the Resolution (in person or by Proxy) at the Creditors' Meeting or who were deemed to vote on the Resolution in accordance with the Plan and the Meeting Order;

"**Resolution**" means the resolution approving the Plan presented to the Affected Creditors for consideration at the Creditors' Meeting;

"**Restructuring Period Claim**" means any right or claim of any Person against any of the Target Canada Entities in connection with any Indebtedness, Liability or obligation of any kind whatsoever owed by any such Target Canada Entity to such Person arising out of the restructuring, assignment, disclaimer, resiliation, termination or breach by such Target Canada Entity, on or after the Filing Date, of any contract, lease or other agreement, whether written or oral, excluding a Landlord Restructuring Period Claim;

"**Sanction and Vesting Order**" means the Order to be sought by the Applicants from the Court as contemplated under the Plan which, *inter alia*, approves and sanctions the Plan and the transactions contemplated thereunder;

"**Stay of Proceedings**" means the stay of proceedings created by the Initial Order as amended and extended by further Orders of the Court from time to time;

"**Subordinated Intercompany Claims**" means only the NE1 Intercompany Claim, the Propco Intercompany Claim, the Propco (Pre-filing TCC) Intercompany Claim and the Propco (Post-filing TCC) Intercompany Claim;

"**Target Canada Entities**" has the meaning ascribed thereto in the Recitals;

"**Target Canada Released Party**" has the meaning ascribed thereto in Section 7.1(a);

"**Tax**" means any and all taxes including all income, sales, use, goods and services, harmonized sales, value added, capital gains, alternative, net worth, transfer, profits, withholding, payroll, employer health, excise, franchise, real property, and personal property taxes and other taxes, customs, duties, fees, levies, imposts and other assessments or similar charges in the nature of a tax, including Canada Pension Plan and provincial pension plan contributions, employment insurance and unemployment insurance payments and workers' compensation premiums, together with any instalments with respect thereto, and any interest, penalties, fines, fees, other charges and additions with respect thereto;

"**Tax Claims**" means any claims of any Taxing Authorities against the Target Canada Entities arising on and after the Plan Implementation Date;

"**Tax Obligation**" means any amount of Tax owing by a Person to a Taxing Authority;

"**Taxing Authorities**" means Her Majesty the Queen in right of Canada, Her Majesty the Queen in right of any province or territory of Canada, any municipality of Canada, the Canada Revenue Agency, the Canada Border Services Agency, any similar revenue or taxing authority of Canada and each and every province or territory of Canada and any political subdivision thereof and any Canadian or foreign government, regulatory authority, government department, agency, commission, bureau, minister, court, tribunal or body or regulation making entity exercising taxing authority or power, and "**Taxing Authority**" means any one of the Taxing Authorities;

"**TCC**" means Target Canada Co., an unlimited liability company incorporated under the NSCA;

"**TCC Cash Pool**" means the Cash pool comprised of all Cash of the Target Canada Entities (excluding Propco) and including the net proceeds of the liquidation of TCC's Property;

"**TCC Cash Pool Account**" means a segregated interest-bearing trust account established by TCC to hold the TCC Cash Pool on behalf of the Target Canada Entities;

"**TCC Disputed Claims Reserve**" means the Cash Reserve to be established on the Plan Implementation Date by TCC from the TCC Cash Pool in an amount equal to the expected distributions to be made to all Creditors with Disputed Claims (based on the face value of each Disputed Claim), and as approved by the Court under the Sanction and Vesting Order, which Cash Reserve shall be held by TCC in the TCC Disputed Claims Reserve Account for distribution in accordance with the Plan;

"**TCC Disputed Claims Reserve Account**" means a segregated interest-bearing trust account established by TCC to hold the TCC Disputed Claims Reserve;

"**TCC (Post-filing Propco) Intercompany Claim**" means the Intercompany Claim 7B filed by TCC pursuant to the Claims Procedure Order against Propco in an amount of **$6,303,621** and adjusted upwards by the Monitor in the Intercompany Claims Report to an amount of **$6,966,363** as set out in Schedule "A";

"**TCC (Pre-filing Propco) Intercompany Claim**" means the Intercompany Claim 7A filed by TCC pursuant to the Claims Procedure Order against Propco in an amount of **$19,619,511** and adjusted downwards by the Monitor in the Intercompany Claims Report to an amount of **$11,620,369** as set out in Schedule "A";

"**TCC Secured Construction Lien Claim**" means a proven Claim against TCC in respect of amounts secured by a perfected construction lien pursuant to Applicable Law against a leasehold interest of TCC that was assigned pursuant to the Real Property Portfolio Sales Process;

"**Third Party Released Party**" has the meaning ascribed thereto in Section 7.1(b);

"**Transfer Restrictions**" means any and all restrictions on the transfer of shares, limited partnership or other units or interests in real property including rights of first refusal, rights of first offer, shotgun rights, purchase options, change of control consent rights, puts or forced sales provisions or similar rights of shareholders or lenders in respect of such interests;

"**Unaffected Claim**" means: (a) an Excluded Claim; (b) a claim in respect of the Administrative Reserve Costs; (c) a Propco Unaffected Claim; (d) a Property LP Unaffected Claim; (e) a claim in respect of a Plan Sponsor Guarantee, including a Landlord Guarantee Claim; and (f) a TCC Secured Construction Lien Claim;

"**Unaffected Creditor**" means a Creditor who has an Unaffected Claim, but only in respect of and to the extent of such Unaffected Claim;

"**Unsecured Creditors' Class**" has the meaning ascribed thereto in Section 3.1;

"**Voting Claim**" means the amount of the Affected Claim of an Affected Creditor as finally determined for voting purposes in accordance with the Claims Procedure Order and the Meeting Order entitling such Affected Creditor to vote at the Creditors' Meeting in accordance with the provisions of the Meeting Order, the Plan and the CCAA, and includes, for greater certainty, a Proven Claim;

"**Website**" means www.alvarezandmarsal.com/targetcanada; and

"**Withholding Obligation**" has the meaning ascribed thereto in Section 5.16(c).

1.2 Certain Rules of Interpretation

For the purposes of the Plan:

(a) any reference in the Plan to a contract, instrument, release, indenture, or other agreement or document being in a particular form or on particular terms and conditions means that such document shall be substantially in such form or substantially on such terms and conditions;

(b) any reference in the Plan to an Order or an existing document or exhibit filed or to be filed means such Order, document or exhibit as it may have been or may be amended, restated or varied from time to time;

(c) unless otherwise specified, all references to currency and to "$" or "Cdn$" are to Canadian dollars;

(d) the division of the Plan into "Articles" and "Sections" and the insertion of a Table of Contents are for convenience of reference only and do not affect the construction or interpretation of the Plan, nor are the descriptive headings of "Articles" and "Sections" otherwise intended as complete or accurate descriptions of the content thereof;

(e) references in the Plan to "Articles", "Sections", "Subsections" and "Schedules" are references to Articles, Sections, Subsections and Schedules of or to the Plan;

(f) the use of words in the singular or plural, or with a particular gender, including a definition, shall not limit the scope or exclude the application of any provision of the Plan or a Schedule hereto to such Person (or Persons) or circumstances as the context otherwise permits;

(g) the words "includes" and "including" and similar terms of inclusion shall not, unless expressly modified by the words "only" or "solely", be construed as terms of limitation, but rather shall mean "includes but is not limited to" and "including but not limited to", so that references to included matters shall be regarded as illustrative without being either characterizing or exhaustive;

(h) unless otherwise provided, any reference to a statute or other enactment of parliament or a legislature includes all regulations made thereunder, all amendments to or re-enactments of such statute or regulations in force from time to time, and, if applicable, any statute or regulation that supplements or supersedes such statute or regulation;

(i) the terms "the Plan", "hereof", "herein", "hereto", "hereunder" and similar expressions shall be deemed to refer generally to the Plan and not to any particular "Article", "Section" or other portion of the Plan and include any documents supplemental hereto; and

(j) the word "or" is not exclusive.

1.3 Time

For purposes of the Plan, unless otherwise specified, all references to time herein and in any document issued pursuant hereto mean prevailing local time in Toronto, Ontario, Canada, unless otherwise stipulated.

1.4 Date and Time for any Action

For purposes of the Plan:

(a) In the event that any date on which any action is required to be taken under the Plan by any Person is not a Business Day, that action shall be required to be taken on the next succeeding day which is a Business Day, and any reference to an event occurring on a Business Day shall mean prior to 5:00 p.m. on such Business Day; and

(b) Unless otherwise specified, time periods within or following which any payment is to be made or act is to be done shall be calculated by excluding the day on which the period commences and including the day on which the period ends and by extending the period to the next succeeding Business Day if the last day of the period is not a Business Day.

1.5 Successors and Assigns

The Plan shall be binding upon and shall enure to the benefit of the heirs, administrators, executors, legal personal representatives, liquidators, receivers, trustees in bankruptcy, and successors and assigns of any Person or party named or referred to in the Plan.

1.6 Governing Law

The Plan shall be governed by and construed in accordance with the laws of the Province of Ontario and the federal laws of Canada applicable therein. All questions as to the interpretation of or application of the Plan and all proceedings taken in connection with the Plan and its provisions shall be subject to the exclusive jurisdiction of the Court.

1.7 Currency

Unless specifically provided for in the Plan or the Sanction and Vesting Order, for the purposes of voting or distribution under the Plan, a Claim shall be denominated in Canadian dollars and all payments and distributions to Affected Creditors on account of their Proven Claims, to Propco Unaffected Creditors on account of their Propco Unaffected Claims, to Property LP Unaffected Creditors on account of their Property LP Unaffected Claims and to Landlord Guarantee Creditors on account of their Landlord Guarantee Enhancement Amounts shall be made in Canadian dollars. In accordance with paragraph 6 of the Claims Procedure Order, any Claim in a currency other than Canadian dollars must be converted to Canadian dollars, and any such amount shall be regarded as having been converted at the noon spot rate of exchange quoted by the Bank of Canada for exchanging such currency to Canadian dollars as at the Filing Date, which rate is US**$1**:Cdn**$1.1932**.

1.8 Schedules

The following are the Schedules to the Plan, which are incorporated by reference into the Plan and form a part of it:

Schedule "A"	Intercompany Claims
Schedule "B"	Domain Names
Schedule "C"	Meeting Order
Schedule "D"	Landlord Guarantee Creditors
Schedule "E"	Landlord Non-Guarantee Creditors
Schedule "F"	Employee Trust Termination Certificate
Schedule "G"	Employee Trust Property Joint Direction
Schedule "H"	Co-Tenancy Stay Schedule

ARTICLE 2
PURPOSE AND EFFECT OF THE PLAN

2.1 Purpose of Plan

The purpose of the Plan is to:

(a) complete the controlled, orderly and timely wind down of certain of the Target Canada Entities;

(b) effect a compromise, settlement and payment of all Proven Claims as finally determined for voting and distribution purposes pursuant to the Claims Procedure Order and the Meeting Order;

(c) obtain third party releases of the Plan Sponsor and Plan Sponsor Subsidiaries, among others, other than in respect of the Landlord Guarantee Claims; and

(d) comply with the January 15 Endorsement, avoid protracted litigation and effect a global resolution of the CCAA Proceedings,

in the expectation that all Persons with an economic interest in the Business will derive a greater benefit from the implementation of the Plan than would result from a bankruptcy of the Target Canada Entities.

2.2 Persons Affected

The Plan provides for a wind down of certain of the Target Canada Entities and a compromise of the Affected Claims. The Plan will become effective at the Effective Time on the Plan Implementation Date. On the Plan Implementation Date, the Affected Claims will be fully and

finally compromised, released, settled and discharged to the extent provided for under the Plan. The Plan shall be binding on and shall enure to the benefit of the Target Canada Entities, the Affected Creditors, the Released Parties and all other Persons named or referred to in, receiving the benefit of or subject to, the Plan.

2.3 Persons Not Affected

For greater certainty, the Plan does not affect the Unaffected Creditors with respect to and to the extent of their Unaffected Claims, including for greater certainty the Landlord Guarantee Creditors with respect to and to the extent of their Landlord Guarantee Claims. Nothing in the Plan shall affect any Target Canada Entity's rights and defences, both legal and equitable, with respect to any Unaffected Claims including, but not limited to, all rights with respect to legal and equitable defences or entitlements to set-offs or recoupments against such Unaffected Claims.

2.4 Subordinated Intercompany Claims

Notwithstanding anything to the contrary in the Plan, no Person shall be entitled to any distributions under the Plan in respect of its Subordinated Intercompany Claim unless and until all of the Affected Creditors (including Affected Creditors that are holders of non-subordinated Intercompany Claims and holders of Plan Sponsor Subrogated Claims) have received aggregate distributions under the Plan totalling the full amount of their respective Proven Claims.

2.5 Plan Sponsor Agreement

Plan Sponsor shall enter into an agreement with the Target Canada Entities to be bound by the Plan and the Landlord Guarantee Creditor Settlement Agreement and to perform all of its obligations hereunder and thereunder, conditional on the occurrence of the Plan Implementation Date, including without limitation delivering **$25.451 million** to TCC to be deposited to the Landlord Guarantee Enhancement Cash Pool pursuant to Section 4.3 and contributing **$7.521** million to TCC for purposes of TCC establishing the Landlord Non-Guarantee Creditor Equalization Cash Pool pursuant to Section 4.8. For greater certainty, these payments do not give rise to a subrogated claim by the Plan Sponsor.

2.6 Equity Claims

All Persons holding Equity Claims shall not be entitled to vote at or attend the Creditors' Meeting, and shall not receive any distributions under the Plan or otherwise receive any other compensation in respect of their Equity Claims.

ARTICLE 3
CLASSIFICATION OF CREDITORS, VOTING CLAIMS AND RELATED MATTERS

3.1 Classification of Creditors

For the purposes of considering, voting on and receiving distributions under the Plan, the Affected Creditors shall constitute a single class, the "**Unsecured Creditors' Class**".

3.2 Claims of Affected Creditors/Convenience Class Creditors

(a) Affected Creditors with Proven Claims that are less than or equal to **$25,000** in the aggregate shall be deemed to vote in favour of the Plan and shall be entitled to receive cash distributions equivalent to the amount of their Proven Claims and no further distributions under the Plan.

(b) Affected Creditors with Proven Claims in excess of **$25,000** who deliver a duly completed and executed Convenience Class Claim Election to the Monitor by the Election/Proxy Deadline, shall be treated for all purposes as Convenience Class Creditors and shall be deemed to vote in favour of the Plan and shall be entitled to receive only the Cash Elected Amount and no further distributions under the Plan.

(c) Affected Creditors who are not Convenience Class Creditors (including Affected Creditors with Disputed Claims which have become Proven Claims) shall be entitled to vote their Voting Claims at the Creditors' Meeting in respect of the Plan and shall be entitled to receive distributions on their Proven Claims pursuant to the Plan.

3.3 Unaffected Claims

Unaffected Claims shall not be compromised under the Plan. No holder of an Unaffected Claim shall:

(a) be treated as a Convenience Class Creditor;

(b) be entitled to vote on the Plan or attend at any Creditors' Meeting in respect of such Unaffected Claim; or

(c) be entitled to or receive any distributions pursuant to the Plan in respect of such Unaffected Claim, unless specifically provided for under and pursuant to the Plan.

3.4 Priority Claims

The Employee Priority Claims and the Government Priority Claims, if any, shall be paid on or after the Plan Implementation Date from the Administrative Reserve Account pursuant to and in accordance with Section 6.3 of the Plan, the Sanction and Vesting Order and the CCAA.

3.5 Creditors' Meeting

The Creditors' Meeting shall be held in accordance with the Plan, the Claims Procedure Order, the Meeting Order and any further Order of the Court. The only Persons entitled to attend the Creditors' Meeting shall be representatives of the Target Canada Entities and the Plan Sponsor and their respective legal counsel and advisors, the Monitor and its legal counsel and advisors, the Pharmacists' Representative Counsel, the Employee Representative Counsel, the Employee Trust Trustee and his legal counsel and all other Persons, including the holders of Proxies, entitled to vote at the Creditors' Meeting and their respective legal counsel and advisors.

3.6 Voting

(a) Each Affected Creditor in the Unsecured Creditors' Class who is entitled to vote at the Creditors' Meeting, pursuant to and in accordance with the Claims Procedure Order, the Meeting Order, the Plan and the CCAA, shall be entitled to one vote equal to the dollar value of its Affected Claim determined as a Voting Claim.

(b) Convenience Class Creditors shall be deemed to vote in favour of the Plan.

(c) Holders of Intercompany Claims shall not be entitled to vote on the Plan.

(d) The Plan Sponsor shall not be entitled to vote on the Plan in respect of its Plan Sponsor Subrogated Claims.

(e) The Plan Sponsor shall not be entitled to vote on the Plan in respect of any amounts contributed to the Landlord Guarantee Enhancement Cash Pool and to the Landlord Non-Guarantee Creditor Equalization Cash Pool.

(f) The Plan Sponsor shall not be entitled to vote on the Plan in respect of any Cash Management Lender Claims (which constitute Unaffected Claims).

3.7 Procedure for Valuing Voting Claims

The procedure for valuing Voting Claims and resolving disputes and entitlements to voting shall be as set forth in the Claims Procedure Order, the Meeting Order, the Plan and the CCAA. The Monitor, in consultation with the Target Canada Entities, shall have the right to seek the assistance of the Court in valuing any Voting Claim in accordance with the Meeting Order and the Plan, if required, and to ascertain the result of any vote on the Plan.

3.8 Approval by Creditors

In order to be approved, the Plan must receive the affirmative vote of the Required Majority of the Unsecured Creditors' Class.

3.9 Guarantees and Similar Covenants

No Person who has a Claim under a Guarantee in respect of any Claim which is compromised under the Plan (such compromised Claim being the "**Principal Claim**"), or who has any right to or claim over in respect of or to be subrogated to the rights of any Person in respect of the Principal Claim, shall:

(a) be entitled to any greater rights as against the Target Canada Entities than the Person holding the Principal Claim;

(b) be entitled to vote on the Plan to the extent that the Person holding the Principal Claim is voting on the Plan; or

(c) be entitled to receive any distribution under the Plan to the extent that the Person holding the Principal Claim is receiving a distribution.

ARTICLE 4
PROPCO CASH POOL, TCC CASH POOL, CASH RESERVES, AND LANDLORD CASH POOLS

4.1 Creation of the Propco Cash Pool

On the Plan Implementation Date, Propco shall deliver to TCC by way of wire transfer to the Propco Cash Pool Account (in accordance with the wire transfer instructions provided by TCC at least three (3) Business Days prior to the Plan Implementation Date) the aggregate of all of its Cash, which Cash shall be held by TCC on behalf of Propco as the Propco Cash Pool.

TCC shall hold the Propco Cash Pool in the Propco Cash Pool Account and shall distribute such Cash in the Propco Cash Pool Account, net of the Propco Disputed Claims Reserve, in accordance with Sections 5.2, 5.3, 5.4 and 5.5 of the Plan.

4.2 The Propco Disputed Claims Reserve

On the Plan Implementation Date, TCC shall transfer from the Propco Cash Pool Account the Cash necessary to establish the Propco Disputed Claims Reserve for the benefit of Propco. TCC shall hold the Propco Disputed Claims Reserve in the Propco Disputed Claims Reserve Account on behalf of Propco for the purpose of paying amounts to Propco Creditors and Property LP Creditors in respect of their disputed Claims against Propco or Property LP which have become Propco Unaffected Claims or Property LP Unaffected Claims, in whole or in part, in accordance with the Plan.

TCC shall distribute such Cash in the Propco Disputed Claims Reserve Account in accordance with Sections 5.4 and 5.5 of the Plan.

4.3 Creation of the Landlord Guarantee Enhancement Cash Pool

Two (2) Business Day prior to the Plan Implementation Date, the Plan Sponsor shall deliver **$25.451 million** to TCC by way of wire transfer (in accordance with the wire transfer instructions provided by TCC at least five (5) Business Days prior to the Plan Implementation Date), which amount TCC shall hold in trust for the Plan Sponsor and shall deposit into the Landlord Guarantee Enhancement Cash Pool Account for the benefit of the Plan Sponsor on the Plan Implementation Date. On the Initial Distribution Date, the Plan Sponsor shall direct and shall be deemed to direct TCC to deposit for the benefit of the Plan Sponsor **$34.081 million** from the distributions payable under Section 5.3 of the Plan into the Landlord Guarantee Enhancement Cash Pool Account in accordance with Section 5.3 of the Plan.

TCC shall hold the Landlord Guarantee Enhancement Cash Pool in the Landlord Guarantee Enhancement Cash Pool Account on behalf of the Plan Sponsor in accordance with Section 5.10 of the Plan for the purpose of satisfying the Plan Sponsor's obligations to pay the Landlord Guarantee Enhancement Amounts in accordance with Section 2.5 of the Plan.

4.4 The Plan Sponsor Propco Recovery Limit Reserve

The Plan Sponsor Propco Recovery Limit Reserve shall be funded in accordance with Section 5.3 up to a maximum amount equal to the Plan Sponsor Propco Recovery Limit.

TCC shall distribute such Cash in the Plan Sponsor Propco Recovery Limit Reserve Account for the account of Propco in accordance with Section 5.6 of the Plan.

4.5 Creation of the TCC Cash Pool

On the Plan Implementation Date, the Target Canada Entities (other than TCC and Propco) shall deliver to TCC by way of wire transfer (in accordance with the wire transfer instructions provided by TCC at least three (3) Business Days prior to the Plan Implementation Date) the aggregate of all of their Cash, if any, which Cash, together with TCC's Cash, shall be held by TCC on behalf of the Target Canada Entities as the TCC Cash Pool.

TCC shall hold the TCC Cash Pool in the TCC Cash Pool Account and shall distribute such Cash in the TCC Cash Pool Account, net of the Administrative Reserve, the TCC Disputed Claims Reserve, the Landlord Guarantee Creditor Base Claim Cash Pool and the Landlord Non-Guarantee Creditor Equalization Cash Pool, in accordance with Sections 5.7, 5.11 and 5.12 of the Plan.

4.6 The Administrative Reserve

On the Plan Implementation Date, TCC shall transfer from the TCC Cash Pool Account the Cash necessary to establish the Administrative Reserve.

TCC shall hold the Administrative Reserve in the Administrative Reserve Account for the purpose of paying the Administrative Reserve Costs in accordance with the Plan and shall distribute any remaining balance in the Administrative Reserve Account in accordance with Section 5.12 of the Plan.

4.7 The TCC Disputed Claims Reserve

On the Plan Implementation Date, TCC shall transfer from the TCC Cash Pool Account the Cash necessary to establish the TCC Disputed Claims Reserve. TCC shall hold the TCC Disputed Claims Reserve in the TCC Disputed Claims Reserve Account for the purpose of paying amounts to Affected Creditors in respect of their Disputed Claims which have become Proven Claims, in whole or in part, in accordance with the Claims Procedure Order and the Plan.

As Disputed Claims are resolved by the Monitor, TCC shall at the direction of the Monitor transfer amounts from the TCC Disputed Claims Reserve Account to the TCC Cash Pool Account, with any final balance remaining in the TCC Disputed Claims Reserve Account (once all Disputed Claims have been finally determined), including any interest thereon, to be contributed by TCC to the TCC Cash Pool Account for distribution to Affected Creditors with Proven Claims pursuant to and in accordance with Section 5.12 the Plan.

4.8 Landlord Non-Guarantee Creditor Equalization Cash Pool

Two (2) Business Days prior to the Plan Implementation Date, the Plan Sponsor shall deliver **$7.521 million** to TCC by way of wire transfer (in accordance with the wire transfer instructions provided by TCC at least five (5) Business Days prior to the Plan Implementation Date), which amount TCC shall hold in trust for the benefit of the Plan Sponsor, and which shall on the Plan Implementation Date be deemed to be contributed by the Plan Sponsor to TCC, and which shall then be deposited by TCC into the Landlord Non-Guarantee Creditor Equalization Cash Pool.

TCC shall hold the Landlord Non-Guarantee Creditor Equalization Cash Pool in the Landlord Non-Guarantee Creditor Equalization Cash Pool Account in accordance with Section 5.8 of the Plan for the purpose of paying the Landlord Non-Guarantee Creditor Equalization Amounts in accordance with Section 5.8 of the Plan.

4.9 Landlord Guarantee Creditor Base Claim Cash Pool

On the Plan Implementation Date, TCC shall transfer from the TCC Cash Pool Account the Cash necessary to establish the Landlord Guarantee Creditor Base Claim Cash Pool. TCC shall hold the Landlord Guarantee Creditor Base Claim Cash Pool in the Landlord Guarantee Creditor Base Claim Cash Pool Account for the purpose of paying the Landlord Guarantee Creditor Base Claim Amounts in accordance with Section 5.9 of the Plan.

ARTICLE 5
PROVISIONS REGARDING DISTRIBUTIONS AND DISBURSEMENTS

All distributions and disbursements to be effected pursuant to the Plan shall be made pursuant to this Article 5 and shall occur in the manner set out below under the supervision of the Monitor.

Notwithstanding any other provisions of the Plan, no distributions or transfers of Cash shall be made by TCC with respect to all or any portion of a Disputed Claim, all or any portion of a disputed Claim against Propco or Property LP or all or any portion of a disputed TCC Secured Construction Lien Claim unless and only to the extent that such Disputed Claim has become a Proven Claim, or such disputed Claim against Propco or Property LP has become a Propco Unaffected Claim or Property LP Unaffected Claim, as applicable, or such disputed TCC Secured Construction Lien Claim has become a proven Unaffected Claim, in whole or in part.

5.1 Subordination in respect of Propco and Property LP

On the Plan Implementation Date in order to provide for the payment in full of the Propco Unaffected Claims and the Property LP Unaffected Claims:

(a) Property LP shall subordinate that amount of the Property LP (Propco) Intercompany Claim that is in excess of the Contributed Claim Amount, in favour of the proven Claims of all Propco Creditors;

(b) the Plan Sponsor shall subordinate the Plan Sponsor (Propco) Intercompany Claim in favour of (i) the proven Claims of the Propco Unaffected Creditors and (ii) the Contributed Claim Amount; and

(c) TCC shall subordinate the TCC (Pre-filing Propco) Intercompany Claim and the TCC (Post-filing Propco) Intercompany Claim in favour of (i) the proven Claims of the Propco Unaffected Creditors and (ii) the Contributed Claim Amount.

5.2 Distributions to Propco Unaffected Creditors

Forthwith after giving effect to the subordinations set out in Section 5.1, TCC shall create the Propco Disputed Claims Reserve, and thereafter TCC shall on behalf of and for the account of Propco, pay Propco Unaffected Creditors (other than Property LP) with Propco Unaffected Claims in full solely from the Propco Cash Pool Account, by cheque sent by pre-paid ordinary mail to the

address for such Propco Unaffected Creditor as set out in its Proof of Claim. For greater certainty, Claims of Creditors who are Landlords (excluding a Landlord holding a Property LP Unaffected Claim) shall not receive a distribution from the Propco Cash Pool Account.

If a Propco Unaffected Creditor has submitted a Proof of Claim against the Target Canada Entities (in addition to its Proof of Claim against Propco) in respect of its Propco Unaffected Claim, such Propco Unaffected Creditor shall not be entitled to and shall not receive any distributions from the TCC Cash Pool Account in respect of such Claim.

5.3 Re-contribution by Plan Sponsor in respect of Property LP (Propco) Intercompany Claim

(a) On the Initial Distribution Date, following the payments to Propco Unaffected Creditors set out in Section 5.2:

(i) TCC, on behalf of and for the account of Property LP, shall first pay the Property LP Unaffected Claims at the direction of Property LP in accordance with Section 5.4; and

(ii) TCC, on behalf of and for the account of Propco, shall then distribute the remaining Cash in the Propco Cash Pool Account to the following Persons on a pro rata basis:

(A) TCC, on account of the TCC (Pre-filing Propco) Intercompany Claim and the TCC (Post-filing Propco) Intercompany Claim in partial satisfaction of such Intercompany Claims;

(B) the Plan Sponsor, on account of the Plan Sponsor (Propco) Intercompany Claim in partial satisfaction of such Intercompany Claim; and

(C) Property LP, on account of that amount of the Property LP (Propco) Intercompany Claim that is in excess of the Contributed Claim Amount in partial satisfaction of such Intercompany Claim.

(b) On the Initial Distribution Date:

(i) First, Property LP shall direct and shall be deemed to direct TCC to pay to the Plan Sponsor any amounts payable to Property LP on account of the distributions set out in Section 5.3(a)(ii)(C);

(ii) Second, Plan Sponsor shall direct and shall be deemed to direct TCC to deposit an amount of **$34.081 million** into the Landlord Guarantee Enhancement Cash Pool Account on account of the distributions set out in Sections 5.3(a)(ii)(B) and amounts payable to the Plan Sponsor as set out in Section 5.3(b)(i);

(iii) Third, Plan Sponsor shall and shall be deemed to direct TCC to deposit any remaining balance of the distributions set out in Sections 5.3(a)(ii)(B) and amounts payable to the Plan Sponsor as set out in Section 5.3(b)(i) into the

Plan Sponsor Propco Recovery Limit Reserve Account up to a maximum amount equal to the Plan Sponsor Propco Recovery Limit; and

(iv) Fourth, TCC shall deposit its distribution set out in Section 5.3(a)(ii)(A) into the TCC Cash Pool Account, and the Plan Sponsor shall and shall be deemed to direct TCC to deposit any ultimate balance of the distributions set out in Sections 5.3(a)(ii)(B) and amounts payable to the Plan Sponsor as set out in Section 5.3(b)(i) into the TCC Cash Pool Account as a contribution by Plan Sponsor to TCC.

(c) After disputed Claims of Propco Creditors and Property LP Creditors are resolved by the Monitor, TCC shall, at the direction of the Monitor distribute the balance of the Cash in the Propco Disputed Claims Reserve to TCC, the Plan Sponsor and Property LP on a pro rata basis on account of the remaining balance, if any, of those Intercompany Claims set out in Section 5.3(a)(ii) in full and final satisfaction of such Intercompany Claims and such amounts shall and shall be deemed to have been treated by the applicable parties in the same manner as provided for in Section 5.3(b).

5.4 Distributions on Account of Property LP Unaffected Claims

Property LP shall be obligated to satisfy all Property LP Unaffected Claims.

For purposes of facilitating the payment of all such Property LP Unaffected Claims, Property LP directs and shall be deemed to direct that Propco shall pay such Property LP Unaffected Claims on behalf of and for the account of Property LP in payment and satisfaction by Propco of that portion of the Property LP (Propco) Intercompany Claim that is equal to the Contributed Claim Amount.

For ease and convenience, a disputed Claim against Property LP shall be resolved pursuant to Section 5.5 as if it were a disputed Claim against Propco, and the payment of any such Claim shall be deemed to be treated by the applicable parties in the same manner as provided for in Section 5.2 and Section 5.3.

5.5 Resolution of Disputed Propco Creditor Claims and Disputed Property LP Creditor Claims

From and after the Plan Implementation Date, as frequently as the Monitor may determine in its sole and unfettered discretion, TCC on behalf of Propco shall pay to each Propco Creditor or Property LP Creditor with a disputed Claim that has become a Propco Unaffected Claim or a Property LP Unaffected Claim, respectively, in whole or in part, on or before the third Business Day prior to a Distribution Date (other than the Final Distribution Date), an amount of Cash from the Propco Disputed Claims Reserve Account equal to such Propco Unaffected Claim or Property LP Unaffected Claim, and any balance remaining in the Propco Disputed Claims Reserve Account relating to such Propco Creditor's or Property LP Creditor's disputed Claim shall be deposited into the Plan Sponsor Propco Recovery Limit Reserve Account or the TCC Cash Pool Account, as the case may be, in accordance with Section 5.3(c).

5.6 Distributions from Plan Sponsor Propco Recovery Limit Reserve Account

(a) On the Initial Distribution Date, TCC, on behalf of Propco, shall pay to the Plan Sponsor in respect of the Plan Sponsor (Propco) Intercompany Claim an amount of Cash from the Plan Sponsor Propco Recovery Limit Reserve Account equal to the product of (a) the Plan Sponsor Propco Recovery Limit multiplied by (b) the percentage recovery to Affected Creditors (other than a Convenience Class Creditor or a Landlord Guarantee Creditor in respect of its Landlord Guarantee Creditor Base Claim Amount) from the TCC Cash Pool on the Initial Distribution Date in accordance with Section 5.7(b) below.

(b) On each subsequent date on which TCC makes distributions to Affected Creditors pursuant to Section 5.11, TCC:

(i) with the assistance of the Monitor, shall determine the aggregate percentage recovery to Affected Creditors (other than a Convenience Class Creditor or a Landlord Guarantee Creditor in respect of its Landlord Guarantee Creditor Base Claim Amount) from the TCC Cash Pool up to and including such distribution (and taking into account prior distributions) on such date (the "**Aggregate Recovery Percentage**"); and

(ii) shall pay to the Plan Sponsor an amount of Cash from the Plan Sponsor Propco Recovery Limit Reserve Account equal to (i) the product of (1) the Plan Sponsor Propco Recovery Limit multiplied by (2) the Aggregate Recovery Percentage, less (ii) the amount of distributions already made to the Plan Sponsor from the Plan Sponsor Propco Recovery Limit Reserve Account.

(c) On the Final Distribution Date, TCC:

(i) with the assistance of the Monitor, shall determine the final aggregate percentage recovery to Affected Creditors (other than a Convenience Class Creditor or a Landlord Guarantee Creditor in respect of its Landlord Guarantee Creditor Base Claim Amount) from the TCC Cash Pool up to and including the final distribution (and taking into account prior distributions) (the "**Final Aggregate Recovery Percentage**");

(ii) shall pay to the Plan Sponsor an amount of Cash from the Plan Sponsor Propco Recovery Limit Reserve Account equal to (i) the product of (1) the Plan Sponsor Propco Recovery Limit multiplied by (2) the Final Aggregate Recovery Percentage, less (ii) the amount of distributions already made to the Plan Sponsor from the Plan Sponsor Propco Recovery Limit Reserve Account; and

(iii) thereafter, shall deposit into the TCC Cash Pool Account on behalf of Plan Sponsor as a contribution to TCC any remaining balance in the Plan Sponsor Propco Recovery Limit Reserve Account.

5.7 Initial Distributions from TCC Cash Pool Account to Affected Creditors with Proven Claims

On the Initial Distribution Date, the Cash in the TCC Cash Pool Account shall be distributed by TCC, on behalf and for the account of the Target Canada Entities, as follows:

(a) each Convenience Class Creditor shall receive a distribution in the amount of its Convenience Class Claim, by cheque sent by prepaid ordinary mail to the address for such Convenience Class Creditor as set out in its Proof of Claim; and

(b) each Affected Creditor (other than a Convenience Class Creditor or a Landlord Guarantee Creditor in respect of its Landlord Guarantee Creditor Base Claim Amount) with a Proven Claim shall receive a distribution in an amount equal to its Pro Rata Share of the Cash in the TCC Cash Pool Account (after effecting the payments in Section 5.7(a)) by cheque sent by prepaid ordinary mail to the address for such Affected Creditor as set out in its Proof of Claim (or, at the election of TCC, by wire transfer in accordance with the wire transfer instructions provided by the applicable Affected Creditor).

5.8 Disbursements of Landlord Non-Guarantee Creditor Equalization Amounts

On the Initial Distribution Date, TCC, on behalf and for the account of the Target Canada Entities, shall disburse to each Landlord Non-Guarantee Creditor with a Proven Claim that is a Landlord Restructuring Period Claim, each Landlord Non-Guarantee Creditor's Landlord Non-Guarantee Creditor Equalization Amount from the Landlord Non-Guarantee Creditor Equalization Cash Pool Account by cheque sent by prepaid ordinary mail to the address for such Landlord in accordance with such Landlord's Proof of Claim (or, at the election of TCC, by wire transfer in accordance with the wire transfer instructions provided by the applicable Landlord Non-Guarantee Creditor).

5.9 Disbursements of Landlord Guarantee Creditor Base Claim Amounts

On the Initial Distribution Date, TCC, on behalf and for the account of the Target Canada Entities, shall disburse to each Landlord Guarantee Creditor with a Proven Claim that is a Landlord Restructuring Period Claim, each Landlord Guarantee Creditor's Landlord Guarantee Creditor Base Claim Amount from the Landlord Guarantee Creditor Base Claim Cash Pool Account by cheque sent by prepaid ordinary mail to the address for such Landlord in accordance with such Landlord's Proof of Claim (or, at the election of TCC, by wire transfer in accordance with the wire transfer instructions provided by the applicable Landlord Guarantee Creditor).

5.10 Disbursements of Landlord Guarantee Enhancement Amount

On the Initial Distribution Date, TCC, on behalf and for the account of the Plan Sponsor in satisfaction of the Plan Sponsor's obligations under the Landlord Guarantee Creditor Settlement Agreement, shall disburse, in accordance with the Landlord Guarantee Creditor Settlement Agreement, to each Landlord Guarantee Creditor each Landlord Guarantee Creditor's Landlord Guarantee Enhancement Amount from the Landlord Guarantee Enhancement Cash Pool Account by cheque sent by prepaid ordinary mail to the address for such Landlord in accordance with such Landlord's Proof of Claim (or, at the election of TCC, by wire transfer in accordance with the wire transfer instructions provided by the applicable Landlord Guarantee Creditor).

5.11 Resolution of Disputed TCC Creditor Claims and Subsequent Distributions

Subject to Section 5.7, from and after the Initial Distribution Date, as frequently as the Monitor may determine in its sole and unfettered discretion, TCC, on behalf of the Target Canada Entities, shall distribute to:

(a) each Affected Creditor (other than a Convenience Class Creditor or a Landlord Guarantee Creditor in respect of its Landlord Guarantee Creditor Base Claim Amount) with a Disputed Claim that has become a Proven Claim in whole or in part, on or before the third (3rd) Business Day prior to a Distribution Date (other than the Final Distribution Date), an amount of Cash from the TCC Disputed Claims Reserve Account equal to the aggregate amount of all distributions such Affected Creditor would have otherwise already received pursuant to the Plan had its Disputed Claim been a Proven Claim on and as of the Initial Distribution Date, and any remaining balance in the TCC Disputed Claims Reserve Account relating to such Affected Creditor's Disputed Claim shall be deposited into the TCC Cash Pool Account; and

(b) each Affected Creditor (other than a Convenience Class Creditor or a Landlord Guarantee Creditor in respect of its Landlord Guarantee Creditor Base Claim Amount) with a Proven Claim an amount equal to such Affected Creditor's respective Pro Rata Share of the Cash in the TCC Cash Pool Account (subsequent to effecting the payments in Section 5.11(a)) by cheque sent by prepaid ordinary mail to the address for such Affected Creditor as set out in its Proof of Claim (or, at the election of TCC, by wire transfer in accordance with the wire transfer instructions provided by the applicable Affected Creditor).

5.12 Final Distribution

On the Final Distribution Date, once TCC has effected all distributions pursuant to Section 5.11 and there are no remaining Disputed Claims, and following the deposits into the TCC Cash Pool Account set out in Sections 5.3(b)(iv), 5.3(c), and 5.6(c)(iii):

(a) TCC, on behalf of the Target Canada Entities, shall pay any final Administrative Reserve Costs;

(b) thereafter, TCC shall contribute any balance remaining in the Administrative Reserve Account and the TCC Disputed Claims Reserve Account to the TCC Cash Pool Account;

(c) thereafter, TCC shall distribute to the Affected Creditors (other than Convenience Class Creditors and Landlord Guarantee Creditors in respect of their Landlord Guarantee Creditor Base Claim Amounts) with Proven Claims an amount equal to such Affected Creditor's respective Pro Rata Share of any Cash in the TCC Cash Pool Account; and

(d) thereafter, TCC shall provide written notice to the Monitor that it has completed its duties to effect all distributions, disbursements and payments in accordance with the Plan.

5.13 Treatment of Undeliverable Distributions

If any Affected Creditor's, Propco Unaffected Creditor's or Property LP Unaffected Creditor's distribution is returned as undeliverable or is not cashed, no further distributions to such Creditor shall be made unless and until the Monitor is notified by such Creditor of its current address or wire particulars, at which time all such distributions shall be made to such Creditor without interest. All claims for undeliverable or un-cashed distributions in respect of Proven Claims, Propco Unaffected Claims or Property LP Unaffected Claims must be made on or before the deadline specified in the Notice of Final Distribution, after which date the Claims of such Creditor or successor or assign of such Creditor with respect to such unclaimed or un-cashed distributions shall be forever discharged and forever barred, without any compensation therefor, notwithstanding any Applicable Law to the contrary, at which time the Cash amount held by TCC in relation to such Claim shall be returned to the TCC Cash Pool Account or the Propco Cash Pool Account. Nothing in the Plan or Sanction and Vesting Order shall require the Monitor or TCC to attempt to locate the holder of any Proven Claim, Propco Unaffected Claim or Property LP Unaffected Claim.

If any Landlord Guarantee Creditor's distribution from the Landlord Guarantee Enhancement Cash Pool or any Landlord Non-Guarantee Creditor's distribution from the Landlord Non-Guarantee Creditor Equalization Cash Pool is returned as undeliverable or is not cashed, no further distributions to such Landlord shall be made unless and until the Monitor is notified by such Landlord of its current address or wire particulars, at which time all such distributions shall be made to such Landlord without interest. All claims for undeliverable or un-cashed distributions in respect of Landlord Guarantee Enhancement Amounts and Landlord Non-Guarantee Creditor Equalization Amounts must be made on or before the deadline specified in the Notice of Final Distribution, after which date the claims of such Landlord or successor or assign of such Landlord with respect to such unclaimed or un-cashed distributions shall be forever discharged and forever barred, without any compensation therefor, notwithstanding any Applicable Law to the contrary, at which time: (a) in the case of a Landlord Guarantee Enhancement Amount, (i) the percentage of the Cash amount held by TCC in relation to such Landlord Guarantee Enhancement Amount equal to **$25.451** million divided by the total amount of the Landlord Guarantee Enhancement Cash Pool as at the Plan Implementation Date shall be returned to the Plan Sponsor in accordance with the wire transfer instructions to be provided by the Plan Sponsor to TCC, and (ii) the balance of the Cash amount held by TCC in relation to such Landlord Guarantee Enhancement Amount shall be returned to the TCC Cash Pool Account, and (b) in the case of a Landlord Non-Guarantee Equalization Amount, the Cash amount held by TCC in relation to such Landlord Non-Guarantee Creditor Equalization Amount shall be returned to the Plan Sponsor in accordance with the wire transfer instructions to be provided by the Plan Sponsor to TCC.

5.14 Assignment of Claims for Voting and Distribution Purposes Prior to the Creditors' Meeting

An Affected Creditor, a Propco Unaffected Creditor or a Property LP Unaffected Creditor may transfer or assign the whole of its Claim prior to the Creditors' Meeting, provided that neither the Target Canada Entities nor the Monitor shall be obligated to give notice to or otherwise deal with the transferee or assignee of such Claim as an Affected Creditor, a Propco Unaffected Creditor or a Property LP Unaffected Creditor in respect thereof, including allowing such transferee or assignee of an Affected Claim to vote at the Creditors' Meeting, unless and until actual notice of the transfer or assignment, together with satisfactory evidence of such transfer or assignment, has

been received and acknowledged by the Monitor in writing no later than 5:00 p.m. on the date that is seven (7) days prior to the Creditors' Meeting. Thereafter such transferee or assignee shall, for all purposes in accordance with the Claims Procedure Order and the Meeting Order, constitute an Affected Creditor, a Propco Unaffected Creditor or a Property LP Unaffected Creditor, as applicable, and shall be bound by any and all notices previously given to the transferor or assignor and any and all steps taken in respect of such Claim.

Where a Claim has been transferred or assigned in part, the transferor or assignor shall retain the right to vote at the Creditors' Meeting in respect of the full amount of the Claim, and the transferee or assignee shall have no voting rights at the Creditors Meeting in respect of such Claim.

For greater certainty, after the execution of the Landlord Guarantee Creditor Settlement Agreement or a Landlord Non-Guarantee Creditor Consent and Support Agreement, as applicable, a Landlord Guarantee Creditor or a Landlord Non-Guarantee Creditor may only assign any Claim in accordance with the terms of the Landlord Guarantee Creditor Settlement Agreement or a Landlord Non-Guarantee Creditor Consent and Support Agreement, as applicable.

5.15 Assignment of Claims for Distribution Purposes After the Creditors' Meeting

An Affected Creditor (other than a Convenience Class Creditor), a Propco Unaffected Creditor or a Property LP Unaffected Creditor may transfer or assign the whole of its Claim for distribution purposes after the Creditors' Meeting provided that TCC shall not be obliged to make distributions to any such transferee or assignee or otherwise deal with such transferee or assignee as an Affected Creditor, a Propco Unaffected Creditor or a Property LP Unaffected Creditor in respect thereof unless and until actual notice of the transfer or assignment, together with satisfactory evidence of such transfer or assignment, has been received and acknowledged by the Monitor in writing; thereafter, such transferee or assignee shall, for all purposes in accordance with the Claims Procedure Order, the Meeting Order and the Plan, constitute an Affected Creditor, a Propco Unaffected Creditor or a Property LP Unaffected Creditor, as applicable, and shall be bound by any and all notices previously given to the transferor or assignor and any and all steps taken in respect of such Claim.

For greater certainty, after the execution of the Landlord Guarantee Creditor Settlement Agreement or a Landlord Non-Guarantee Creditor Consent and Support Agreement, as applicable, a Landlord Guarantee Creditor or a Landlord Non-Guarantee Creditor may only assign any Claim for distribution purposes in accordance with the terms of the Landlord Guarantee Creditor Settlement Agreement or a Landlord Non-Guarantee Creditor Consent and Support Agreement, as applicable.

5.16 Tax Matters

(a) Any terms and conditions of any Affected Claims, any Propco Unaffected Claims or any Property LP Unaffected Claims which purport to deal with the ordering of or grant of priority of payment of principal, interest, penalties or other amounts shall be deemed to be void and ineffective.

(b) Notwithstanding any provisions of the Plan, each Person that receives a distribution, disbursement or other payment pursuant to the Plan shall have sole and exclusive responsibility for the satisfaction and payment of any Tax Obligations

imposed on such Person by any Taxing Authority on account of such distribution, disbursement or payment.

(c) Any payor shall be entitled to deduct and withhold and remit from any distribution, payment or consideration otherwise payable to any Person pursuant to the Plan such amounts as are required (a "**Withholding Obligation**") to be deducted and withheld with respect to such payment under the ITA, or any provision of federal, provincial, territorial, state, local or foreign tax law, in each case, as amended or succeeded. For greater certainty, no distribution, payment or other consideration shall be made to or on behalf of a Person until such Person has delivered to the Monitor and TCC such documentation prescribed by Applicable Law or otherwise reasonably required by TCC as will enable TCC to determine whether or not, and to what extent, such distribution, payment or consideration to such Person is subject to any Withholding Obligation imposed by any Taxing Authority.

(d) All distributions made by TCC on behalf of the Target Canada Entities pursuant to the Plan shall be first in satisfaction of the portion of Affected Claims, Propco Unaffected Claims or Property LP Unaffected Claims, as the case may be, that are not subject to any Withholding Obligation.

(e) To the extent that amounts are withheld or deducted and paid over to the applicable Taxing Authority, such withheld or deducted amounts shall be treated for all purposes of the Plan as having been paid to such Person as the remainder of the payment in respect of which such withholding and deduction were made.

(f) For the avoidance of doubt, it is expressly acknowledged and agreed that the Monitor and any Director or Officer will not hold any assets hereunder, including Cash, or make distributions, payments or disbursements, and no provision hereof shall be construed to have such effect.

5.17 Input Tax Credits

If the Plan Sponsor (or a subsidiary thereof other than the Target Canada Entities) has paid or pays GST/HST on amounts in respect of a Landlord Guarantee Claim for which only the Target Canada Entities will receive Input Tax Credits ("**Plan Sponsor GST/HST Contribution Amounts**"), then in order to reimburse the Plan Sponsor (or a subsidiary thereof other than the Target Canada Entities) for the Plan Sponsor GST/HST Contribution Amounts:

(a) The Plan Sponsor shall provide TCC and the Monitor with satisfactory evidence of the Plan Sponsor GST/HST Contribution Amounts;

(b) All Input Tax Credits (whether or not in respect of payments made by the Plan Sponsor or a subsidiary thereof other than the Target Canada Entities) actually paid to TCC shall be held by TCC in trust in a segregated interest-bearing account for the benefit of Plan Sponsor, and shall be paid to the Plan Sponsor from time to time, until such time as the Plan Sponsor has been fully reimbursed for all Plan Sponsor GST/HST Contribution Amounts; and

(c) Once the Plan Sponsor GST/HST Contribution Amounts have been paid in full, subsequent Input Tax Credits actually paid to TCC shall be contributed by TCC to the TCC Cash Pool Account.

ARTICLE 6
PLAN IMPLEMENTATION

6.1 Corporate Authorizations

The adoption, execution, delivery, implementation and consummation of all matters contemplated under the Plan involving any corporate action of any of the Target Canada Entities will occur and be effective as of the Plan Implementation Date as set out in Section 6.3, and will be authorized and approved under the Plan and by the Court, where appropriate, as part of the Sanction and Vesting Order, in all respects and for all purposes without any requirement of further action by shareholders, partners, Directors or Officers of such Target Canada Entity. All necessary approvals to take actions shall be deemed to have been obtained from the Directors or shareholders or partners of the Target Canada Entity, as applicable.

6.2 Pre-Plan Implementation Date Transactions

The following transactions shall be effected prior to the implementation of the Plan:

(a) Landlord Guarantee Creditor Enhancement Amounts: The Plan Sponsor shall deliver **$25.451 million** to TCC in accordance with Section 4.3; and

(b) Landlord Non-Guarantee Creditor Equalization Amounts: The Plan Sponsor shall deliver **$7.521 million** to TCC in accordance with Section 4.8.

6.3 Plan Implementation Date Transactions

The following transactions, steps, offsets, distributions, payments, disbursements, compromises, releases, discharges to be effected in the implementation of the Plan (the "**Plan Transactions**") shall occur on or after the Plan Implementation Date:

(a) Delivery of Cash to TCC: The Target Canada Entities (other than TCC) shall deliver to TCC the aggregate of all of their Cash in accordance with Article 4;

(b) Establishment of Accounts and Reserves: TCC, with the supervision of the Monitor, shall establish the accounts and reserves in accordance with Article 4;

(c) Subordinations of Intercompany Claims:

(i) In addition to the prior subordination of the NE1 Intercompany Claim, the Subordinated Intercompany Claims shall be and shall be deemed to be subordinated as against all Creditors, in accordance with Section 2.4;

(ii) The amount of the Property LP (Propco) Intercompany Claim equal to the Contributed Claim Amount shall be and shall be deemed to be subordinated as against and in favour of the proven Claims of all Propco Creditors, in accordance with Section 5.1;

(iii) The Plan Sponsor (Propco) Intercompany Claim shall be and shall be deemed to be subordinated as against and in favour of all Propco Unaffected Creditors and the Contributed Claim Amount, in accordance with Section 5.1;

(iv) The TCC (Pre-filing Propco) Intercompany Claim and the TCC (Post-filing Propco) Intercompany Claim shall be and shall be deemed to be subordinated as against and in favour of the Claims of all Propco Unaffected Creditors and the Contributed Claim Amount, in accordance with Section 5.1;

(v) For greater certainty, no other Intercompany Claims (other than those identified in clauses (i) to (iv) above) shall be deemed to be subordinated;

(d) Landlord Guarantee Creditor Enhancement Amount: TCC shall deposit the Landlord Guarantee Enhancement Amount received from the Plan Sponsor into the Landlord Guarantee Enhancement Cash Pool Account in accordance with Section 4.3;

(e) Landlord Non-Guarantee Creditor Equalization Amounts: TCC shall deposit the Landlord Non-Guarantee Creditor Equalization Amounts received from the Plan Sponsor into the Landlord Non-Guarantee Creditor Equalization Cash Pool Account in accordance with Section 4.8;

(f) Payments by TCC: TCC, on behalf of the Target Canada Entities, shall pay the following Administrative Reserve Costs from the Administrative Reserve Account on or after the Plan Implementation Date pursuant to the Sanction and Vesting Order and the CCAA:

(i) all fees and disbursements owing as at the Plan Implementation Date to counsel to the Target Canada Entities, the Monitor, counsel to the Monitor, counsel to the Directors and the Employee Representative Counsel;

(ii) all fees and disbursements owing as at the Plan Implementation Date to Northwest;

(iii) all amounts on account of Government Priority Claims;

(iv) all amounts on account of Employee Priority Claims, to the extent such amounts have not been satisfied from the Employee Trust;

(v) all amounts on account of proven TCC Secured Construction Lien Claims;

(vi) all amounts on account of Cash Management Lender Claims;

(vii) all amounts on account of the Post-Filing Trade Payables;

(viii) all amounts owing to Persons on account of their KERP Claims;

(ix) all fees owing to third-parties on account of the administration of distributions, disbursements and payments under the Plan, including without limitation Bank of America; and

(x) such amounts as may be necessary to fund any final minor adjustments to the Cash pools after establishment thereof in accordance with Section 6.3(b);

(g) Release of CCAA Charges; Continuation of Administration Charge: The Financial Advisor Subordinated Charge, the DIP Lender's Charge, the Liquidation Agent's Charge and Security Interest and the KERP Charge shall be discharged and the Administration Charge and the Directors' Charge shall continue and shall attach solely against the Propco Cash Pool, the TCC Cash Pool, and the Cash Reserves from and after the Plan Implementation Date pursuant to and in accordance with the Sanction and Vesting Order;

(h) Directors and Officers: On the Plan Implementation Date, the Directors and Officers of the Target Canada Entities (other than the current Directors of TCC and Target Canada Pharmacy (Ontario) Corp.) shall and shall be deemed to resign without the requirement of further action on the part of such Directors and Officers, unless any one of them affirmatively elects to remain as a Director or Officer, as applicable, in order to facilitate any Plan Transaction Steps in connection with the wind-down of the Target Canada Entities; for the avoidance of doubt, any deemed resignation pursuant to this Section 6.3(h) or the Sanction and Vesting Order will not disentitle, or otherwise negatively affect, the entitlements of any Directors and Officers pursuant to the terms of any existing employment or retention agreements, which agreements shall continue subject to the terms and conditions thereof;

(i) Distributions from the Propco Cash Pool and the Propco Disputed Claims Reserve: Once TCC, in consultation with the Monitor, has determined that all requisite consents, declarations, certificates or approvals of or by any Governmental Authority as may be considered necessary by TCC or the Monitor in respect of any such distribution have been obtained, TCC shall make distributions from the Propco Cash Pool Account and the Propco Disputed Claims Reserve Account in accordance with Sections 5.2, 5.3, 5.4 and 5.5;

(j) Intercompany Distributions from the Propco Cash Pool: TCC shall deposit, and each of Property LP and the Plan Sponsor shall and shall be deemed to direct that TCC shall deposit, any distributions to be received from TCC out of the Propco Cash Pool Account to the Landlord Guarantee Enhancement Cash Pool Account, the Plan Sponsor Propco Recovery Limit Reserve Account and the TCC Cash Pool Account in the order and in the amounts set out in Section 5.3;

(k) Distributions from the Plan Sponsor Propco Recovery Limit Reserve: TCC shall make distributions from the Plan Sponsor Propco Recovery Limit Reserve Account to the Plan Sponsor in accordance with Section 5.6;

(l) Distributions from the TCC Cash Pool and the TCC Disputed Claims Reserve: Once TCC, in consultation with the Monitor, has determined that all requisite

consents, declarations, certificates or approvals of or by any Governmental Authority as may be considered necessary by TCC or the Monitor in respect of any such distribution have been obtained, TCC shall make distributions from the TCC Cash Pool Account and the TCC Disputed Claims Reserve Account in accordance with Sections 5.7, 5.11 and 5.12;

(m) Disbursement of Landlord Non-Guarantee Creditor Equalization Amounts: On the Initial Distribution Date, TCC, on behalf of the Plan Sponsor, shall fully and finally disburse the Landlord Non-Guarantee Creditor Equalization Amounts in accordance with Section 5.8;

(n) Disbursement of Landlord Guarantee Creditor Base Claim Amounts: On the Initial Distribution Date, TCC, on behalf of the Target Canada Entities, shall fully and finally disburse the Landlord Guarantee Creditor Base Claim Amounts in accordance with Section 5.9;

(o) Disbursement of Landlord Guarantee Enhancement Amounts: On the Initial Distribution Date, TCC, on behalf of the Plan Sponsor, shall fully and finally disburse the Landlord Guarantee Enhancement Amounts in accordance with Section 5.10;

(p) Compromise, Satisfaction and Release: The compromises with the Affected Creditors, the full and final satisfaction of the Propco Unaffected Claims and the Property LP Unaffected Claims and the release of the Released Parties referred to herein shall become effective in accordance with Article 7 of the Plan, and Propco and Property LP shall be deemed to have no claims against the Landlords, including without limitation arising out of the Plan Sponsor Guarantees;

(q) IP Assets: On the Plan Implementation Date, in partial consideration for the Plan Sponsor contributing to the Landlord Guarantee Enhancement Cash Pool and the Plan Sponsor's subordination of the Subordinated Intercompany Claims and the re-contribution of the Property LP (Propco) Intercompany Claim in excess of the Contributed Claim Amount, the IP Assets shall be transferred and shall vest absolutely in the Plan Sponsor (or its designee) free and clear of all Encumbrances pursuant to and in accordance with the Sanction and Vesting Order;

(r) Pharmacy Shares: On the Plan Implementation Date, upon the delivery of the Monitor's certificate as set out in the Pharmacy Share Sale Approval and Vesting Order, the Pharmacy Shares shall be transferred and shall vest absolutely in the Pharmacy Purchaser free and clear of all Encumbrances pursuant to and in accordance with the Pharmacy Share Sale Approval and Vesting Order and the Directors of Target Canada Pharmacy (Ontario) Corp. shall and shall be deemed to resign immediately prior to the closing of such transaction without the requirement of further action;

(s) Disposition of Remaining Assets and Collection of Receivables: The Monitor shall be authorized to collect any outstanding receivables and to market and sell any remaining assets of the Target Canada Entities, and if the sale price for such assets is greater than **$250,000**, such sale shall be approved pursuant to Court Order.

Subject to Section 5.17, the proceeds of any such sales or receivables shall be deposited to the TCC Cash Pool Account;

(t) Maintenance of Target Canada Entities: If necessary to effect the sale of the shares of one or more of the Target Canada Entities, the Monitor shall file all necessary annual information forms or returns under Applicable Law in order to maintain such Target Canada Entities in good standing;

(u) Dissolutions: Immediately prior to the delivery by the Monitor of the Monitor's Plan Completion Certificate, and with the Target Canada Entities' and the Plan Sponsor's consent, steps shall be taken to dissolve any remaining Target Canada Entities in a tax efficient and orderly manner;

(v) Termination of the Employee Trust: Upon delivery of a certificate from the Employee Trust Trustee to the Monitor in the form attached as Schedule "F" (the "**Employee Trust Termination Certificate**") certifying that all outstanding disputes by employee claimants in respect of their entitlements, if any, under the Employee Trust have been fully and finally resolved pursuant to and in accordance with the Employee Trust Claims Resolution Order:

(i) the Employee Trust shall be and shall be deemed to be terminated;

(ii) any remaining Trustee Fees, Trustee Expenses, Administrator Fees and Administrator Expenses (each as defined in the Employee Trust Agreement) shall be paid from any remaining Employee Trust Property to the Employee Trust Trustee and the Employee Trust Administrator, as applicable;

(iii) the Employee Trust Trustee shall satisfy any commitments to pay Eligible Employee Claims (as defined in the Employee Trust Agreement) made under Article 2 of the Employee Trust Agreement with the assistance of the Employee Trust Administrator;

(iv) the Employee Trust Trustee and the Employee Trust Administrator shall deliver an irrevocable joint direction to The Royal Bank of Canada in the form attached as Schedule "G" (the "**Employee Trust Property Joint Direction**") to remit the balance of the Employee Trust Property, net of the payments set out in Sections 6.3(v)(ii) and 6.3(v)(iii), in each case net of any applicable Withholding Obligations, to the Plan Sponsor or its designee in accordance with the written directions to be delivered by the Plan Sponsor to the Employee Trust Trustee and the Employee Trust Administrator one (1) Business Day prior to the date of delivery of the Employee Trust Property Joint Direction, provided however that the Employee Trust Trustee and the Employee Trust Administrator shall not be required to deliver such direction until all requisite consents, declarations, certificates or approvals of or by any Governmental Authority as may be considered necessary by the Employee Trust Trustee and the Employee Trust Administrator have been obtained; and

(v) the Employee Trust Trustee and the Employee Trust Administrator shall be and shall be deemed to be fully and finally released and discharged from all of their respective obligations under the Employee Trust Agreement.

ARTICLE 7
RELEASES

7.1 Plan Releases

(a) On the Plan Implementation Date, each of the Target Canada Entities, NE1 and their respective Directors, Officers, current and former employees, advisors, legal counsel and agents, including the Liquidation Agent, Lazard and Northwest (being referred to individually as a "**Target Canada Released Party**") shall be released and discharged from any and all demands, claims, actions, applications, causes of action, counterclaims, suits, debts, sums of money, accounts, covenants, damages, judgments, orders, including for injunctive relief or specific performance and compliance orders, expenses, executions, Encumbrances and other recoveries on account of any liability, obligation, demand or cause of action of whatever nature which any Creditor, Affected Creditor, Propco Unaffected Creditor, Property LP Unaffected Creditor or other Person may be entitled to assert, including any and all Claims in respect of the payment and receipt of proceeds, statutory liabilities of the Directors, Officers and employees of the Target Canada Released Parties and any alleged fiduciary or other duty (whether such employees are acting as a Director, Officer or employee), whether known or unknown, matured or unmatured, foreseen or unforeseen, existing or hereafter arising, based in whole or in part on any omission, transaction, duty, responsibility, indebtedness, liability, obligation, dealing or other occurrence existing or taking place on or prior to the later of the Plan Implementation Date and the date on which actions are taken to implement the Plan that are in any way relating to, arising out of or in connection with the Claims, the Business whenever or however conducted, the Plan, the CCAA Proceedings, or any Claim that has been barred or extinguished by the Claims Procedure Order and all claims arising out of such actions or omissions shall be forever waived and released (other than the right to enforce the Target Canada Entities' obligations under the Plan or any related document), all to the full extent permitted by Applicable Law, provided that nothing herein shall release or discharge (i) any Target Canada Released Party if such Target Canada Released Party is judged by the expressed terms of a judgment rendered on a final determination on the merits to have committed criminal, fraudulent or other wilful misconduct or (ii) the Directors with respect to matters set out in section 5.1(2) of the CCAA.

(b) On the Plan Implementation Date, the Monitor, A&M, and their respective current and former directors, officers and employees, counsel to the Directors, Pharmacists' Representative Counsel, the Consultative Committee Members and all of their respective advisors, legal counsel and agents (being referred to individually as a "**Third Party Released Party**") shall be released and discharged from any and all demands, claims, actions, applications, causes of action, counterclaims, suits, debts, sums of money, accounts, covenants, damages, judgments, orders, including for injunctive relief or specific performance and compliance orders, expenses, executions, Encumbrances and other recoveries on

account of any liability, obligation, demand or cause of action of whatever nature which any Creditor, Affected Creditor, Propco Unaffected Creditor, Property LP Unaffected Creditor or other Person may be entitled to assert, whether known or unknown, matured or unmatured, foreseen or unforeseen, existing or hereafter arising, based in whole or in part on any omission, transaction, duty, responsibility, indebtedness, liability, obligation, dealing or other occurrence existing or taking place on or prior to the later of the Plan Implementation Date and the date on which actions are taken to implement the Plan that are in any way relating to, arising out of or in connection with the Claims, the Business whenever or however conducted, the Plan, the CCAA Proceedings, or any Claim that has been barred or extinguished by the Claims Procedure Order and all claims arising out of such actions or omissions shall be forever waived and released (other than the right to enforce the Monitor's obligations under the Plan or any related document), all to the full extent permitted by Applicable Law, provided that nothing herein shall release or discharge any Third Party Released Party if such Third Party Released Party is judged by the expressed terms of a judgment rendered on a final determination on the merits to have committed criminal, fraudulent or other wilful misconduct.

(c) On the Plan Implementation Date, the Plan Sponsor, the Plan Sponsor Subsidiaries, the HBC Entities and their current and former directors, officers and employees and their respective advisors, legal counsel and agents (being referred to individually as a "**Plan Sponsor Released Party**"):

(i) shall not be released hereunder from Landlord Guarantee Claims; and

(ii) shall be released and discharged from any and all demands, claims, actions, applications, causes of action, counterclaims, suits, debts, sums of money, accounts, covenants, damages, judgments, orders, including for injunctive relief or specific performance and compliance orders, expenses, executions, Encumbrances and other recoveries on account of any liability, obligation, demand or cause of action of whatever nature which any Creditor, Affected Creditor, Propco Unaffected Creditor, Property LP Unaffected Creditor or other Person (excluding a Landlord Guarantee Creditor in respect of its Landlord Guarantee Claim) may be entitled to assert, whether known or unknown, matured or unmatured, foreseen or unforeseen, existing or hereafter arising, based in whole or in part on any omission, transaction, duty, responsibility, indebtedness, liability, obligation, dealing or other occurrence existing or taking place on or prior to the later of the Plan Implementation Date and the date on which actions are taken to implement the Plan that are in any way relating to, arising out of or in connection with the Claims, the Business whenever or however conducted, the Plan, the CCAA Proceedings, or any Claim that has been barred or extinguished by the Claims Procedure Order and all claims arising out of such actions or omissions shall be forever waived and released (other than the right to enforce the Plan Sponsor's obligations under the Plan or any related document), all to the full extent permitted by Applicable Law, provided that nothing herein shall release or discharge any Plan Sponsor Released Party if such Plan Sponsor Released Party is judged by the expressed terms of a

judgment rendered on a final determination on the merits to have committed criminal, fraudulent or other wilful misconduct.

For greater certainty, the Plan Sponsor shall not be released from any indemnity or guarantee provided by the Plan Sponsor in favour of any Director, Officer or employee.

(d) Immediately upon the delivery of the Employee Trust Termination Certificate, the Employee Trust Administrator and its current and former directors, officers and employees, the Employee Trust Trustee, Employee Representative Counsel, the Employee Representatives and all of their respective advisors, legal counsel and agents (being referred to individually as an "**Employee Trust Released Party**", and collectively together with each of the Target Canada Released Parties, the Third Party Released Parties and the Plan Sponsor Released Parties, the "**Released Parties**") shall be released and discharged from any and all demands, claims, actions, applications, causes of action, counterclaims, suits, debts, sums of money, accounts, covenants, damages, judgments, orders, including for injunctive relief or specific performance and compliance orders, expenses, executions, Encumbrances and other recoveries on account of any liability, obligation, demand or cause of action of whatever nature which any Creditor, Affected Creditor, Propco Unaffected Creditor, Property LP Unaffected Creditor or other Person may be entitled to assert, whether known or unknown, matured or unmatured, foreseen or unforeseen, existing or hereafter arising, based in whole or in part on any omission, transaction, duty, responsibility, indebtedness, liability, obligation, dealing or other occurrence existing or taking place on or prior to the later of the Plan Implementation Date and the date on which actions are taken to implement the Plan that are in any way relating to, arising out of or in connection with the Claims, the Business whenever or however conducted, the Plan, the CCAA Proceedings, or any Claim that has been barred or extinguished by the Claims Procedure Order or the Employee Trust Claims Resolution Order and all Claims arising out of such actions or omissions shall be forever waived and released (other than the right to enforce the Employee Trust Trustee's and the Employee Trust Administrator's obligations under the Plan or any related document), all to the full extent permitted by Applicable Law, provided that nothing herein shall release or discharge any Employee Trust Released Party if such Employee Trust Released Party is judged by the expressed terms of a judgment rendered on a final determination on the merits to have committed criminal, fraudulent or other wilful misconduct.

(e) The Sanction and Vesting Order will enjoin the prosecution, whether directly, derivatively or otherwise, of any Claim, Propco Unaffected Claim, Property LP Unaffected Claim, obligation, suit, judgment, damage, demand, debt, right, cause of action, liability or interest released, discharged, compromised or terminated pursuant to the Plan.

(f) Nothing in the Plan shall be interpreted as restricting the application of Section 21 of the CCAA.

ARTICLE 8
COURT SANCTION, CONDITIONS PRECEDENT AND IMPLEMENTATION

8.1 Application for Sanction and Vesting Order

If the Required Majority of the Affected Creditors approves the Plan, the Target Canada Entities shall apply for the Sanction and Vesting Order on or before the date set in the Meeting Order for the hearing of the Sanction and Vesting Order or such later date as the Court may set.

8.2 Sanction and Vesting Order

The Sanction and Vesting Order will have effect from and after the Effective Time on the Plan Implementation Date, and shall, among other things:

(a) declare that (i) the Plan has been approved by the Required Majority of Affected Creditors with Proven Claims in conformity with the CCAA; (ii) the Target Canada Entities have complied with the provisions of the CCAA and the Orders of the Court made in these CCAA Proceedings in all respects; (iii) the Court is satisfied that the Target Canada Entities have not done or purported to do anything that is not authorized by the CCAA; and (iv) the Plan and the Plan Transaction Steps contemplated thereby are fair and reasonable;

(b) declare that the Plan and all associated steps, compromises, transactions, arrangements, releases and reorganizations effected thereby are approved, binding and effective on the Target Canada Entities, the Plan Sponsor, all Affected Creditors, the Released Parties and all other Persons and parties affected by the Plan as of the Effective Time;

(c) authorize and direct the Employee Trust Trustee and the Employee Trust Administrator to remit the balance of the Employee Trust Property, net of the payments set out in Sections 6.3(v)(ii) and 6.3(v)(iii) and any applicable Withholding Obligations, to the Plan Sponsor or its designee upon delivery by the Employee Trust Trustee and the Employee Trust Administrator of the Employee Trust Property Joint Direction to The Royal Bank of Canada pursuant to and in accordance with the Plan;

(d) grant to the Monitor, in addition to its rights and obligations under the CCAA, the powers, duties and protections contemplated by and required under the Plan and authorize and direct the Monitor to perform its duties and fulfil its obligations under the Plan to facilitate the implementation thereof;

(e) authorize the Monitor to take all such actions to market and sell any remaining assets and pursue any outstanding accounts receivable owing to any of the Target Canada Entities, or to assist the Target Canada Entities with respect thereto;

(f) declare that all right, title and interest in and to the IP Assets have vested absolutely in the Plan Sponsor (or its designee), free and clear of all Encumbrances;

(g) direct the Plan Sponsor to maintain the books and records of the Target Canada Entities for purposes of assisting the Monitor in the completion of the resolution of Disputed Claims and Claims of the Propco Creditors and the Property LP Creditors and the orderly wind-down of the Target Canada Entities;

(h) confirm the releases of the Released Parties as set out in Section 7.1;

(i) declare that any Affected Claim, any Propco Unaffected Claim and any Property LP Unaffected Claim for which a Proof of Claim has not been filed by the Claims Bar Date in accordance with the Claims Procedure Order shall be forever barred and extinguished;

(j) declare that the stays of proceedings in favour of the Landlords pursuant to the Orders of the Court set out in Schedule "H" (the "**Co-Tenancy Stay Schedule**") shall have terminated on the dates set out in the Co-Tenancy Stay Schedule;

(k) deem the remaining Directors and Officers of the Target Canada Entities (other than the current Directors of TCC or Target Canada Pharmacy (Ontario) Corp.) to have resigned without replacement on the Effective Time on the Plan Implementation Date, unless such Persons affirmatively elect to remain as a Director or Officer in order to facilitate any Plan Transaction Steps in connection with the wind-down of any of the Target Canada Entities;

(l) deem the Directors of Target Canada Pharmacy (Ontario) Corp. to have resigned in accordance with Section 6.3(r);

(m) declare that all distributions or payments by TCC, in each case on behalf of the Target Canada Entities, to the Affected Creditors with Proven Claims, to Propco Unaffected Creditors and to the Property LP Unaffected Creditors under the Plan are for the account of the Target Canada Entities and the fulfillment of their respective obligations under the Plan;

(n) declare that in no circumstance will the Monitor have any liability for any of the Target Canada Entities' tax liabilities regardless of how or when such liability may have arisen;

(o) declare that TCC shall be authorized, in connection with the making of any payment or distribution, and TCC and the Monitor shall be authorized, in connection with the taking of any step or transaction or performance of any function under or in connection with the Plan, to apply to any Governmental Authority for any consent, authorization, certificate or approval in connection therewith;

(p) declare that, in carrying out the terms of the Sanction and Vesting Order and the Plan, (i) the Monitor shall benefit from all the protections given to it by the CCAA, the Initial Order and any other Order in the CCAA Proceedings, and as an officer of the Court, including the Stay of Proceedings in its favour; (ii) the Monitor shall incur no liability or obligation as a result of carrying out the provisions of the Sanction and Vesting Order and/or the Plan; and (iii) the Monitor shall be entitled to rely on the books and records of the Target Canada Entities and any information

provided by any of the Target Canada Entities without independent investigation and shall not be liable for any claims or damages resulting from any errors or omissions in such books, records or information;

(q) provide for discharge of the CCAA Charges (other than the Administration Charge and the Directors' Charge) and the continuation of the Administration Charge and the Directors' Charge which shall survive the Plan Implementation Date;

(r) approve the Monitor's form of Notice of Final Distribution;

(s) authorize the Target Canada Entities (at their sole election) to seek an order of any court of competent jurisdiction to recognize the Plan and the Sanction and Vesting Order and to confirm the Plan and the Sanction and Vesting Order as binding and effective in any appropriate foreign jurisdiction;

(t) declare that the Target Canada Entities and the Monitor may apply to the Court from time to time for advice and direction in respect of any matters arising from or under the Plan;

(u) approve the form of the Employee Trust Termination Certificate, and declare that upon the delivery thereof, the Monitor shall file the Employee Trust Termination Certificate with the Court and, immediately upon such filing:

(i) the Employee Trust Trustee shall be deemed to be discharged from its duties as Employee Trust Trustee and released of all claims relating to its activities as Employee Trust Trustee; and

(ii) the Employee Trust Administrator shall be deemed to be discharged from its duties as Employee Trust Administrator and released of all claims relating to its activities as Employee Trust Trustee; and

(v) approve the form of the Monitor's Plan Completion Certificate, and declare that the Monitor, in its capacity as Monitor, following written notice from TCC pursuant to Section 5.12(d) that TCC has completed its duties to effect distributions, disbursements and payments in accordance with the Plan, shall file with the Court the Monitor's Plan Completion Certificate stating that all of its duties and the Target Canada Entities' duties under the Plan and the Orders have been completed, and thereafter the Monitor shall seek an Order, *inter alia*, discharging and releasing the Monitor from its duties as Monitor in the CCAA Proceedings, releasing the Target Canada Entities and any Directors and Officers holding such office following the Plan Implementation Date and their advisors, from all claims relating to the implementation of the Plan and releasing the Administration Charge and the Directors' Charge.

8.3 Conditions Precedent to Implementation of the Plan

The implementation of the Plan shall be conditional upon the fulfilment or waiver, where applicable, of the following conditions precedent by the date specified therefor, provided however

that any waiver of any such conditions precedent shall require the consent of the Plan Sponsor and the Monitor acting reasonably:

(a) each of the Landlord Guarantee Creditors and the Plan Sponsor shall have executed and delivered the Landlord Guarantee Creditor Settlement Agreement and each of the Landlord Non-Guarantee Creditors and TCC shall have executed and delivered a Landlord Non-Guarantee Creditor Consent and Support Agreement(s), which agreements shall be in full force and effect;

(b) the Meeting Order shall have been granted by the Court on or before April 21, 2016, or such later date as shall be acceptable to TCC in consultation with the Monitor, and shall have become a Final Order;

(c) the Creditors' Meeting to consider and vote on the Plan shall have been convened by the date set by the Meeting Order or such later date and shall be acceptable to TCC in consultation with the Monitor;

(d) the Target Canada Entities shall have satisfied their respective Post-Filing Trade Payables in the ordinary course or provision shall have been made in respect thereof in the Administrative Reserve to the satisfaction of the Monitor;

(e) all material consents, declarations, rulings, certificates or approvals of or by any Governmental Authority as may be considered necessary by the Target Canada Entities, the Plan Sponsor and the Monitor in respect of the Plan Transaction Steps shall have been obtained;

(f) the Plan shall have been approved by the Required Majority of the Affected Creditors forming the Unsecured Creditors' Class at the Creditors' Meeting;

(g) the Sanction and Vesting Order shall have been granted by the Court by June 6, 2016, or such later date as shall be acceptable to TCC, in consultation with the Monitor, in form satisfactory to the Target Canada Entities, the Plan Sponsor and the Monitor, and shall have become a Final Order; and

(h) the Plan Implementation Date shall have occurred by the date that is seven (7) days from the date on which the Sanction and Vesting Order becomes a Final Order, which in no event shall be later than July 29, 2016.

8.4 Monitor's Certificate

Upon delivery of written notice from the Target Canada Entities and the Plan Sponsor of the fulfilment or waiver of the conditions precedent to implementation of the Plan as set out in Section 8.3 of the Plan, the Monitor shall deliver the Monitor's Plan Implementation Certificate to the Target Canada Entities. Following the Plan Implementation Date, the Monitor shall file such certificate with the Court and shall post a copy of same on the Website.

ARTICLE 9
GENERAL

9.1 Binding Effect

On the Plan Implementation Date, or as otherwise provided in the Plan:

(a) the Plan will become effective at the Effective Time and the Plan Transaction Steps will be implemented;

(b) the treatment of Affected Claims, Propco Unaffected Claims, Property LP Unaffected Claims and the TCC Secured Construction Lien Claims under the Plan shall be final and binding for all purposes and enure to the benefit of the Target Canada Entities, the Plan Sponsor, all Affected Creditors, the Propco Unaffected Creditors, the Property LP Unaffected Creditors, the holders of TCC Secured Construction Lien Claims, the Released Parties and all other Persons and parties named or referred to in, or subject to, the Plan and their respective heirs, executors, administrators and other legal representatives, successors and assigns;

(c) all Affected Claims shall be and shall be deemed to be forever discharged and released, and all Propco Unaffected Claims, Property LP Unaffected Claims and TCC Secured Construction Lien Claims shall be and shall be deemed to be fully satisfied, discharged and released, excepting only the obligations to make distributions in respect of such Affected Claims, Propco Unaffected Claims, Property LP Unaffected Claims and TCC Secured Construction Lien Claims in the manner and to the extent provided for in the Plan; provided, however, that the Subordinated Intercompany Claims shall be discharged and released in a manner determined by the Plan Sponsor and the Target Canada Entities on or prior to the Plan Implementation Date;

(d) each Person named or referred to in, or subject to, the Plan shall be deemed to have consented and agreed to all of the provisions of the Plan, in its entirety;

(e) each Person named or referred to in, or subject to, the Plan shall be deemed to have executed and delivered to the Target Canada Entities and the Plan Sponsor all consents, releases, directions, assignments and waivers, statutory or otherwise, required to implement and carry out the Plan in its entirety; and

(f) each Person named or referred to in, or subject to, the Plan shall be deemed to have received from the Target Canada Entities and the Plan Sponsor all statements, notices, declarations and notifications, statutory or otherwise, required to implement and carry out the Plan in its entirety.

9.2 Claims Bar Date

Nothing in this Plan extends or shall be interpreted as extending or amending the Claims Bar Date, or gives or shall be interpreted as giving any rights to any Person in respect of Claims that have been barred or extinguished pursuant to the Claims Procedure Order.

9.3 Deeming Provisions

In the Plan, the deeming provisions are not rebuttable and are conclusive and irrevocable.

9.4 Interest and Fees

Interest shall not accrue or be paid on Affected Claims after the Filing Date, and no holder of an Affected Claim shall be entitled to interest accruing nor to fees and expenses incurred in respect of an Affected Claim on or after the Filing Date and any Claims in respect of interest accruing or fees and expenses incurred on or after the Filing Date shall be deemed to be forever extinguished and released. For greater certainty, interest (if any) shall continue to accrue on Propco Unaffected Claims and Property LP Unaffected Claims in accordance with the terms of the applicable contract.

9.5 Non-Consummation

The Target Canada Entities reserve the right to revoke or withdraw the Plan at any time prior to the Plan Sanction Date with the consent of the Plan Sponsor. If the Target Canada Entities revoke or withdraw the Plan, or if the Sanction and Vesting Order is not issued or if the Plan Implementation Date does not occur, (a) the Plan (including all Plan Transaction Steps) shall be null and void in all respects, (b) any settlement or compromise embodied in the Plan (including the subordinations and/or re-contributions of any Intercompany Claims set out herein), or any document or agreement executed pursuant to or in connection with the Plan shall be deemed to be null and void, and (c) nothing contained in the Plan, and no acts taken in preparation for consummation of the Plan, shall (i) constitute or be deemed to constitute a waiver or release of any Claims, Propco Unaffected Claims or Property LP Unaffected Claims by or against any of the Target Canada Entities or any other Person, (ii) prejudice in any manner the rights of the Target Canada Entities, the Plan Sponsor or any other Person in any further proceedings involving any of the Target Canada Entities or Intercompany Claims or (iii) constitute an admission of any sort by any of the Target Canada Entities, the Plan Sponsor or any other Person.

9.6 Modification of the Plan

(a) The Target Canada Entities reserve the right, at any time and from time to time, with the consent of the Monitor and the Plan Sponsor, both prior to and during the Creditors' Meeting or after the Creditors' Meeting, to amend, restate, modify and/or supplement the Plan; provided (i) if made prior to or at the Creditors' Meeting, such amendment, restatement, modification or supplement shall be communicated to Affected Creditors in the manner required by the Meeting Order and (ii) if made following the Creditors' Meeting, such amendment, restatement, modification or supplement shall be approved by the Court following notice to the Affected Creditors.

(b) Notwithstanding Section 9.6(a), any amendment, restatement, modification or supplement to the Plan may be made by the Target Canada Entities, with the consent of the Monitor and the Plan Sponsor or pursuant to an Order of the Court, at any time and from time to time, provided that it concerns a matter which (i) is of an administrative nature required to better give effect to the implementation of the Plan and the Sanction and Vesting Order or (ii) to cure any errors, omissions or

ambiguities, and in either case is not materially adverse to the financial or economic interests of the Affected Creditors.

(c) Any amended, restated, modified or supplementary Plan or Plans filed with the Court and, if required by this Section, approved by the Court shall, for all purposes, be and be deemed to be a part of, and incorporated in, the Plan.

9.7 Paramountcy

Except with respect to the Unaffected Claims, from and after the Effective Time on the Plan Implementation Date, any conflict between:

(a) the Plan; and

(b) the covenants, warranties, representations, terms, conditions, provisions or obligations, expressed or implied, of any contract, mortgage, security agreement, indenture, trust indenture, loan agreement, commitment letter, agreement for sale, bylaws of the Target Canada Entities, lease or other agreement, written or oral and any and all amendments or supplements thereto existing between any Person and the Target Canada Entities as at the Plan Implementation Date;

will be deemed to be governed by the terms, conditions and provisions of the Plan and the Sanction and Vesting Order, which shall take precedence and priority.

9.8 Severability of Plan Provisions

If, prior to the Plan Sanction Date, any term or provision of the Plan is held by the Court to be invalid, void or unenforceable, the Court, at the request of the Target Canada Entities and with the consent of the Monitor and the Plan Sponsor, shall have the power to either (a) sever such term or provision from the balance of the Plan and provide the Target Canada Entities with the option to proceed with the implementation of the balance of the Plan as of and with effect from the Plan Implementation Date, or (b) alter and interpret such term or provision to make it valid or enforceable to the maximum extent practicable, consistent with the original purpose of the term or provision held to be invalid, void or unenforceable, and such term or provision shall then be applied as altered or interpreted. Notwithstanding any such holding, alteration or interpretation, and provided that the Target Canada Entities proceed with the implementation of the Plan, the remainder of the terms and provisions of the Plan shall remain in full force and effect and shall in no way be affected, impaired or invalidated by such holding, alteration or interpretation.

9.9 Responsibilities of the Monitor

The Monitor is acting and will continue to act in all respects in its capacity as Monitor in the CCAA Proceedings with respect to the Target Canada Entities and not in its personal or corporate capacity, including without limitation supervising the establishment and administration of the TCC Cash Pool, the Propco Cash Pool, the Landlord Guarantee Creditor Base Claim Cash Pool, the Landlord Guarantee Enhancement Cash Pool, the Landlord Non-Guarantee Creditor Equalization Cash Pool, the Plan Sponsor Propco Recovery Limit Reserve and the Cash Reserves (including any adjustments with respect to same) and establishing any of the Distribution Dates, Effective Time or the timing or sequence of the Plan Transaction Steps. The Monitor will not be responsible or

liable whatsoever for any obligations of the Target Canada Entities or the Plan Sponsor. The Monitor will have the powers and protections granted to it by the Plan, the CCAA, the Initial Order, the Meeting Order, the Sanction and Vesting Order and any other Order made in the CCAA Proceedings.

9.10 Different Capacities

Persons who are affected by the Plan may be affected in more than one capacity. Unless expressly provided herein to the contrary, a Person will be entitled to participate hereunder in each such capacity. Any action taken by a Person in one capacity will not affect such Person in any other capacity, unless expressly agreed by a Person in writing or unless its Claims overlap or are otherwise duplicative.

9.11 Notices

Any notice or other communication to be delivered hereunder must be in writing and reference the Plan and may, subject as hereinafter provided, be made or given by personal delivery, ordinary mail or by email addressed to the respective Parties as follows:

(a) If to the Target Canada Entities:

Target Canada Co.
c/o Osler, Hoskin & Harcourt LLP
Box 50, 1 First Canadian Place
100 King Street West
Toronto, ON M5X 1B8

Attention: Aaron Alt
Email: aaron.alt@target.com

with a copy to:

Osler, Hoskin & Harcourt LLP
Box 50, 1 First Canadian Place
100 King Street West
Toronto, ON M5X 1B8

Attention: Tracy C. Sandler
Email: tsandler@osler.com

(b) If to the Plan Sponsor:

Target Corporation
1000 Nicollet Mall
TPS-3155
Minneapolis, MN 55403

Attention: Corey Haaland
Email: corey.haaland@target.com

with a copy to:

Faegre Baker Daniels LLP
2200 Wells Fargo Center
90 S. Seventh Street
Minneapolis, MN 55402

Attention: Dennis M. Ryan
Email: dennis.ryan@faegrebd.com

with a copy to:

Davies Ward Phillips & Vineberg LLP
155 Wellington Street West
Toronto, ON M5V 3J7

Attention: Jay A. Swartz
Email: jswartz@dwpv.com

(c) If to the Monitor or the Employee Trust Administrator:

Alvarez & Marsal Canada Inc.
Royal Bank Plaza, South Tower
200 Bay Street, Suite 2900
PO Box 22
Toronto, ON M5J 2J1

Attention: Douglas R. McIntosh / Alan J. Hutchens
Email: dmcintosh@alvarezandmarsal.com / ahutchens@alvarezandmarsal.com

with a copy to:

Goodmans LLP
Bay Adelaide Centre
333 Bay Street, Suite 3400
Toronto, ON M5H 2S7

Attention: Jay A. Carfagnini / Melaney Wagner
Email: jcarfagnini@goodmans.ca / mwagner@goodmans.ca

(d) If to the Employee Trust Trustee:

Hon. John D. Ground
Amicus Chambers
141 Adelaide Street West
11th Floor
Toronto, ON M5H 3L5

Email: jground@NeesonChambers.com

with a copy to:

Lax O'Sullivan Lisus Gottlieb LLP
145 King Street West, Suite 2750
Toronto, ON M5H 1J8

Attention: Terrence O'Sullivan
Email: tosullivan@counsel-toronto.com

or to such other address as any party may from time to time notify the others in accordance with this Section. Any such communication so given or made shall be deemed to have been given or made and to have been received on the day of delivery if delivered, or on the day of sending by means of recorded electronic communication, provided that such day in either event is a Business Day and the communication is so delivered or sent before 5:00 p.m. on such day. Otherwise, such communication shall be deemed to have been given and made and to have been received on the next following Business Day.

9.12 Further Assurances

Each of the Persons named or referred to in, or subject to, the Plan will execute and deliver all such documents and instruments and do all such acts and things as may be necessary or desirable to carry out the full intent and meaning of the Plan and to give effect to the transactions contemplated herein.

DATED as of the 19th day of May, 2016.

SCHEDULE "A"
INTERCOMPANY CLAIMS[1]

Claim #	Original Claimant	Debtor Company	Currency	Claim ($)	Proposed Adjustment	Recalculated Claim	Contingent Claim	Defined Plan Term	Plan Treatment
Intercompany Claim									
Claim #1	NE1	TCC	CAD	3,068,729,438	-	3,068,729,438		NE1 Intercompany Claim	Fully subordinated
Claim #2									
2A	TBI	TCC	USD	23,573,542	(4,786,473)	18,787,069		N/A	Distribution from TCC Cash Pool as Affected Creditor
2B	TBI	TCC	USD	37,502,539	(37,502,539)	-		N/A	N/A
Claim #3	TCSI	TCC	USD	2,778,278	(613,869)	2,164,409		N/A	Distribution from TCC Cash Pool as Affected Creditor
Claim #4									
4A	TC	Prop LLC	USD	89,079,107	-	89,079,107		Plan Sponsor (Propco) Intercompany Claim	Recovery limited (distribution up to Plan Sponsor Propco Recovery Limit in accordance with Section 5.6)
4B	TC	TCC	USD	541,404	(36,585)	504,818		N/A	Distribution from TCC Cash Pool as Affected Creditor

[1] Intercompany Claims information is derived from the Intercompany Claims Report. Amounts set out herein are exclusive of applicable GST/HST or provincial sales tax.

Claim #	Original Claimant	Debtor Company	Currency	Claim ($)	Proposed Adjustment	Recalculated Claim	Contingent Claim	Defined Plan Term	Plan Treatment
4C	TC	TCC	USD	559,373	(559,373)	-		N/A	N/A
Leasehold Arrangements Claims									
Claim #5									
5A	Prop LP	Prop LLC	CAD	1,449,577,927	-	1,449,577,927		Property LP (Propco) Intercompany Claim	Partially subordinated (see Section 5.3 of the Plan)
5B	Prop LP	TCC	CAD	87,748,817	(4,886,996)	82,861,821		Property LP (TCC) Intercompany Claim	Distribution from TCC Cash Pool as Affected Creditor
5C	Prop LP	Prop LLC					Contingent	N/A	N/A
5D	Prop LP	TCC					Contingent	N/A	N/A
Claim #6									
6A	Prop LLC	TCC	CAD	27,254,109 (after netting claim 7A, being 46,873,620 on a gross basis)	6,978,418	34,232,528 (after netting claim 7A, being 45, 852,897 on a gross basis)		Propco (Pre-filing TCC) Intercompany Claim	Fully subordinated
6B	Prop LLC	TCC	CAD	1,911,494,242	(554,738,191)	1,356,756,051		Propco Intercompany Claim	Fully subordinated
6C	Prop LLC	TCC	CAD	37,347,552 (after netting claim 7B, being 43,651,173 on a gross basis)	(787,729)	36,559,823 (after netting claim 7B, being 43,526,186 on a gross basis)		Propco (Post-filing TCC) Intercompany Claim	Fully subordinated

Claim #	Original Claimant	Debtor Company	Currency	Claim ($)	Proposed Adjustment	Recalculated Claim	Contingent Claim	Defined Plan Term	Plan Treatment
Claim #7									
7A	TCC	Prop LLC	CAD	19,619,511	(7,999,142)	11,620,369	Contingent	TCC (Pre-filing Propco) Intercompany Claim	Partially subordinated (see Section 5.3 of the Plan)
7B	TCC	Prop LLC	CAD	6,303,621	662,742	6,966,363	Contingent	TCC (Post-filing Propco) Intercompany Claim	Partially subordinated (see Section 5.3 of the Plan)
7C	TCC	Prop LP	CAD	528,730	-	528,730	Contingent	N/A	Netted against Intercompany Claim 5B

SCHEDULE "B"

Domain Names

alliesforconsumerdigitalsafety.ca
avaandviv.ca
avaviv.ca
brightspotmobile.ca
brightspotphone.ca
bullseyemobilesolutions.ca
bullseyepharmacy.ca
bullseyeshoprequests.ca
bullseyespecialrequests.ca
bullseyesubscription.ca
bullseyesubscriptions.ca
bullseyeticket.ca
bullseyetickets.ca
canadapartnersonline.ca
consumerdigitalsafetyallies.ca
consumerdigitalsafetyconsortium.ca
digitalsafetyallies.ca
dites-le-nous-target.ca
domaniedelarcher.ca
expectmorepayless.ca
garde-marche.ca
hopethop.ca
larchermaraicher.ca
marchefute.ca
moretaylor.ca
mybrightspot.ca
partenairescanadiensenligne.ca
partnersonlinecanada.ca
pharmacyevents.ca
redperk.ca
redperks.ca
reellementessentiel.ca
savoreveryday.ca
savoureveryday.ca
smith-hawken.ca
smithhawken.ca
smithnhawken.ca
suttonanddodge.ca

takechargeofeducation.ca
target-ceo.ca
targetcartwheel.ca
targetceo.ca
targetexpress.ca
targetget.ca
targetlocation.ca
targetspoton.ca
targetsubscription.ca
targetsubscriptions.ca
tellbullseye.ca
telltarget.ca
telltgt.ca
tevolio.ca
trouvezmieuxpayezmoins.ca
upandup.ca
upandupbrand.ca
upup.ca
upupbrand.ca
wellbeingdreams.ca
winecube.ca
yourtarget.ca

SCHEDULE "C"

Meeting Order

Court File No. CV-15-10832-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE	)	WEDNESDAY, THE 13TH
REGIONAL SENIOR JUSTICE	)	DAY OF APRIL, 2016
MORAWETZ	)	

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TARGET CANADA CO., TARGET CANADA HEALTH CO., TARGET CANADA MOBILE GP CO., TARGET CANADA PHARMACY (BC) CORP., TARGET CANADA PHARMACY (ONTARIO) CORP., TARGET CANADA PHARMACY CORP., TARGET CANADA PHARMACY (SK) CORP., and TARGET CANADA PROPERTY LLC (collectively the "**Applicants**")

MEETING ORDER

THIS MOTION, made by the Applicants and the partnerships listed on Schedule "A" hereto (together with the Applicants, the "**Target Canada Entities**") pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. c-36, as amended (the "**CCAA**") for an order, *inter alia*, (a) accepting the filing of an Amended and Restated Joint Plan of Compromise and Arrangement pursuant to the CCAA filed by the Target Canada Entities dated April 6, 2016 (the "**Plan**"), (b) authorizing the Target Canada Entities to establish one class of Affected Creditors for the purpose of considering and voting on the Plan, (c) authorizing the Target Canada Entities to

call, hold and conduct a meeting of the Affected Creditors (the "**Creditors' Meeting**") to consider and vote on a resolution to approve the Plan; (d) approving the procedures to be followed with respect to the calling and conduct of the Creditors' Meeting; and (e) setting the date for the hearing of the Target Canada Entities' motion seeking sanction of the Plan, was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the Affidavit of Mark J. Wong sworn April 6, 2016 (the "**Wong Affidavit**"), and the exhibits thereto and the Twenty-Sixth Report of the Monitor, and on hearing the submissions of respective counsel for the Target Canada Entities, the Monitor, and such other counsel as were present, and on being advised that the Service List was served with the Motion Record herein:

SERVICE

1. THIS COURT ORDERS that the time for service of the Notice of Motion and the Motion Record herein is hereby abridged and validated so that this Motion is properly returnable today and that service thereof upon any interested party other than the persons served with the Motion Record is hereby dispensed with.

2. THIS COURT ORDERS that any capitalized terms not otherwise defined in this Meeting Order shall have the meanings ascribed to them in the Plan.

AMENDED AND RESTATED JOINT PLAN OF COMPROMISE AND ARRANGEMENT

3. THIS COURT ORDERS that the Plan is hereby accepted for filing, and the Target Canada Entities are hereby authorized to seek approval of the Plan from the Affected Creditors in the manner set forth herein.

4. THIS COURT ORDERS that the Target Canada Entities, with the consent of the Plan Sponsor and the Monitor, be and they are hereby authorized to make and to file a modification or restatement of, or amendment or supplement to, the Plan (each a "**Plan Modification**") prior to or at the Creditors' Meeting, in which case any such Plan Modification shall, for all purposes, be and be deemed to form part of and be incorporated into the Plan. The Target Canada Entities shall give notice of any such Plan Modification at the Creditors' Meeting prior to the vote being taken to approve the Plan. The Target Canada Entities may give notice of any such Plan Modification at or before the Creditors' Meeting by notice which shall be sufficient if, in the case of notice at the Creditors' Meeting, given to those Affected Creditors present at such meeting in person or by Proxy and, in the case of notice before the Creditors' Meeting, provided to those Persons listed on the service list posted on the Website (as amended from time to time, the "**Service List**"). The Monitor shall forthwith post on the Website any such Plan Modification, with notice of such posting forthwith provided to the Service List.

5. THIS COURT ORDERS that after the Creditors' Meeting (and both prior to and subsequent to the obtaining of any Sanction and Vesting Order), the Target Canada Entities may at any time and from time to time, with the consent of the Plan Sponsor and the Monitor effect a Plan Modification (a) pursuant to an Order of the Court or (b) where such Plan Modification concerns a matter which, in the opinion of the Target Canada Entities and the Monitor, is of an administrative nature required to better give effect to the implementation of the Plan and the Sanction and Vesting Order or to cure any errors, omissions or ambiguities, and in either circumstance is not materially adverse to the financial or economic interests of the Affected Creditors. The Monitor shall forthwith post on the Website any such Plan Modification, with notice of such posting forthwith provided to the Service List.

FORMS OF DOCUMENTS

6. THIS COURT ORDERS that the Notice of Creditors' Meeting substantially in the form attached hereto as Schedule "B" (the "**Notice of Creditors' Meeting**"), the Proxy substantially in the form attached hereto as Schedule "C" (the "**Proxy**"), the Convenience Class Claim Election substantially in the form attached hereto as Schedule "D" (the "**Convenience Class Claim Election**") and the form of Resolution substantially in the form attached as Schedule "E" (the "**Resolution**") are each hereby approved and the Target Canada Entities with the consent of the Monitor are authorized and directed to make such changes to such forms of documents as they consider necessary or desirable to conform the content thereof to the terms of the Plan or this Meeting Order.

CLASSIFICATION OF CREDITORS

7. THIS COURT ORDERS that for the purposes of considering and voting on the Plan, the Affected Creditors shall constitute a single class, the "Unsecured Creditors' Class".

NOTICE OF CREDITORS' MEETING

8. THIS COURT ORDERS that the Monitor shall cause to be sent by regular pre-paid mail, courier, fax or e-mail copies of the Notice of Creditors' Meeting, the Proxy, the Convenience Class Claim Election, the Resolution, the Plan, the Letter to Creditors attached as Exhibit "B" to the Wong Affidavit and a copy of this Meeting Order (collectively, the "**Meeting Materials**") as soon as practicable after the granting of this Meeting Order and, in any event, no later than April 21, 2016 to each Affected Creditor at the address for such Affected Creditor set out in such Affected Creditor's Proof of Claim or to such other address subsequently provided to the Monitor by such Affected Creditor.

9. THIS COURT ORDERS that the Monitor shall forthwith post an electronic copy of the Meeting Materials on the Website, send a copy of the Meeting Materials to the Service List and shall provide a written copy to any Affected Creditor upon request by such Affected Creditor.

10. THIS COURT ORDERS that on or before April 27, 2016 the Monitor shall cause the Notice of Creditors' Meeting to be published for a period of two (2) Business Days in *The Globe and Mail* (National Edition), *La Presse* and *The Wall Street Journal*.

11. THIS COURT ORDERS that the delivery of the Meeting Materials in the manner set out in paragraph 8 hereof, posting of the Meeting Materials on the Website in accordance with paragraph 8 hereof, and the publication of the Notice of Creditors' Meeting in accordance with paragraph 9 hereof shall constitute good and sufficient service of this Meeting Order and of the Plan, and good and sufficient notice of the Creditors' Meeting on all Persons who may be entitled to receive notice thereof of these proceedings or who may wish to be present in person or by Proxy at the Creditors' Meeting or who may wish to appear in these proceedings, and no other form of notice or service need be made on such Persons.

12. THIS COURT ORDERS that on or before May 11, 2016, the Monitor shall serve a report regarding the Plan on the Service List and promptly thereafter post such report on the Website.

CONDUCT AT THE CREDITORS' MEETING

13. THIS COURT ORDERS that the Target Canada Entities are hereby authorized to call, hold and conduct the Creditors' Meeting on May 25, 2016 at 10:00 a.m. at the Toronto Region Board of Trade, 77 Adelaide Street West in Toronto, Ontario for the purpose of considering, and if deemed advisable by the Unsecured Creditors' Class, voting in favour of, with or without variation, the Resolution to approve the Plan.

14. THIS COURT ORDERS that a representative of the Monitor, designated by the Monitor, shall preside as the chair of the Creditors' Meeting (the "**Chair**") and, subject to any further Order of this Court, shall decide all matters relating to the conduct of the Creditors' Meeting.

15. THIS COURT ORDERS that the Chair is authorized to accept and rely upon Proxies or such other forms as may be acceptable to the Chair.

16. THIS COURT ORDERS that the quorum required at the Creditors' Meeting shall be one (1) Affected Creditor with a Voting Claim present at such meeting in person or by Proxy.

17. THIS COURT ORDERS that the Monitor may appoint scrutineers for the supervision and tabulation of the attendance at, quorum at and votes cast at the Creditors' Meeting. A Person designated by the Monitor shall act as secretary at the Creditors' Meeting.

18. THIS COURT ORDERS that if (a) the requisite quorum is not present at the Creditors' Meeting, or (b) the Creditors' Meeting is postponed by the vote of the majority in value of Affected Creditors holding Voting Claims in person or by Proxy at the Creditors' Meeting, then the Creditors' Meeting shall be adjourned by the Chair to such time and place as the Chair deems necessary or desirable.

19. THIS COURT ORDERS that the Chair be, and he or she is hereby, authorized to adjourn, postpone or otherwise reschedule the Creditors' Meeting on one or more occasions to such time(s), date(s) and place(s) as the Chair deems necessary or desirable (without the need to first convene such Creditors' Meeting for the purpose of any adjournment, postponement or other rescheduling thereof). None of the Target Canada Entities, the Chair or the Monitor shall be required to deliver any notice of the adjournment of the Creditors' Meeting or adjourned Creditors' Meeting, provided that the Monitor shall: (a) announce the adjournment of the Creditors' Meeting or adjourned

Creditors' Meeting, as applicable; (b) post notice of the adjournment at the originally designated time and location of the Creditors' Meeting or adjourned Creditors' Meeting, as applicable; (c) forthwith post notice of the adjournment on the Website; and (d) provide notice of the adjournment to the Service List forthwith. Any Proxies validly delivered in connection with the Creditors' Meeting shall be accepted as Proxies in respect of any adjourned Creditors' Meeting.

20. THIS COURT ORDERS that the only Persons entitled to attend and speak at the Creditors' Meeting are representatives of the Target Canada Entities and the Plan Sponsor and their respective legal counsel and advisors, the Monitor and its legal counsel and advisors, Pharmacists' Representative Counsel, Employee Representative Counsel, the Employee Trust Trustee and his legal counsel and all other Persons, including the holders of Proxies, entitled to vote at the Creditors' Meeting and their respective legal counsel and advisors. Any other Person may be admitted to the Creditors' Meeting on invitation of the Chair.

VOTING PROCEDURE AT THE CREDITORS' MEETING

21. THIS COURT ORDERS that the Chair shall direct a vote on the Resolution to approve the Plan and any amendments or variations thereto made in accordance with the Plan and this Meeting Order.

22. THIS COURT ORDERS that any Proxy in respect of the Creditors' Meeting (or any adjournment, postponement or other rescheduling thereof) must be (a) received by the Monitor by 10:00 a.m. on May 24, 2016, or 24 hours (excluding Saturdays, Sundays and statutory holidays) prior to any adjourned, postponed or rescheduled Creditors' Meeting, or (b) deposited with the Chair at the Creditors' Meeting (or any adjournment, postponement or other rescheduling thereof) immediately prior to the vote at the time specified by the Chair (the "**Election/Proxy Deadline**").

23. THIS COURT ORDERS that, in the absence of instruction to vote for or against the approval of the Resolution in a duly signed and returned Proxy, the Proxy shall be deemed to include instructions to vote for the approval of the Resolution, provided the Proxy holder does not otherwise exercise its right to vote at the Creditors' Meeting.

24. THIS COURT ORDERS that each Affected Creditor with a Voting Claim shall be entitled to one vote equal to the dollar value of its Affected Claim determined as a Voting Claim in accordance with the Claims Procedure Order and paragraph(s) 30 and 30 of this Meeting Order.

25. THIS COURT ORDERS that each Convenience Class Creditor shall be deemed to have voted in favour of the Plan.

26. THIS COURT ORDERS that (a) holders of Intercompany Claims shall not be entitled to vote on the Plan and (b) the Plan Sponsor shall not be entitled to vote on the Plan in respect of (i) its Plan Sponsor Subrogated Claims, (ii) any amounts to be contributed to the Landlord Guarantee Enhancement Cash Pool and to the Landlord Non-Guarantee Creditor Equalization Cash Pool under the Plan, or (iii) any Cash Management Lender Claims.

27. THIS COURT ORDERS that an Affected Creditor's Voting Claim shall not include fractional numbers and Voting Claims shall be rounded down to the nearest whole Canadian Dollar amount.

28. THIS COURT ORDERS that an Affected Creditor, a Propco Unaffected Creditor or a Property LP Unaffected Creditor may transfer or assign the whole of its Claim prior to the Creditors' Meeting, provided that neither the Target Canada Entities nor the Monitor shall be obligated to give notice to or otherwise deal with the transferee or assignee of such Claim as an Affected Creditor, a Propco Unaffected Creditor or a Property LP Unaffected Creditor in respect

thereof, including allowing such transferee or assignee of an Affected Claim to vote at the Creditors' Meeting, unless and until actual notice of the transfer or assignment, together with satisfactory evidence of such transfer or assignment, has been received and acknowledged by the Monitor in writing no later than 5:00 p.m. on the date that is seven (7) days prior to the Creditors' Meeting. Thereafter such transferee or assignee shall, for all purposes in accordance with the Claims Procedure Order and this Meeting Order, constitute an Affected Creditor, a Propco Unaffected Creditor or a Property LP Unaffected Creditor, as applicable, and shall be bound by any and all notices previously given to the transferor or assignor and steps taken in respect of such Claim. Such transferee or assignee shall not be entitled to set-off, apply, merge, consolidate or combine any Claims assigned or transferred to it against or on account or in reduction of any amounts owing by such transferee or assignee to any of the Target Canada Entities. Where a Claim has been transferred or assigned in part, the transferor or assignor shall retain the right to vote at the Creditors' Meeting in respect of the full amount of the Claim as determined for voting purposes in accordance with this Meeting Order, and the transferee or assignee shall have no voting rights at the Creditors' Meeting in respect of such Claim.

29. THIS COURT ORDERS that an Affected Creditor (other than a Convenience Class Creditor), a Propco Unaffected Creditor or a Property LP Unaffected Creditor may transfer or assign the whole of its Claim after the Creditors' Meeting provided that the Target Canada Entities shall not be obligated to make any distributions to any such transferee or assignee or otherwise deal with such transferee or assignee as an Affected Creditor, a Propco Unaffected Creditor or a Property LP Unaffected Creditor in respect thereof unless and until actual notice of the transfer or assignment, together with satisfactory evidence of such transfer or assignment, has been received and acknowledged by the Monitor in writing. Thereafter, such transferee or assignee shall, for all purposes in accordance with the Claims Procedure Order, this Meeting Order and the Plan,

constitute an Affected Creditor, a Propco Unaffected Creditor or a Property LP Unaffected Creditor, as applicable, and shall be bound by any and all notices previously given to the transferor or assignor and steps taken in respect of such Claim.

DISPUTED CLAIMS

30. THIS COURT ORDERS that the Canada Revenue Agency shall have one vote in respect of its Disputed Claims, the dollar value of which shall be equal to $1, without prejudice to the determination of the dollar value of such Disputed Claims for distribution purposes in accordance with the Claims Procedure Order.

31. THIS COURT ORDERS that the dollar value of a Disputed Claim of an Affected Creditor (other than the Disputed Claims of the Canada Revenue Agency) for voting purposes at the Creditors' Meeting shall be the dollar value of such Disputed Claim as set out in such Affected Creditor's Notice of Revision or Disallowance previously delivered by the Monitor pursuant to the Claims Procedure Order, without prejudice to the determination of the dollar value of such Affected Creditor's Disputed Claim for distribution purposes in accordance with the Claims Procedure Order.

32. THIS COURT ORDERS that the Monitor shall keep a separate record of votes cast by Affected Creditors holding Disputed Claims and shall report to the Court with respect thereto at the Sanction Motion.

CONVENIENCE CLASS CLAIM ELECTION

33. THIS COURT ORDERS that any Affected Creditor with one or more Proven Claims in an amount in excess of Cdn$25,000 shall be entitled to elect to receive only the Cash Elected Amount and be deemed to vote in favour of the Plan in accordance with paragraph 24 hereof by returning

an executed Convenience Class Claim Election to the Monitor prior to the Election/Proxy Deadline.

APPROVAL OF THE PLAN

34. THIS COURT ORDERS that in order to be approved, the Plan must receive an affirmative vote by the Required Majority.

35. THIS COURT ORDERS that following the vote at the Creditors' Meeting, the Monitor shall tally the votes and determine whether the Plan has been approved by the Required Majority.

36. THIS COURT ORDERS that the results of and all votes provided at the Creditors' Meeting shall be binding on all Affected Creditors, whether or not any such Affected Creditor is present or voting at the Creditors' Meeting.

SANCTION HEARING

37. THIS COURT ORDERS that the Monitor shall provide a report to the Court as soon as practicable after the Creditors' Meeting (the "**Monitor's Report Regarding the Creditors' Meeting**") with respect to:

(a) the results of voting at the Creditors' Meeting on the Resolution;

(b) whether the Required Majority has approved the Plan;

(c) the separate tabulation for Disputed Claims required by paragraph 32 herein; and

(d) in its discretion, any other matter relating to the Target Canada Entities' motion seeking sanction of the Plan.

38. THIS COURT ORDERS that an electronic copy of the Monitor's Report Regarding the Creditors' Meeting, the Plan, including any Plan Modifications, and a copy of the motion seeking the Sanction and Vesting Order in respect of the Plan (the "**Sanction Motion**") shall be posted on the Website prior to the Sanction Motion.

39. THIS COURT ORDERS that in the event the Plan has been approved by the Required Majority, the Target Canada Entities may bring the Sanction Motion before this Court on June 2, 2016, or such later date as shall be acceptable to the Target Canada Entities, the Plan Sponsor and the Monitor as set by this Court upon motion by the Target Canada Entities, seeking the Sanction and Vesting Order.

40. THIS COURT ORDERS that service of this Meeting Order by the Target Canada Entities to the parties on the Service List, the delivery of the Meeting Materials in accordance with paragraph 8 hereof, posting of the Meeting Materials on the Website in accordance with paragraph 8 hereof, and the publication of the Notice of Creditors' Meeting in accordance with paragraph 9 hereof shall constitute good and sufficient service and notice of the Sanction Motion.

41. THIS COURT ORDERS that any Person intending to oppose the Sanction Motion shall (i) file or have filed with the Court a Notice of Appearance and serve such Notice of Appearance on the Service List at least seven (7) days before the date set for the Sanction Motion; and (ii) serve on the Service List a notice setting out the basis for such opposition and a copy of the materials to be used to oppose the Sanction Motion that are available by at least seven (7) days before the date set for the Sanction Motion, or such shorter time as the Court, by Order, may allow.

42. THIS COURT ORDERS that in the event that the Sanction Motion is adjourned, only those Persons appearing on the Service List as of the date of service shall be served with notice of the adjourned date.

43. THIS COURT ORDERS that, subject to any further Order of the Court, in the event of any conflict, inconsistency, ambiguity or difference between the provisions of the Plan and this Meeting Order, the terms, conditions and provisions of the Plan shall govern and be paramount, and any such provision of this Meeting Order shall be deemed to be amended to the extent necessary to eliminate any such conflict, inconsistency, ambiguity or difference.

EXTENSION OF STAY PERIOD

44. THIS COURT ORDERS that the Stay Period (as defined in paragraph 17 of the Initial Order) is hereby extended until and including June 6, 2016.

EXTENSION OF NOTICE OF OBJECTION BAR DATE

45. THIS COURT ORDERS that the definition of "Notice of Objection Bar Date" set out at paragraph 3(aa) of the Claims Procedure Order (issued by Regional Senior Justice Morawetz on June 11, 2015, as amended) is hereby amended to extend the Notice of Objection Bar Date to 28 days following June 6, 2016 or such later date as this Court may Order.

GENERAL PROVISIONS

46. THIS COURT ORDERS that the Monitor, in addition to its prescribed rights and obligations under the CCAA and the Initial Order, shall assist the Target Canada Entities in connection with the matters described herein, and is hereby authorized and directed to take such other actions and fulfill such other roles as are contemplated by this Meeting Order.

47. THIS COURT ORDERS that the Target Canada Entities and the Monitor shall use reasonable discretion as to the adequacy of compliance with respect to the manner in which any forms hereunder are completed and executed and the time in which they are submitted and may

waive strict compliance with the requirements of this Meeting Order including with respect to the completion, execution and time of delivery of required forms.

48. THIS COURT ORDERS that the Monitor may, if necessary, apply to this Court for directions regarding its obligations under this Meeting Order.

49. THIS COURT ORDERS that any notice or other communication to be given under this Meeting Order by a Creditor to the Monitor or the Target Canada Entities shall be in writing in the substantially the form, if any, provided for in this Meeting Order and will be sufficiently given only if given by prepaid ordinary mail, registered mail, courier, personal delivery, facsimile transmission or e-mail addressed to:

Target Canada Entities' Counsel:	Osler, Hoskin & Harcourt LLP P.O. Box 50, 1 First Canadian Place 100 King Street West Toronto, ON M5X 1B8
	Attention: Tracy C. Sandler / Jeremy E. Dacks E-mail: tsandler@osler.com / jdacks@osler.com Fax: (416) 862-6666
The Monitor:	Alvarez & Marsal Canada Inc., Target Canada Monitor 200 Bay Street, Suite 2900 P.O. Box 22 Toronto, ON M5J 2J1
	Attention: Alan J. Hutchens E-mail: ahutchens@alvarezandmarsal.com Fax: (416) 847-5201
With a copy to Monitor's Counsel:	Goodmans LLP Bay Adelaide Centre 333 Bay Street, Suite 3400 Toronto, ON M5H 2S7
	Attention: Jay A. Carfagnini / Melaney J. Wagner E-mail: jcarfagnini@goodmans.ca / mwagner@goodmans.ca Fax: (416) 979-1234

50. THIS COURT ORDERS that any such notice or other communication shall be deemed to have been received: (a) if sent by prepaid ordinary mail or registered mail, on the third Business Day after mailing in Ontario, the fifth Business Day after mailing within Canada (other than within Ontario), and the tenth Business Day after mailing internationally; (b) if sent by courier or personal delivery, on the next Business Day following dispatch; and (c) if delivered by facsimile transmission or e-mail by 5:00 p.m. on a Business Day, on such Business Day and if delivered after 5:00 p.m. or other than on a Business Day, on the following Business Day.

51. THIS COURT ORDERS that, in the event that the day on which any notice or communication required to be delivered pursuant to this Meeting Order is not a Business Day, then such notice or communication shall be required to be delivered on the next Business Day.

52. THIS COURT ORDERS that if, during any period during which notices or other communications are being given pursuant to this Meeting Order, a postal strike or postal work stoppage of general application should occur, such notices or other communications sent by ordinary or registered mail and then not received shall not, absent further Order of this Court, be effective and notices and other communications given hereunder during the course of any such postal strike or work stoppage of general application shall only be effective if given by courier, personal delivery, facsimile transmission or e-mail in accordance with this Order.

53. THIS COURT ORDERS that all references to time in this Meeting Order shall mean prevailing local time in Toronto, Ontario and any references to an event occurring on a Business Day shall mean prior to 5:00 p.m. on the Business Day unless otherwise indicated.

54. THIS COURT ORDERS that references to the singular shall include the plural, references to the plural shall include the singular and to any gender shall include the other gender.

55. THIS COURT HEREBY REQUESTS the aid and recognition of any court, tribunal, regulatory or administrative bodies, having jurisdiction in Canada or in the United States of America, to give effect to this Meeting Order and to assist the Target Canada Entities, the Monitor and their respective agents in carrying out the terms of this Meeting Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Target Canada Entities and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Target Canada Entities and the Monitor and their respective agents in carrying out the terms of this Order.

SCHEDULE "A"
PARTNERSHIPS

Target Canada Pharmacy Franchising LP
Target Canada Mobile LP
Target Canada Property LP

SCHEDULE "B"
NOTICE OF CREDITORS' MEETING

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF THE TARGET CANADA ENTITIES

AMENDED AND RESTATED JOINT PLAN OF COMPROMISE AND ARRANGEMENT

NOTICE OF CREDITORS' MEETING

TO: The Affected Creditors of Target Canada Co., Target Canada Health Co., Target Canada Mobile GP Co., Target Canada Pharmacy (BC) Corp., Target Canada Pharmacy (Ontario) Corp., Target Canada Pharmacy Corp., Target Canada Pharmacy (SK) Corp., Target Canada Property LLC, Target Canada Pharmacy Franchising LP, Target Canada Mobile LP and Target Canada Property LP (collectively, the "**Target Canada Entities**")

NOTICE IS HEREBY GIVEN that a meeting of the Affected Creditors of the Target Canada Entities will be held on May 25, 2016 at 10:00 a.m. at the Toronto Region Board of Trade, 77 Adelaide Street West, Toronto, ON M5X 1C1 (the "**Creditors' Meeting**") for the following purposes:

1. to consider and, if deemed advisable, to pass, with or without variation, a resolution (the "**Resolution**") approving the Amended and Restated Joint Plan of Compromise and Arrangement of the Target Canada Entities pursuant to the *Companies' Creditors Arrangement Act* (Canada) (the "**CCAA**") dated April ●, 2016 (as amended, restated, modified and/or supplemented from time to time in accordance with the terms thereof, the "**Plan**"); and

2. to transact such other business as may properly come before the Creditors' Meeting or any adjournment or postponement thereof.

The Creditors' Meeting is being held pursuant to an order (the "**Meeting Order**") of the Ontario Superior Court of Justice (Commercial List) (the "**Court**") made on April **[13]**, 2016.

Capitalized terms used and not otherwise defined in this Notice have the respective meanings given to them in the Plan.

The Plan contemplates the compromise of Claims of the Affected Creditors. Quorum for the Creditors' Meeting has been set by the Meeting Order as the presence, in person or by Proxy, at the Creditors' Meeting of one Affected Creditor with a Voting Claim.

In order for the Plan to be approved and binding in accordance with the CCAA, the Resolution must be approved by that number of Affected Creditors representing at least a majority in number of Voting Claims, whose Affected Claims represent at least two-thirds in value of the Voting Claims of Affected Creditors who validly vote (in person or by Proxy) on the Resolution at the Creditors' Meeting or were deemed to vote on the Resolution as provided for in the Meeting Order (the "**Required Majority**"). Each Affected Creditor will be entitled to one vote at the Creditors' Meeting, which vote will have the value of such person's Voting Claim as determined in accordance with the Claims Procedure Order and the Meeting Order. If approved by the Required Majority, the Plan must also be sanctioned by the Court under the CCAA. Subject to the satisfaction of the other conditions precedent to implementation of the Plan, all Affected Creditors will then receive the treatment set forth in the Plan.

Deemed Voting in Favour of the Plan

Convenience Class Creditors will be deemed to vote in favour of the Plan.

Forms and Proxies

Convenience Class Claim Election

Affected Creditors with one or more Proven Claims in an amount in excess of Cdn$25,000 may file with the Monitor a Convenience Class Claim Election, pursuant to which such Affected Creditor may elect to be treated as a Convenience Class Creditor and receive only the Cash Elected Amount of Cdn$25,000 and shall be deemed thereby to vote in favour of the Plan, prior to 10:00 a.m. (Toronto Time) on May 24, 2016, or 24 hours (excluding Saturdays, Sundays and statutory holidays) prior to any adjourned, postponed or rescheduled Creditors' Meeting, or deposit such Convenience Class Claim Election with the Chair at the Creditors' Meeting (or any adjournment, postponement or other rescheduling thereof) immediately prior to the vote at the time specified by the Chair (the "**Election/Proxy Deadline**").

Proxy Form

An Affected Creditor may attend at the Creditors' Meeting in person or may appoint another person as its proxyholder by inserting the name of such person in the space provided in the form of Proxy provided to Affected Creditors by the Monitor, or by completing another valid form of Proxy. Persons appointed as proxyholders need not be Affected Creditors.

In order to be effective, proxies must be received by the Monitor at Alvarez & Marsal Canada Inc., 200 Bay Street, Suite 2900, P.O. Box 22, Toronto, ON M5J 2J1 (Attention: Steven Glustein), facsimile: (416) 847-5201, e-mail: targetcanadamonitor@alvarezandmarsal.com, prior to the Election/Proxy Deadline.

If an Affected Creditor (other than those who are deemed to vote in favour of the Plan as set out above) specifies a choice with respect to voting on the Resolution on a Proxy, the Proxy will be voted in accordance with the specification so made. **In absence of such specification, a Proxy will be voted FOR the Resolution provided that the proxyholder does not otherwise exercise its right to vote at the Creditors' Meeting.**

NOTICE IS ALSO HEREBY GIVEN that if the Plan is approved by the Required Majority at the Creditors' Meeting, the Target Canada Entities intend to bring a motion before the Court on June 2, 2016 at 9:30 a.m. (Toronto time) at the Court located at 330 University Avenue, Toronto, Ontario M5G 1R8. The motion will be seeking the granting of the Sanction and Vesting Order sanctioning the Plan under the CCAA and for ancillary relief consequent upon such sanction. Any Affected Creditor that wishes to appear or be represented, and to present evidence or arguments, at such Court hearing must file with the Court a Notice of Appearance and serve such Notice of Appearance on the Service List at least seven (7) days before such Court hearing. Any Affected Creditor that wishes to oppose the relief sought at such Court hearing shall serve on the Service List a notice setting out the basis for such opposition and a copy of the materials to be used at such hearing at least seven (7) days before the date set for such hearing, or such shorter time as the Court, by Order, may allow. A copy of the Service List may be obtained by contacting the Monitor at the particulars set out above or from the Monitor's website set out below.

This Notice is given by the Target Canada Entities pursuant to the Meeting Order.

You may view copies of the documents relating to this process on the Monitor's website at www.alvarezandmarsal.com/targetcanada.

DATED this ● day of ●, ●.

SCHEDULE "C"
FORM OF PROXY

PROXY AND INSTRUCTIONS
FOR AFFECTED CREDITORS IN THE MATTER OF THE PROPOSED AMENDED AND RESTATED JOINT PLAN OF COMPROMISE AND ARRANGEMENT OF
THE TARGET CANADA ENTITIES

MEETING OF AFFECTED CREDITORS

to be held pursuant to an Order of the Ontario Superior Court of Justice (Commercial List) (the "**Court**") made on April **[13]**, 2016 (the "**Meeting Order**") in connection with the Amended and Restated Joint Plan of Compromise and Arrangement of the Target Canada Entities dated April ●, 2016 (as amended, restated, modified and/or supplemented from time to time, the "**Plan**")

on May 25, 2016 at 10:00 a.m. (Toronto time) at

Toronto Region Board of Trade
77 Adelaide Street West
Toronto, ON M5X 1C1

and at any adjournment, postponement or other rescheduling thereof (the "**Creditors' Meeting**")

PLEASE COMPLETE, SIGN AND DATE THIS PROXY AND (I) RETURN IT TO ALVAREZ & MARSAL CANADA INC. BY 10:00 A.M. (TORONTO TIME) ON MAY 24, 2016, OR 24 HOURS (EXCLUDING SATURDAYS, SUNDAYS AND STATUTORY HOLIDAYS) PRIOR TO ANY ADJOURNED, POSTPONED OR RESCHEDULED CREDITORS' MEETING, OR (II) DEPOSIT THIS PROXY WITH THE CHAIR AT THE CREDITORS' MEETING (OR ANY ADJOURNMENT, POSTPONEMENT OR OTHER RESCHEDULING THEREOF) IMMEDIATELY PRIOR TO THE VOTE AT THE TIME SPECIFIED BY THE CHAIR (THE "**ELECTION/PROXY DEADLINE**"). PLEASE RETURN OR DEPOSIT YOUR ORIGINAL PROXY SO THAT IT IS ACTUALLY RECEIVED BY THE MONITOR OR THE CHAIR ON OR BEFORE THE ELECTION/PROXY DEADLINE.

Please use this Proxy form if you do not wish to attend the Creditors' Meeting to vote in person but wish to appoint a proxyholder to attend the Creditors' Meeting, vote your Voting Claim to accept or reject the Plan and otherwise act for and on your behalf at the Creditors' Meeting and any adjournment(s), postponement(s) or rescheduling(s) thereof.

The Plan is included in the Meeting Materials delivered by the Monitor to all Affected Creditors, copies of which you have received. All capitalized terms used but not defined in this Proxy shall have the meanings ascribed to such terms in the Plan.

You should review the Plan before you vote. In addition, on April **[13]**, 2016, the Court issued the Meeting Order establishing certain procedures for the conduct of the Creditors' Meeting, a copy of which is included in the Meeting Materials. The Meeting Order contains important information regarding the voting process. Please read the Meeting Order and the instructions sent with this Proxy prior to submitting this Proxy.

If the Plan is approved by the Required Majority and is sanctioned by the Court, it will be binding on you whether or not you vote.

Convenience Class Creditors do not need to complete or return a Proxy as they are deemed to vote in favour of the Plan pursuant to the Meeting Order and the Plan.

APPOINTMENT OF PROXYHOLDER AND VOTE

By checking one of the two boxes below, the undersigned Affected Creditor hereby revokes all proxies previously given and nominates, constitutes and appoints either (*if no box is checked, the Monitor will act as your proxyholder*):

☐ _____, or

☐ a representative of Alvarez & Marsal Canada Inc. in its capacity as Monitor of the Target Canada Entities

as proxyholder, with full power of substitution, to attend, vote and otherwise act for and on behalf of the undersigned at the Creditors' Meeting and at adjournment(s), postponement(s) and rescheduling(s) thereof, and to vote the amount of the Affected Creditors' Voting Claim. Without limiting the generality of the power hereby conferred, the person named as proxyholder is specifically directed to vote as shown below. The person named as proxyholder is also directed to vote at the proxyholder's discretion and otherwise act for and on behalf of the undersigned with respect to any amendments or variations to the Plan and to any matters that may come before the Creditors' Meeting or at any adjournment, postponement or rescheduling thereof and to vote the amount of the Affected Creditor's Voting Claim as follows (*mark only one*):

☐ Vote **FOR** the approval of the Plan, or

☐ Vote **AGAINST** the approval of the Plan

Please note that if no specification is made above, the Affected Creditor will be deemed to have voted FOR approval of the Plan at the Creditors' Meeting provided the Affected Creditor does not otherwise exercise its right to vote at the Creditors' Meeting.

DATED at _____ this _____ day of _____, 20__.

AFFECTED CREDITOR'S SIGNATURE:

_____
(Print Legal Name of Affected Creditor)

_____
(Print Legal Name of Assignee, if applicable)

_____
(Signature of the Affected Creditor/Assignee or an Authorized Signing Officer of the Affected Creditor/Assignee)

_____
(Print Name and Title of Authorized Signing Officer of the Affected Creditor/Assignee, if applicable)

_____
(Mailing Address of the Affected Creditor/Assignee)

_____
(Telephone Number and E-mail of the Affected Creditor/Assignee or Authorized Signing Officer of the Affected Creditor/Assignee)

YOUR PROXY MUST BE RECEIVED (I) BY THE MONITOR AT THE ADDRESS LISTED BELOW OR (II) BY THE CHAIR AT THE CREDITORS' MEETING BEFORE THE ELECTION/PROXY DEADLINE.

ALVAREZ & MARSAL CANADA INC.
MONITOR OF THE TARGET CANADA ENTITIES

200 Bay Street
Suite 2900
P.O. Box 22
Toronto, ON
M5J 2J1

Attention: Steven Glustein
Facsimile: (416) 847-5201
E-mail: targetcanadamonitor@alvarezandmarsal.com

IF YOU HAVE ANY QUESTIONS REGARDING THIS PROXY OR THE VOTING PROCEDURES, OR IF YOU NEED AN ADDITIONAL COPY OR ADDITIONAL COPIES OF THE ENCLOSED MATERIALS, PLEASE CONTACT THE MONITOR AT targetcanadamonitor@alvarezandmarsal.com OR VISIT THE MONITOR'S WEBSITE AT www.alvarezandmarsal.com/targetcanada

INSTRUCTIONS FOR COMPLETION OF PROXY

1. All capitalized terms used but not defined in this Proxy shall have the meanings ascribed to such terms in the Amended and Restated Joint Plan of Compromise and Arrangement of the Target Canada Entities dated April ●, 2016 (the "**Plan**"), a copy of which you have received.

2. Please read and follow these instructions carefully. Your Proxy must actually be received (i) by the Monitor at Alvarez & Marsal Canada Inc., Monitor of the Target Canada Entities, 200 Bay Street, Suite 2900, P.O. Box 22, Toronto, ON M5J 2J1 (Attention: Steven Glustein), facsimile: (416) 847-5201, e-mail: targetcanadamonitor@alvarezandmarsal.com prior to 10:00 a.m. (Toronto time) on May 24, 2016 or 24 hours (excluding Saturdays, Sundays and statutory holidays) prior to the time of any adjournment, postponement or rescheduling of the Creditors' Meeting or (ii) by the Chair at the Creditors' Meeting (or any adjournment, postponement or rescheduling thereof) immediately prior to the vote at the time specified by the Chair (the "**Election/Proxy Deadline**"). If your Proxy is not received by the Election/Proxy Deadline, unless such time is extended, your Proxy will not be counted.

3. The aggregate amount of your Claim in respect of which you are entitled to vote (your "**Voting Claim**") shall be your Proven Claim, or with respect to a Disputed Claim, the amount as determined by the Monitor to be your Voting Claim in accordance the Claims Procedure Order and the Meeting Order.

4. Each Affected Creditor who has a right to vote at the Creditors' Meeting has the right to appoint a person (who need not be an Affected Creditor) to attend, act and vote for and on behalf of the Affected Creditor and such right may be exercised by inserting in the space provided the name of the person to be appointed, or to select a representative of the Monitor as its proxyholder. If no proxyholder is selected, the Affected Creditor will be deemed to have appointed any officer of Alvarez & Marsal Canada Inc., in its capacity as Monitor, or such other person as Alvarez & Marsal Canada Inc. may designate, as proxyholder of the Affected Creditor, with power of substitution, to attend on behalf of and act for the Affected Creditor at the Creditors' Meeting to be held in connection with the Plan and at any and all adjournments, postponements or other rescheduling thereof.

5. Check the appropriate box to vote for or against the Plan. If you do not check either box, you will be deemed to have voted FOR approval of the Plan provided you do not otherwise exercise your right to vote at the Creditors' Meeting.

6. Sign the Proxy – your original signature is required on the Proxy to appoint a proxyholder and vote at the Creditors' Meeting. If you are completing the proxy as a duly authorized representative of a corporation or other entity, indicate your relationship with such corporation or other entity and the capacity in which you are signing, and if subsequently requested, provide proof of your authorization to so sign. In addition, please provide your name, mailing address, telephone number and e-mail address.

7. Return the completed Proxy to the Monitor at Alvarez & Marsal Canada Inc., Monitor of the Target Canada Entities, 200 Bay Street, Suite 2900, P.O. Box 22, Toronto, ON M5J

2J1 (Attention: Steven Glustein), facsimile: (416) 847-5201, e-mail: targetcanadamonitor@alvarezandmarsal.com, so that it is actually received by no later than the Election/Proxy Deadline.

8. If you need additional Proxies, please immediately contact the Monitor.

9. If multiple Proxies are received from the same person with respect to the same Claims prior to the Election/Proxy Deadline, the latest dated, validly executed Proxy timely received will supersede and revoke any earlier received Proxy. However, if a holder of Claims casts Proxies received by the Monitor dated with the same date, but which are voted inconsistently, such Proxies will not be counted. If a Proxy is not dated in the space provided, it shall be deemed dated as of the date it is received by the Monitor.

10. If an Affected Creditor (other than a Convenience Class Creditor) validly submits a Proxy to the Monitor and subsequently attends the Creditors' Meeting and votes in person inconsistently, such Affected Creditor's vote at the Creditors' Meeting will supersede and revoke the earlier received Proxy.

11. Proxies may be accepted for purposes of an adjourned, postponed or other rescheduled Creditors' Meeting if received by the Monitor by the Election/Proxy Deadline.

12. Any Proxy that is illegible or contains insufficient information to permit the identification of the claimant will not be counted.

13. After the Election/Proxy Deadline, no Proxy may be withdrawn or modified, except by an Affected Creditor voting in person at the Creditors' Meeting, without the prior consent of the Monitor and the Target Canada Entities.

14. If you are an Affected Creditor with one or more Proven Claims in an amount in excess of Cdn$25,000, you may elect to receive the Cash Elected Amount in full and final satisfaction of your Affected Claims by completing the Convenience Class Claim Election contained in the Meeting Materials you received from the Monitor. If you elect to receive the Cash Elected Amount, you will be deemed to have voted in favour of the Plan and do not need to complete this Proxy.

IF YOU HAVE ANY QUESTIONS REGARDING THIS PROXY OR THE VOTING PROCEDURES, OR IF YOU NEED AN ADDITIONAL COPY OR ADDITIONAL COPIES OF THE ENCLOSED MATERIALS, PLEASE CONTACT THE MONITOR AT targetcanadamonitor@alvarezandmarsal.com OR VISIT THE MONITOR'S WEBSITE AT www.alvarezandmarsal.com/targetcanada

SCHEDULE "D"
FORM OF CONVENIENCE CLASS CLAIM ELECTION

TO: ALVAREZ & MARSAL CANADA INC., in its capacity as Monitor of the Target Canada Entities

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In connection with the Amended and Restated Joint Plan of Compromise and Arrangement of the Target Canada Entities pursuant to the *Companies' Creditors Arrangement Act* (Canada) dated April ●, 2016 (as amended, restated, modified and/or supplemented from time to time, the "**Plan**"), the undersigned hereby elects to be treated as a Convenience Class Creditor and thereby to receive the Cash Elected Amount of Cdn$25,000 in full and final satisfaction of the Proven Claim(s) of the undersigned, and hereby acknowledges that the undersigned shall be deemed to vote its Voting Claim(s) in favour of the Plan at the Creditors' Meeting.

For the purposes of this election, terms not defined herein shall have the meanings ascribed thereto in the Plan.

DATED at _____ this _____ day of _____, 20__.

AFFECTED CREDITOR'S SIGNATURE:

_____
(Print Legal Name of Affected Creditor)

_____
(Print Legal Name of Assignee, if applicable)

_____
(Signature of the Affected Creditor/Assignee or an Authorized Signing Officer of the Affected Creditor/Assignee)

_____
(Print Name and Title of Authorized Signing Officer of the Affected Creditor/Assignee, if applicable)

_____
(Mailing Address of the Affected Creditor/Assignee)

_____
(Telephone Number and E-mail of the Affected Creditor/Assignee or Authorized Signing Officer of the Affected Creditor/Assignee)

SCHEDULE "E"
FORM OF RESOLUTION

BE IT RESOLVED THAT:

1. The Amended and Restated Joint Plan of Compromise and Arrangement of Target Canada Co., Target Canada Health Co., Target Canada Mobile GP Co., Target Canada Pharmacy (BC) Corp., Target Canada Pharmacy (Ontario) Corp., Target Canada Pharmacy Corp., Target Canada Pharmacy (SK) Corp., Target Canada Property LLC, Target Canada Pharmacy Franchising LP, Target Canada Mobile LP, and Target Canada Property LP (collectively, the "**Target Canada Entities**") pursuant to the *Companies' Creditors Arrangement Act* (Canada) dated April ●, 2016 (the "**Plan**"), which Plan has been presented to this meeting and which is substantially in the form attached as Exhibit "●" to the Affidavit of Mark J. Wong sworn ●, 2016 (as such Plan may be amended, restated, supplemented and/or modified as provided for in the Plan) be and it is hereby accepted, approved, agreed to and authorized; and

2. any director or officer of each of the Target Canada Entities be and is hereby authorized and directed, for and on behalf of each of the Target Canada Entities, respectively (whether under its respective corporate seal or otherwise), to execute and deliver, or cause to be executed and delivered, any and all documents and instruments and to take or cause to be taken such other actions as he or she may deem necessary or desirable to implement this resolution and the matters authorized hereby, including the transactions required by the Plan, such determination to be conclusively evidenced by the execution and delivery of such documents or other instruments or the taking of any such actions.

SCHEDULE "D"

Landlord Guarantee Creditors

NO.	LANDLORD GROUP	LANDLORD/ CLAIMANT	STORE #	LOCATION
1.	20 Vic Management Inc. (manager)	HOOPP Realty Inc.	3708	Devonshire Mall
2.	ADMNS Meadowlands Investment Corporation	ADMNS Meadowlands Investment Corporation	3628	Meadowlands Shopping Center
3.	Bentall Kennedy	Penretail Management Ltd.	3510	Westmount Shopping Centre
4.	Bentall Kennedy	Hazeldean Mall LP	3511	Hazeldean Mall
5.	Bentall Kennedy (manager)	bcIMC Realty Corporation	3624	Bower Place
6.	Bentall Kennedy	2725312 Canada Inc. and 2973758 Canada Inc.	3690	Willowbrook Shopping Centre
7.	Bentall Kennedy (manager)	bcIMC Realty Corporation	3715	Cloverdale Mall
8.	Bentall Kennedy	PCM Sheridan Inc.	3669	Sheridan Mall
9.	Calloway REIT	Calloway REIT (Laurentian) Inc.	3642	Laurentian Power Centre
10.	Calloway REIT	Calloway Reit (Hopedale) Inc.	3670	Hopedale Mall
11.	Centrecorp Management Services Ltd.	Faubourg Boisbriand Shopping Centre Holdings Inc.	3765	Faubourg Boisbriand
12.	Cominar Real Estate Investment Trust	9130-1093 Quebec Inc. as nominee for Cominar Real Estate Investment Trust	3576	Carrefour St Georges
13.	Cominar Real Estate Investment Trust	Cominar Real Estate Investment Trust	3592	Les Rivieres Shopping Centre
14.	Crombie Real Estate Investment Trust	Crombie Property Holdings Limited	3630	1899 Algonquin Avenue

NO.	LANDLORD GROUP	LANDLORD/ CLAIMANT	STORE #	LOCATION
15.	Davpart Inc.	Lindsay Square Mall Inc.	3560	Lindsay Square Mall
16.	Doral Holdings Limited	Doral Holdings Limited and 430635 Ontario Inc.	3645	Seaway Mall
17.	Kingsett	Place Vertu Holdings Inc.	3769	Place Vertu
18.	Mcintosh Properties Ltd.	Mcintosh Properties Ltd.	3698	Orchard Park Plaza
19.	Montez Corporation	Montez (Corner Brook) Inc.	3650	Corner Brook
20.	Morguard Investments Limited	Revenue Properties Company Limited and Morguard Real Estate Investment Trust	3574	Prairie Mall
21.	Morguard Investments Limited	2046459 Ontario Inc.	3575	Cottonwood Mall
22.	Morguard Investments Limited	3934390 Canada Inc.	3577	The Mall at Lawson Heights
23.	Morguard Investments Limited	Morguard Real Estate Investment Trust	3608	Cambridge Centre
24.	Morguard Investments Limited	Morguard Corporation and Bramalea City Centre Equities Inc.	3623	Bramalea City Centre
25.	Morguard Investments Limited	Bonnie Doon Shopping Centre (Holdings) Ltd.	3710	Bonnie Doon
26.	Morguard Investments Limited	Revenue Properties Company Limited	3742	East York Town Centre
27.	Morguard Investments Limited	Morguard Real Estate Investment Trust	3763	Shoppers Mall
28.	Primaris	Kildonan Place Ltd.	3644	Kildonan Place Shopping Centre
29.	Primaris	McAllister Place Holdings Inc.	3655	McAllister Place
30.	Primaris	St. Albert Centre Holdings Inc.	3694	St. Albert Centre

NO.	LANDLORD GROUP	LANDLORD/ CLAIMANT	STORE #	LOCATION
31.	SunLife Assurance Company of Canada	Sun Life Assurance Company of Canada	3538	Forest Lawn Shopping Centre
32.	Triovest Realty Advisors Inc. (manager)	Barton Centre LP	3753	Centre Mall
33.	Triovest Realty Advisors Inc. (manager)	7902484 Canada Inc.	3767	Taunton Road Power Centre
34.	Valiant Rental Properties Ltd	Valiant Rental Inc.	3757	Clarington Town Centre
35.	Westcliff Management Ltd. (manager)	Carrefour Richelieu Realties Ltd.	3657	Carrefour Du Nord
36.	Westcliff Management Ltd. (manager)	Carrefour Richelieu Realties Ltd.	3516	Carrefour Richelieu
37.	Westcliff Management Ltd. (manager)	Carrefour Richelieu Realties Ltd.	3595	Carrefour Angrignon

SCHEDULE "E"

Landlord Non-Guarantee Creditors

NO.	LANDLORD GROUP	LANDLORD/CLAIMANT	STORE #	LOCATION
1.	20 Vic Management, Inc.	OPB Realty Inc.	3663	Pickering Town Centre
2.	Beauward Shopping Centre, Ltd.	Beauwood Shopping Centre, Ltd.	3693	Carrefour St-Eustache
3.	Beauward Shopping Centre, Ltd.	Beauwood Shopping Centre, Ltd.	3718	Les Galeries Joliette
4.	Bridlewood Mall Management	Bridlewood Mall Management Inc.	3667	Bridlewood Mall
5.	Cogir Management Corporation	Halifax 1658 Bedford Highway Inc.	3731	Bedford Place
6.	Cominar Real Estate Investment Trust	9090-7155 Quebec Inc.	3702	Place Longueuil
7.	Cominar Real Estate Investment Trust	Cominar NF Real Estate Holdings Inc.	3732	Cabot Square
8.	Cominar Real Estate Investment Trust	2226009 Ontario Inc.	7000	Centre Laval
9.	Crombie Developments Limited	Crombie Developments Ltd	3530	Sydney Shopping Centre
10.	Crombie Developments Limited	Crombie Developments Ltd	3550	Uptown Centre
11.	Effort Trust Company	60 Martindale Crescent (Hamilton) Limited	3671	Meadowland Power centre
12.	First Capital Corporation	First Capital (Stoney Creek) Corporation	3524	Zellers Plaza – Stoney Creek
13.	First Capital Corporation	Corporation FCHT Holdings (Quebec) Inc.	3634	Place Portobello
14.	Fishman Holdings North America, Inc.	2058790 Ontario Ltd.	3707	Woodbine Centre

NO.	LANDLORD GROUP	LANDLORD/CLAIMANT	STORE #	LOCATION
15.	Northwest Realty, Inc.	Discovery Harbour Shopping Centre Ltd.	3508	Discovery Harbour Shopping Centre
16.	Primaris	Sherwood Park Portfolio Inc.	3564	Sherwood Park Mall
17.	Primaris	Medicine Hat Mall Inc.	3614	Medicine Hat Mall
18.	Primaris	Sunridge Mall Holdings Inc.	3713	Sunridge Mall
19.	Primaris	Place D'Orleans Holdings Inc.	3764	Place D'Orleans
20.	RioCan	RioCan Holdings Inc.	3519	South Hamilton Square
21.	RioCan	RioCan Holdings Inc.	3522	County Fair Mall
22.	RioCan	RioCan Holdings Inc.	3526	Lawrence Square
23.	RioCan	RioCan Holdings (Five Points) Inc.	3559	Five Points Mall
24.	RioCan	RioKim Holdings (PEI) Inc.	3637	Charlottetown Mall
25.	RioCan	151516 Canada Inc.	3639	Durham Centre
26.	RioCan	RioCan Holdings Inc.	3665	Orillia Square
27.	RioCan	1388688 Ontario Limited	3668	Shoppers World Brampton
28.	RioCan	RioKim Holdings (Quebec II) Inc.	3695	Mega Centre Autoroute 13
29.	RioCan	RioCan Holdings Inc.	3699	Stratford Mall
30.	RioCan	RK (Burlington Mall) Inc.	3738	Burlington Mall
31.	RioCan	RioKim Holdings (Ontario II) Inc.	3751	Gates of Fergus
32.	RioCan	RioCan Holdings Inc. & Canada Mortgage and Housing Corp.	3761	Millcroft Centre

NO.	LANDLORD GROUP	LANDLORD/CLAIMANT	STORE #	LOCATION
33.	RioCan	RioCan PS Inc.	3762	Flamborough Power Centre
34.	RioCan	2076031 Ontario Limited	3768	Eglinton and Warden
35.	RioCan	MillWoods Centre Inc.	3770	Mill Woods Town Centre
36.	RioCan	RioTrin Properties (Brampton) Inc.	3773	Trinity Common
37.	RioCan	RioTrin Properties (Weston) Inc. & 2176905 Ontario Ltd.	7002	Stockyards
38.	RioCan	RioCan Holdings Inc.	7001	RioCan Niagara Falls
39.	46th Avenue Investments	46th Avenue Investments Limited	7327	Warehouse Space
40.	Bentall Kennedy	bcIMC Realty Corporation	7417	Ottawa Office
41.	Triovest	Big Bend Equities Inc.	7328	Warehouse Space
42.	Complexe Lebourgneuf 2	Complexe Lebourgneuf Phase II Inc.	7416	Quebec City Office
43.	CREIT Management LP	Canadian Property Holdings (Alberta) Inc.	7326	Warehouse Space
44.	Cominar Real Estate Investment Trust	Cominar REIT	7413	Montreal Office
45.	HOOPP Realty Inc.	Menkes Property Management Services Ltd. as agent for HOOPP Realty Inc.	7400	Mississauga Office
46.	HOOPP Realty Inc.	Menkes Property Management Services Ltd. as agent for HOOPP Realty Inc.	9730	Headquarters
47.	HOOPP Realty Inc.	Menkes Property Management Services Ltd. as agent for HOOPP Realty Inc.	9731	Headquarters

NO.	LANDLORD GROUP	LANDLORD/CLAIMANT	STORE #	LOCATION
48.	Ivanhoe Cambridge	Oshawa Centre Holdings Inc.	7403	Oshawa Office
49.	Redstone Equities	Park Place IV Limited	7418	Dartmouth Office
50.	Morguard Investments Limited	Pensionfund Realty Limited	7412	Winnipeg Office
51.	Strategic Group	Macleod Place Ltd.	7411	Calgary Office
52.	Bentall Kennedy	391102 B.C. Ltd.	7407	Burnaby Office

SCHEDULE "F"

Employee Trust Termination Certificate

TO: **ALVAREZ & MARSAL CANADA INC.**, in its capacity as the Court-appointed Monitor of the Target Canada Entities and not in its personal capacity

RE: Termination of the Trust Agreement between Target Corporation, Alvarez & Marsal Canada Inc., in its capacity as the Court-appointed Monitor of Target Canada Co. and certain of its subsidiaries and not in its personal capacity, and the Hon. John D. Ground dated January 15, 2015 (as amended, restated, supplemented and/or modified from time to time, the "**Employee Trust Agreement**")

The undersigned, in his capacity as the Trustee under the Employee Trust Agreement, does hereby certify that all outstanding disputes by employee claimants in respect of their entitlements, if any, under the Employee Trust Agreement have been fully and finally resolved pursuant to and in accordance with the Employee Trust Claims Procedure Order issued by the Ontario Superior Court of Justice (Commercial List) dated October 21, 2015 (Court File No. CV-15-10832-00CL).

[Remainder of Page Intentionally Left Blank]

DATED _____, **[2016]**.

HON. JOHN D. GROUND, in his capacity as Trustee under the Employee Trust Agreement and not in his personal capacity

_____

SCHEDULE "G"

Employee Trust Property Joint Direction

TO: **THE ROYAL BANK OF CANADA ("RBC")**

RE: Trust Agreement between Target Corporation (the "Plan Sponsor"), Alvarez & Marsal Canada Inc., in its capacity as the Court-appointed Monitor of Target Canada Co. and certain of its subsidiaries and not in its personal capacity, and the Hon. John D. Ground dated January 15, 2015 (as amended, restated, supplemented and/or modified from time to time, the "**Employee Trust Agreement**")

AND RE: Account Number [●] (the "**Account**")

The undersigned hereby direct RBC to remit all funds on deposit in the Account, which amount totals $●, to the **[Plan Sponsor/or [Insert designee]]** in accordance with the payment instructions contained on Schedule "A" hereto.

And for so doing this shall be your good, sufficient and irrevocable authority.

[Remainder of Page Intentionally Left Blank]

DATED _____, **[2016]**.

HON. JOHN D. GROUND, in his capacity as Trustee under the Employee Trust Agreement and not in his personal capacity

_____

ALVAREZ & MARSAL CANADA INC., in its capacity as the Administrator under the Employee Trust Agreement and not in its personal capacity

By: _____
Name:
Title:

SCHEDULE "H"

Co-Tenancy Stays

This schedule sets out the outside dates for the expiry of the co-tenancy stays that have been ordered in this proceeding:

Order	Para.	Date Granted	Length	Date Stay Expires
Initial Order	18	January 15, 2015	During the Stay Period	With the Stay Period
Canadian Tire	11	May 19, 2015	6 months	November 19, 2015
Cadillac Fairview	9	May 19, 2015	6 months	November 19, 2015
Lowe's	11	May 20, 2015	6 months	November 20, 2015
Wal-Mart	12	May 21, 2015	8 months	January 21, 2016
Erin Mills	11	July 17, 2015	8 months	March 17, 2016

SCHEDULE "C"
FORM OF MONITOR'S PLAN IMPLEMENTATION DATE CERTIFICATE

Court File No. CV-15-10832-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TARGET CANADA CO., TARGET CANADA HEALTH CO., TARGET CANADA MOBILE GP CO., TARGET CANADA PHARMACY (BC) CORP., TARGET CANADA PHARMACY (ONTARIO) CORP., TARGET CANADA PHARMACY CORP., TARGET CANADA PHARMACY (SK) CORP., and TARGET CANADA PROPERTY LLC (collectively the "**Applicants**")

MONITOR'S CERTIFICATE
(Plan Implementation)

All capitalized terms not otherwise defined herein shall have the meanings ascribed thereto in the Order of the Honourable Regional Senior Justice Morawetz made in these proceedings on June 2, 2016 (the "**Sanction and Vesting Order**").

Pursuant to paragraph 8 of the Sanction and Vesting Order, Alvarez & Marsal Canada Inc. in its capacity as Court-appointed Monitor of the Target Canada Entities (the "**Monitor**") delivers to the Target Canada Entities this certificate and hereby certifies that it has been informed in writing by the Target Canada Entities and the Plan Sponsor that all of the conditions precedent set out in section 8.3 of the Plan have been satisfied or waived, as applicable, in accordance with the terms of the Plan and that the Plan Implementation Date has occurred and the Plan is effective in accordance with its terms and the terms of the Sanction and Vesting Order. This Certificate will be filed with the Court and posted on the Website.

DATED at the City of Toronto, in the Province of Ontario, this ● day of ●, 2016 at ● **[a.m. / p.m]**.

ALVAREZ & MARSAL CANADA INC., in its capacity as Court-appointed Monitor of Target Canada Co., *et al.* and not in its personal or corporate capacity

By: _____
Name:
Title:

SCHEDULE "D"

IP ASSETS VESTED IN 3293849 NOVA SCOTIA COMPANY

alliesforconsumerdigitalsafety.ca
avaandviv.ca
avaviv.ca
brightspotmobile.ca
brightspotphone.ca
bullseyemobilesolutions.ca
bullseyepharmacy.ca
bullseyeshoprequests.ca
bullseyespecialrequests.ca
bullseyesubscription.ca
bullseyesubscriptions.ca
bullseyeticket.ca
bullseyetickets.ca
canadapartnersonline.ca
consumerdigitalsafetyallies.ca
consumerdigitalsafetyconsortium.ca
digitalsafetyallies.ca
dites-le-nous-target.ca
domaniedelarcher.ca
garde-marche.ca
hopethop.ca
larchermaraicher.ca
marchefute.ca
moretaylor.ca
mybrightspot.ca
partenairescanadiensenligne.ca
partnersonlinecanada.ca
pharmacyevents.ca
redperk.ca
redperks.ca
reellementessentiel.ca
savoreveryday.ca
savoureveryday.ca
tellbullseye.ca
telltgt.ca
tevolio.ca
wellbeingdreams.ca

SCHEDULE "E"

IP ASSETS VESTED IN TARGET BRANDS INC.

expectmorepayless.ca
smith-hawken.ca
smithhawken.ca
smithnhawken.ca
suttonanddodge.ca
takechargeofeducation.ca
target-ceo.ca
targetcartwheel.ca
targetceo.ca
targetexpress.ca
targetget.ca
targetlocation.ca
targetspoton.ca
targetsubscription.ca
targetsubscriptions.ca
telltarget.ca
trouvezmieuxpayezmoins.ca
upandup.ca
upandupbrand.ca
upup.ca
upupbrand.ca
winecube.ca
yourtarget.ca

SCHEDULE "F"
FORM OF MONITOR'S NOTICE OF FINAL DISTRIBUTION

Court File No. CV-15-10832-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TARGET CANADA CO., TARGET CANADA HEALTH CO., TARGET CANADA MOBILE GP CO., TARGET CANADA PHARMACY (BC) CORP., TARGET CANADA PHARMACY (ONTARIO) CORP., TARGET CANADA PHARMACY CORP., TARGET CANADA PHARMACY (SK) CORP., and TARGET CANADA PROPERTY LLC (collectively the "**Applicants**")

NOTICE OF FINAL DISTRIBUTION

All capitalized terms not otherwise defined in this Notice shall have the meanings ascribed thereto in the Second Amended and Restated Joint Plan of Compromise and Arrangement of the Applicants pursuant to the *Companies' Creditors Arrangement Act* dated May 19, 2016 (as further amended, restated, supplemented and/or modified in accordance with its terms, the "**Plan**"), a copy of which is available at www.alvarezandmarsal.com/targetcanada.

TAKE NOTICE THAT Target Canada Co. shall effect a final distribution under the Plan on [●] (the "**Final Distribution Date**") pursuant to and in accordance with the terms of the Plan and the Sanction and Vesting Order issued by the Ontario Superior Court of Justice (Commercial List) on June 2, 2016.

AND TAKE NOTICE THAT the Plan provides that if any Affected Creditor's, Propco Unaffected Creditor's, Property LP Unaffected Creditor's, Landlord Guarantee Creditor's or Landlord Non-Guarantee Creditor's distribution is returned as undeliverable or is not cashed, no further distributions to such Creditor or Landlord shall be made unless and until the Monitor is notified by such creditor of its current address or wire particulars, at which time all distributions shall be made to such Creditor or Landlord without interest.

AND TAKE NOTICE THAT all Affected Creditors, Propco Unaffected Creditors, Property LP Unaffected Creditors, Landlord Guarantee Creditors and Landlord Non-Guarantee Creditors who have not received a distribution in respect of their Proven Claims, Propco Unaffected Claims, Property LP Unaffected Claims, Landlord Guarantee Enhancement Amounts or Landlord Guarantee Non-Creditor Equalization Amounts, as applicable, must contact the Monitor, Alvarez & Marsal Canada Inc., at 200 Bay Street, Suite 2900, P.O. Box 22, Toronto, ON M5J 2J1 (Attention: Steven Glustein), facsimile number: (416) 847-5201 or email: targetcanadamonitor@alvarezandmarsal.com on or before 5:00 p.m. (Toronto time) on ● (the "**Distribution Deadline**").

AND TAKE NOTICE THAT, after the Distribution Deadline:

(a) all claims for undeliverable or un-cashed distributions in respect of Proven Claims, Propco Unaffected Claims and Property LP Unaffected Claims of any Affected Creditor, Propco Unaffected Creditor or Property LP Unaffected Creditor, as applicable, or the successor or assign of such Affected Creditor, Propco Unaffected Creditor or Property LP Unaffected Creditor, as applicable, shall be forever discharged and forever barred, without any compensation therefor, notwithstanding any Applicable Laws to the contrary, at which time the Cash amount held by TCC in relation to such Proven Claim, Propco Unaffected Claim or Property LP Unaffected Claim shall be returned to the TCC Cash Pool Account or the Propco Cash Pool Account, as applicable, pursuant to and in accordance with the Plan; and

(b) all claims for undeliverable or un-cashed distributions in respect of Landlord Guarantee Enhancement Amounts and Landlord Non-Guarantee Creditor Equalization Amounts of any Landlord, or the successor or assign of such Landlord, shall be forever discharged and forever barred, without any compensation therefor and shall be dealt with in accordance with the Plan.

DATED at the City of Toronto in the Province of Ontario this ● day of ●, ●.

SCHEDULE "G"
FORM OF MONITOR'S PLAN COMPLETION CERTIFICATE

Court File No. CV-15-10832-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TARGET CANADA CO., TARGET CANADA HEALTH CO., TARGET CANADA MOBILE GP CO., TARGET CANADA PHARMACY (BC) CORP., TARGET CANADA PHARMACY (ONTARIO) CORP., TARGET CANADA PHARMACY CORP., TARGET CANADA PHARMACY (SK) CORP., and TARGET CANADA PROPERTY LLC (collectively the "**Applicants**")

MONITOR'S CERTIFICATE
(Plan Completion)

All capitalized terms not otherwise defined herein shall have the meanings ascribed thereto in the Order of the Honourable Regional Senior Justice Morawetz made in these proceedings on June 2, 2016 (the "**Sanction and Vesting Order**").

Pursuant to paragraph 41 of the Sanction and Vesting Order, Alvarez & Marsal Canada Inc. in its capacity as Court-appointed Monitor of the Target Canada Entities (the "**Monitor**") delivers to the Target Canada Entities this certificate and hereby certifies that it has been informed in writing by TCC that TCC has completed its duties to effect distributions, disbursements and payments in accordance with the Plan and that all of the Monitor's duties and the Target Canada Entities' duties under the Plan and the Orders have been completed.

DATED at the City of Toronto, in the Province of Ontario, this ● day of ●, 2016 at ● **[a.m. / p.m.]**.

ALVAREZ & MARSAL CANADA INC., in its capacity as Court-appointed Monitor of Target Canada Co., *et al.* and not in its personal or corporate capacity

By: _____

Name:
Title:

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED
AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TARGET CANADA CO., *et al.*

Applicants

Court File No. CV-15-10832-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDING COMMENCED AT
TORONTO

SANCTION AND VESTING ORDER

OSLER, HOSKIN & HARCOURT LLP
Box 50, 1 First Canadian Place
Toronto, Canada M5X 1B8

Tracy Sandler (LSUC #: 32443N)
Jeremy Dacks (LSUC #: 41851R)
Shawn Irving (LSUC #: 50035U)
Robert Carson (LSUC #: 57364H)

Tel: (416) 362-2111
Fax: (416) 862-6666

Lawyers for the Applicants

Matter No: 1159785

Court File No. CV-19-00614629-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

THE HONOURABLE MR.	)	TUESDAY, THE 15th
JUSTICE MCEWEN	)	DAY OF SEPTEMBER, 2020

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF PAYLESS SHOESOURCE CANADA INC. AND PAYLESS SHOESOURCE CANADA GP INC.

(the "**Applicants**")

ORDER
(CCAA Termination)

THIS MOTION made by the Payless Canada Entities (as defined below), pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**"), for an Order substantially in the form attached to the Motion Record dated September 3, 2020 was heard this day by judicial video conference via Zoom at Toronto, Ontario due to the COVID-19 crisis.

ON READING the Notice of Motion of the Payless Canada Entities, the Affidavit of Mario Zarazua sworn September 3, 2020 (the "**Zarazua Affidavit**"), and the exhibits thereto, the ninth report of FTI Consulting Canada Inc. ("**FTI**"), in its capacity as court-appointed monitor (the "**Monitor**") of the Applicants and Payless ShoeSource Canada LP (collectively, the "**Payless Canada Entities**") dated September 3, 2020 (the "**Ninth Report**"); and on hearing the submissions of counsel for the Payless Canada Entities, the Monitor, and the other parties listed on the counsel slip, and no one else appearing although duly served as appears from the affidavit of service of Benjamin Goodis sworn September 8, 2020 filed;

SERVICE AND DEFINITIONS

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion and the Motion Record herein be and is hereby abridged and validated so that the Motion is properly returnable today.

2. **THIS COURT ORDERS** that any capitalized term used and not defined herein shall have the meaning ascribed thereto in the Zarazua Affidavit.

STAY EXTENSION

3. **THIS COURT ORDERS** that the Stay Period be and is hereby extended until the date and time of filing of a certificate (the "**CCAA Termination Certificate**") substantially in the form attached hereto as Schedule "A".

DISCHARGE OF CHIEF RESTRUCTURING ORGANIZATION

4. **THIS COURT ORDERS** that effective on the date of this Order, Ankura Consulting Group, LLC ("**Ankura**") shall be discharged and relieved from any further obligations, responsibilities or duties in its capacity as Chief Restructuring Organization (the "**CRO**") pursuant to the Initial Order and any other Orders of this Court in the Payless Canada Entities' CCAA proceeding (the "**CCAA Proceedings**"), provided that notwithstanding its discharge herein, Ankura shall continue to have the benefit of the provisions of all Orders made in the CCAA Proceedings, including all approvals, protections and stays of proceedings in favour of Ankura in its capacity as CRO.

5. **THIS COURT ORDERS AND DECLARES** that Ankura be and is hereby released and discharged from any and all liability that Ankura now has or may hereafter have by reason of, or in any way arising out of, the acts or omissions of Ankura while acting in its capacity as CRO herein, save and except for any gross negligence or wilful misconduct on Ankura's part. Without limiting the generality of the foregoing, Ankura is hereby forever released and discharged from any and all liability relating to matters that were raised, or which could have been raised, in the CCAA Proceedings, save and except for any gross negligence or wilful misconduct on Ankura's part.

PAYMENT OF OUTSTANDING INVOICES

6. **THIS COURT ORDERS** that, notwithstanding anything contained in the CCAA Plan or any other Order of this Court (including, without limitation, paragraph 43 of the Initial Order), the Monitor is authorized to pay outstanding post-filing invoices of the Payless Canada Entities from the Post-Filing Claim Reserve, including any professional fees and a retainer to a trustee in bankruptcy (subject to the terms of this Order), without further Court order or stakeholder approvals.

RELEASES

7. **THIS COURT ORDERS** that, without in any way limiting the releases set out in Article 8 of the CCAA Plan or the provisions of paragraphs 24-28 of the Sanction Order, the Payless Canada Entities, any Directors and Officers, employees, and their respective advisors, including legal counsel, and the Monitor, FTI, and their respective directors, officers, employees and advisors, including legal counsel (collectively, the "**Released Parties**"), shall be and are hereby forever irrevocably released and discharged from any and all present and future claims, liabilities, indebtedness, demands, actions, causes of action, suits, damages, judgments and obligations of whatever nature or kind whatsoever (whether direct or indirect, known or unknown, absolute or contingent, accrued or unaccrued, liquidated or unliquidated, matured or unmatured or due or not yet due, in law or equity and whether based in statute or otherwise) based in whole or in part on any act, omission, or other occurrence existing or taking place prior to the date of this Order or completed pursuant to the terms of this Order in any way relating to, arising out of, or in respect of the implementation of the CCAA Plan or the terms of this Order (collectively, the "**Released Claims**"), which Released Claims are hereby fully, finally, irrevocably and forever waived, discharged, released, cancelled and barred as against the Released Parties, provided that nothing herein shall release or discharge any Released Party if such Released Party is judged by the express terms of a judgment rendered on a final determination on the merits to have committed criminal, fraudulent or other wilful misconduct.

8. **THIS COURT ORDERS** that the Payless Canada Entities are each authorized to file an assignment into bankruptcy and to name FTI or such other trustee as the Payless Canada Entities determine as the trustee in bankruptcy.

RECORDS

9. **THIS COURT ORDERS** that all records of the Payless Canada Entities stored at any Iron Mountain Canada facility where records are currently being held (other than records identified by the proposed trustee in bankruptcy as required to administer a bankruptcy) may be destroyed prior to the filing of the CCAA Termination Certificate.

APPROVAL OF MONITOR'S REPORT, ACTIVITIES, FEES AND DISBURSEMENTS

10. **THIS COURT ORDERS** that the Ninth Report, and the activities of the Monitor referred to therein, be and are hereby approved; provided, however, that only the Monitor, in its personal capacity and only with respect to its own personal liability, shall be entitled to rely upon or utilize in any way such approval.

11. **THIS COURT ORDERS** that the fees and disbursements of the Monitor and its counsel as set out in the affidavits of Toni Vanderlaan sworn September 3, 2020 and Sean H. Zweig sworn September 3, 2020 be and are hereby approved.

CCAA TERMINATION PROVISIONS

12. **THIS COURT ORDERS** that the Monitor shall, at least fourteen (14) days prior to the proposed date of filing the CCAA Termination Certificate (the "**CCAA Termination Date**"), provide notice to the Service List in the CCAA Proceedings: (i) of the Monitor's intention to file the CCAA Termination Certificate; and (ii) that, upon the filing of the CCAA Termination Certificate and subject to the provisions of this Order, the CCAA Proceedings shall be terminated without further Order or action by any party and the relief set out in paras 13-21 of this Order (the "**Termination Relief**") shall be automatically deemed to be effective.

13. **THIS COURT ORDERS** that effective upon the filing of the CCAA Termination Certificate, the Administration Charge and the Directors' Charge (each as defined in the Initial Order) are each hereby be discharged, released and terminated.

14. **THIS COURT ORDERS** that effective upon the filing of the CCAA Termination Certificate, the Monitor is authorized and directed to transfer the balance of the Reserves to the Payless Canada Entities (or their designee) without further consents or court approval, notwithstanding any assignment in bankruptcy made prior to or after the CCAA Termination Date.

15. **THIS COURT ORDERS AND DECLARES** that effective upon the filing of the CCAA Termination Certificate, the Payless Canada Entities and the Monitor will be deemed to have completed all of their obligations under the CCAA Plan and the Orders of this Court.

16. **THIS COURT ORDERS** that effective upon the filing of the CCAA Termination Certificate, the release and discharge from liability set out in paragraph 7 hereof shall be automatically deemed to be effective up to and including the CCAA Termination Date (the "**Release Extension**").

17. **THIS COURT ORDERS AND DECLARES** that, effective upon the filing of the CCAA Termination Certificate, FTI shall immediately be deemed discharged as Monitor and shall have no further duties, obligations, or responsibilities as Monitor, save and except as set out in paragraphs 14 and 19 herein.

18. **THIS COURT ORDERS** that, notwithstanding any provision of this Order, the termination of the CCAA Proceedings or the discharge of the Monitor, nothing herein shall affect, vary, derogate from, limit or amend, and FTI and its counsel shall continue to have the benefit of, the approvals and protections in favour of the Monitor and its counsel at common law or pursuant to the CCAA, the Initial Order, or any other Order of this Court in the CCAA Proceedings, all of which are expressly continued and confirmed, including in connection with any actions taken by the Monitor pursuant to this Order following the CCAA Termination Date.

19. **THIS COURT ORDERS** that notwithstanding the discharge of FTI as Monitor and the termination of these CCAA Proceedings, FTI shall remain Monitor and have the authority to complete or address any matters that may be ancillary or incidental to the CCAA Proceedings following the CCAA Termination Date, and in connection therewith FTI and its counsel shall continue to have the benefit of all approvals and protections in favour of the Monitor at common law or pursuant to the CCAA, the Initial Order and all other Orders made in the CCAA Proceedings.

20. **THIS COURT ORDERS** that in the event that any person objects to the Release Extension or any other relief that will become effective on the filing of the CCAA Termination Certificate, that person must send a written notice of the objection, and the grounds therefor, to the fax, email address or mailing address of the Monitor and its counsel as set out on the Service List, such that the objection is received by the Monitor prior to the proposed CCAA Termination Date. If no objection is received by the Monitor prior to the proposed CCAA Termination Date, the Monitor

shall file the CCAA Termination Certificate on the proposed CCAA Termination Date and the Termination Relief shall be deemed to be effective, without further Order of the Court.

21. **THIS COURT ORDERS** that if an objection is received by the Monitor in accordance with paragraph 20 hereof, the Monitor shall only file the CCAA Termination Certificate: (i) if the objection is resolved, whereupon the Termination Relief shall be deemed to have occurred, or (ii) on further Order of the Court.

GENERAL

22. **THIS COURT ORDERS** that notwithstanding the discharge of the Monitor and the termination of the CCAA Proceedings, this Court shall remain seized of any matter arising from these CCAA Proceedings, and each of the Payless Canada Entities, the Monitor and any other interested party shall have the authority from and after the date of this Order to apply to this Court to address matters ancillary or incidental to these CCAA Proceedings notwithstanding the termination thereof. The Monitor is authorized to take such steps and actions as the Monitor determines are necessary to give effect to this Order following the date of this Order until the CCAA Termination Date.

23. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada, the United States or elsewhere, to give effect to this Order and to assist each of the Payless Canada Entities, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to each of the Payless Canada Entities and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, or to assist each of the Payless Canada Entities and the Monitor and their respective agents in carrying out the terms of this Order.

24. **THIS COURT ORDERS** that each of the Payless Canada Entities and the Monitor be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and that Payless ShoeSource Canada Inc. is authorized and

empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

McE T.

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO:

SEP 15 2020

PER / PAR:

SCHEDULE "A"

FORM OF CCAA TERMINATION CERTIFICATE

Court File No. CV-19-00614629-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF PAYLESS SHOESOURCE CANADA INC. AND PAYLESS SHOESOURCE CANADA GP INC.

(the "**Applicants**")

Monitor's Certificate
(CCAA Termination)

RECITALS

A. All capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Order of the Honourable Justice McEwen made in these proceedings on September 15th, 2020 (the "**CCAA Termination Order**").

B. Pursuant to the CCAA Termination Order, upon FTI Consulting Canada Inc. ("**FTI**") in its capacity as Monitor filing the CCAA Termination Certificate, the CCAA proceedings of the Payless Canada Entities shall be terminated, the Administration Charge and the Directors' Charge shall be terminated, the Payless Canada Entities and the Monitor will be deemed to have completed all of their obligations under the CCAA Plan and Orders of the Court, the Release Extension will become effective, the Monitor shall be authorized to transfer the balance of the Reserves to the Payless Canada Entities, and FTI shall be discharged as the Monitor of the Payless Canada Entities, provided however that notwithstanding this discharge (a) FTI shall remain Monitor for the

performance of such ancillary and incidental duties as may be required to complete the administration of the Payless Canada Entities' CCAA proceedings; and (b) FTI shall continue to have the benefit of the provisions of all Orders made in the Payless Canada Entities' CCAA proceedings, including all approvals, protections and stays of proceedings in favour of FTI in its capacity as Monitor.

THE MONITOR CERTIFIES the following:

1. There are no unresolved objections to the Release Extension or any of the other Termination Relief.

2. Immediately following the filing of this CCAA Termination Certificate, the Monitor will pay the balance of the Reserves to the Payless Canada Entities or their designee.

3. The Monitor has completed the other activities described in the Ninth Report.

DATED at the City of Toronto, in the Province of Ontario, this ___ day of _____, 2020 at _____.

FTI CONSULTING CANADA INC., solely in its capacity as Court-appointed Monitor of the Payless Canada Entities and not in its personal or corporate capacity

By: _____
Name:
Title:

Court File No. CV-19-00614629-00CL

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF PAYLESS SHOESOURCE CANADA INC. AND PAYLESS SHOESOURCE CANADA GP INC.

15 September 20

The Order shall go as per the draft filed and signed.
There is no opposition.
I have reviewed the materials and heard submissions of counsel.
The relief sought is fair and reasonable- including the stay extension, activities of the Monitor, fees sought and the termination provisions.

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDING COMMENCED AT TORONTO

ORDER

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Province of Alberta

JUDICATURE ACT

ALBERTA RULES OF COURT

Alberta Regulation 124/2010

With amendments up to and including Alberta Regulation 95/2025

Current as of May 12 2025

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Inspection or examination of property

6.26 On application, the Court may make one or more of the following orders:

(a) an order to inspect property, including an inspection by a judge or jury, or both, at trial, if the inspection is advisable to decide a question in dispute in an action, application or proceeding;

(b) an order to take samples, make observations or undertake experiments for the purpose of obtaining information or evidence, or both;

(c) an order to enter land or premises for the purpose of carrying out an order under this rule.

Notice before disposing of anything held by the Court

6.27(1) On application, the Court may direct that money or other personal property held by the Court not be paid out or disposed of without notice being served on the applicant.

(2) The applicant must be a person who

(a) is interested in the money or other personal property held by the Court, or

(b) is seeking to have the money or personal property applied to satisfy a judgment or order or a writ of enforcement against the person on whose behalf the money or personal property is held.

(3) The applicant

(a) must file an affidavit verifying the facts relied on in the application, and

(b) may make the application without serving notice of the application on any other person.

Division 4
Restriction on Media Reporting and Public Access to Court Proceedings

Application of this Division

6.28 Unless an enactment otherwise provides or the Court otherwise orders, this Division applies to an application for an order

(a) to ban publication of court proceedings,

(b) to seal or partially seal a court file,

(c) permitting a person to give evidence in a way that prevents that person or another person from being identified,

(d) for a hearing from which the public is excluded, or

(e) for use of a pseudonym.

Restricted court access applications and orders

6.29 An application under this Division is to be known as a restricted court access application and an order made under this Division is to be known as a restricted court access order.

When restricted court access application may be filed

6.30 A person may file a restricted court access application only if the Court has authority to make a restricted court access order under an enactment or at common law.

AR 124/2010 s6.30;194/2020

Timing of application and service

6.31 An applicant for a restricted court access order must, 5 days or more before the date scheduled for the hearing, trial or proceeding in respect of which the order is sought,

(a) file the application in Form 32, and

(b) unless the Court otherwise orders, serve every party and any other person named or described by the Court.

Notice to media

6.32 When a restricted court access application is filed, a copy of it must be served on the court clerk, who must, in accordance with the direction of the Chief Justice, give notice of the application to

(a) the electronic and print media identified or described by the Chief Justice, and

(b) any other person named by the Court.

AR 124/2010 s6.32;163/2010

Judge or applications judge assigned to application

6.33 A restricted court access application must be heard and decided by

(a) the judge or applications judge assigned to hear the application, trial or other proceeding in respect of which the restricted court access order is sought,

(b) if the assigned judge or applications judge is not available or no judge or applications judge has been assigned, the case management judge for the action, or

(c) if there is no judge or applications judge available to hear the application as set out in clause (a) or (b), the Chief Justice or a judge designated for the purpose by the Chief Justice.

AR 124/2010 s6.33;194/2020;136/2022

Application to seal or unseal court files

6.34(1) An application to seal an entire court file or an application to set aside all or any part of an order to seal a court file must be filed.

(2) The application must be made to

(a) the Chief Justice, or

(b) a judge designated to hear applications under subrule (1) by the Chief Justice.

(3) The Court may direct

(a) on whom the application must be served and when,

(b) how the application is to be served, and

(c) any other matter that the circumstances require.

Persons having standing at application

6.35 The following persons have standing to be heard when a restricted court access application is considered

(a) a person who was served or given notice of the application;

(b) any other person recognized by the Court who claims to have an interest in the application, trial or proceeding and whom the Court permits to be heard.

No publication pending application

6.36 Information that is the subject of the initial restricted court access application must not be published without the Court's permission.

AR 124/2010 s6.36;143/2011

Division 5
Facilitating Proceedings

Notice to admit

6.37(1) A party may, by notice in Form 33, call on any other party to admit for the purposes of an application, originating application, streamlined trial or trial, either or both of the following:

(a) any fact stated in the notice, including any fact in respect of a record;

(b) any written opinion included in or attached to the notice, which must state the facts on which the opinion is based.

(2) A copy of the notice must be served on each of the other parties.

(3) Each of the matters for which an admission is requested is presumed to be admitted unless, within 20 days after the date of service of the notice to admit, the party to whom the notice is addressed serves on the party requesting the admission a statement that

(a) denies the fact or the opinion, or both, for which an admission is requested and sets out in detail the reasons why the fact cannot be admitted or the opinion cannot be admitted, as the case requires, or

(b) sets out an objection on the ground that some or all of the matters for which admissions are requested are, in whole or in part,

(i) privileged, or

(ii) irrelevant, improper or unnecessary.

(4) A copy of the statement must be served on each of the other parties.

(5) A denial by a party must fairly meet the substance of the requested admission and, when only some of the facts or opinions for which an admission is requested are denied, the denial must specify the facts or opinions that are admitted and deny only the remainder.

Atomic Energy of Canada Limited *Appellant*

v.

Sierra Club of Canada *Respondent*

and

The Minister of Finance of Canada, the Minister of Foreign Affairs of Canada, the Minister of International Trade of Canada and the Attorney General of Canada *Respondents*

Énergie atomique du Canada Limitée *Appelante*

c.

Sierra Club du Canada *Intimé*

et

Le ministre des Finances du Canada, le ministre des Affaires étrangères du Canada, le ministre du Commerce international du Canada et le procureur général du Canada *Intimés*

INDEXED AS: SIERRA CLUB OF CANADA *v.* CANADA (MINISTER OF FINANCE)

Neutral citation: 2002 SCC 41.

File No.: 28020.

2001: November 6; 2002: April 26.

Present: McLachlin C.J. and Gonthier, Iacobucci, Bastarache, Binnie, Arbour and LeBel JJ.

RÉPERTORIÉ : SIERRA CLUB DU CANADA *c.* CANADA (MINISTRE DES FINANCES)

Référence neutre : 2002 CSC 41.

Nº du greffe : 28020.

2001 : 6 novembre; 2002 : 26 avril.

Présents : Le juge en chef McLachlin et les juges Gonthier, Iacobucci, Bastarache, Binnie, Arbour et LeBel.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Practice — Federal Court of Canada — Filing of confidential material — Environmental organization seeking judicial review of federal government's decision to provide financial assistance to Crown corporation for construction and sale of nuclear reactors — Crown corporation requesting confidentiality order in respect of certain documents — Proper analytical approach to be applied to exercise of judicial discretion where litigant seeks confidentiality order — Whether confidentiality order should be granted — Federal Court Rules, 1998, SOR/98-106, r. 151.

Sierra Club is an environmental organization seeking judicial review of the federal government's decision to provide financial assistance to Atomic Energy of Canada Ltd. ("AECL"), a Crown corporation, for the construction and sale to China of two CANDU reactors. The reactors are currently under construction in China, where AECL is the main contractor and project manager. Sierra Club maintains that the authorization of financial assistance

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

Pratique — Cour fédérale du Canada — Production de documents confidentiels — Contrôle judiciaire demandé par un organisme environnemental de la décision du gouvernement fédéral de donner une aide financière à une société d'État pour la construction et la vente de réacteurs nucléaires — Ordonnance de confidentialité demandée par la société d'État pour certains documents — Analyse applicable à l'exercice du pouvoir discrétionnaire judiciaire sur une demande d'ordonnance de confidentialité — Faut-il accorder l'ordonnance? — Règles de la Cour fédérale (1998), DORS/98-106, règle 151.

Un organisme environnemental, Sierra Club, demande le contrôle judiciaire de la décision du gouvernement fédéral de fournir une aide financière à Énergie atomique du Canada Ltée (« ÉACL »), une société de la Couronne, pour la construction et la vente à la Chine de deux réacteurs CANDU. Les réacteurs sont actuellement en construction en Chine, où ÉACL est l'entrepreneur principal et le gestionnaire de projet. Sierra Club soutient que

by the government triggered s. 5(1)(*b*) of the *Canadian Environmental Assessment Act* ("*CEAA*"), requiring an environmental assessment as a condition of the financial assistance, and that the failure to comply compels a cancellation of the financial arrangements. AECL filed an affidavit in the proceedings which summarized confidential documents containing thousands of pages of technical information concerning the ongoing environmental assessment of the construction site by the Chinese authorities. AECL resisted Sierra Club's application for production of the confidential documents on the ground, *inter alia*, that the documents were the property of the Chinese authorities and that it did not have the authority to disclose them. The Chinese authorities authorized disclosure of the documents on the condition that they be protected by a confidentiality order, under which they would only be made available to the parties and the court, but with no restriction on public access to the judicial proceedings. AECL's application for a confidentiality order was rejected by the Federal Court, Trial Division. The Federal Court of Appeal upheld that decision.

Held: The appeal should be allowed and the confidentiality order granted on the terms requested by AECL.

In light of the established link between open courts and freedom of expression, the fundamental question for a court to consider in an application for a confidentiality order is whether the right to freedom of expression should be compromised in the circumstances. The court must ensure that the discretion to grant the order is exercised in accordance with *Charter* principles because a confidentiality order will have a negative effect on the s. 2(*b*) right to freedom of expression. A confidentiality order should only be granted when (1) such an order is necessary 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 (2) the salutary effects of the confidentiality 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. Three important elements are subsumed under the first branch of the test. First, the risk must be real and substantial, well grounded in evidence, posing a serious threat to the commercial interest in question. Second, the important commercial interest must be one which can be expressed in terms of a public interest in confidentiality, where there is a general principle at stake. Finally, the judge is required to consider not only whether reasonable alternatives are available to such an order but also to restrict the order as much as is reasonably possible while preserving the commercial interest in question.

l'autorisation d'aide financière du gouvernement déclenche l'application de l'al. 5(1)*b*) de la *Loi canadienne sur l'évaluation environnementale* (« *LCÉE* ») exigeant une évaluation environnementale comme condition de l'aide financière, et que le défaut d'évaluation entraîne l'annulation des ententes financières. ÉACL dépose un affidavit qui résume des documents confidentiels contenant des milliers de pages d'information technique concernant l'évaluation environnementale du site de construction qui est faite par les autorités chinoises. ÉACL s'oppose à la communication des documents demandée par Sierra Club pour la raison notamment qu'ils sont la propriété des autorités chinoises et qu'elle n'est pas autorisée à les divulguer. Les autorités chinoises donnent l'autorisation de les communiquer à la condition qu'ils soient protégés par une ordonnance de confidentialité n'y donnant accès qu'aux parties et à la cour, mais n'imposant aucune restriction à l'accès du public aux débats. La demande d'ordonnance de confidentialité est rejetée par la Section de première instance de la Cour fédérale. La Cour d'appel fédérale confirme cette décision.

Arrêt : L'appel est accueilli et l'ordonnance demandée par ÉACL est accordée.

Vu le lien existant entre la publicité des débats judiciaires et la liberté d'expression, la question fondamentale pour la cour saisie d'une demande d'ordonnance de confidentialité est de savoir si, dans les circonstances, il y a lieu de restreindre le droit à la liberté d'expression. La cour doit s'assurer que l'exercice du pouvoir discrétionnaire de l'accorder est conforme aux principes de la *Charte* parce qu'une ordonnance de confidentialité a des effets préjudiciables sur la liberté d'expression garantie à l'al. 2*b*). On ne doit l'accorder que (1) lorsqu'elle est nécessaire pour écarter un risque sérieux pour un intérêt important, y compris un intérêt commercial, dans le contexte d'un litige, en l'absence d'autres options raisonnables pour écarter ce risque, et (2) lorsque ses effets bénéfiques, y compris ses effets sur le droit des justiciables civils à un procès équitable, l'emportent sur ses effets préjudiciables, y compris ses effets sur la liberté d'expression qui, dans ce contexte, comprend l'intérêt du public dans la publicité des débats judiciaires. Trois éléments importants sont subsumés sous le premier volet de l'analyse. Premièrement, le risque en cause doit être réel et important, être bien étayé par la preuve et menacer gravement l'intérêt commercial en question. Deuxièmement, l'intérêt doit pouvoir se définir en termes d'intérêt public à la confidentialité, mettant en jeu un principe général. Enfin le juge doit non seulement déterminer s'il existe d'autres options raisonnables, il doit aussi restreindre l'ordonnance autant qu'il est raisonnablement possible de le faire tout en préservant l'intérêt commercial en question.

Applying the test to the present circumstances, the commercial interest at stake here relates to the objective of preserving contractual obligations of confidentiality, which is sufficiently important to pass the first branch of the test as long as certain criteria relating to the information are met. The information must have been treated as confidential at all relevant times; on a balance of probabilities, proprietary, commercial and scientific interests could reasonably be harmed by disclosure of the information; and the information must have been accumulated with a reasonable expectation of it being kept confidential. These requirements have been met in this case. Disclosure of the confidential documents would impose a serious risk on an important commercial interest of AECL, and there are no reasonably alternative measures to granting the order.

Under the second branch of the test, the confidentiality order would have significant salutary effects on AECL's right to a fair trial. Disclosure of the confidential documents would cause AECL to breach its contractual obligations and suffer a risk of harm to its competitive position. If a confidentiality order is denied, AECL will be forced to withhold the documents in order to protect its commercial interests, and since that information is relevant to defences available under the *CEAA*, the inability to present this information hinders AECL's capacity to make full answer and defence. Although in the context of a civil proceeding, this does not engage a *Charter* right, the right to a fair trial is a fundamental principle of justice. Further, the confidentiality order would allow all parties and the court access to the confidential documents, and permit cross-examination based on their contents, assisting in the search for truth, a core value underlying freedom of expression. Finally, given the technical nature of the information, there may be a substantial public security interest in maintaining the confidentiality of such information.

The deleterious effects of granting a confidentiality order include a negative effect on the open court principle, and therefore on the right to freedom of expression. The more detrimental the confidentiality order would be to the core values of (1) seeking the truth and the common good, (2) promoting self-fulfilment of individuals by allowing them to develop thoughts and ideas as they see fit, and (3) ensuring that participation in the political process is open to all persons, the harder it will be to justify the confidentiality order. In the hands of the parties and their experts, the confidential documents may be of great assistance in probing the truth of the Chinese environmental assessment process, which would assist the court in reaching accurate factual conclusions. Given the highly technical nature of the documents, the important value of the search for the truth which underlies

En l'espèce, l'intérêt commercial en jeu, la préservation d'obligations contractuelles de confidentialité, est suffisamment important pour satisfaire au premier volet de l'analyse, pourvu que certaines conditions soient remplies : les renseignements ont toujours été traités comme des renseignements confidentiels; il est raisonnable de penser que, selon la prépondérance des probabilités, leur divulgation compromettrait des droits exclusifs, commerciaux et scientifiques; et les renseignements ont été recueillis dans l'expectative raisonnable qu'ils resteraient confidentiels. Ces conditions sont réunies en l'espèce. La divulgation des documents confidentiels ferait courir un risque sérieux à un intérêt commercial important de ÉACL et il n'existe pas d'options raisonnables autres que l'ordonnance de confidentialité.

À la deuxième étape de l'analyse, l'ordonnance de confidentialité aurait des effets bénéfiques considérables sur le droit de ÉACL à un procès équitable. Si ÉACL divulguait les documents confidentiels, elle manquerait à ses obligations contractuelles et s'exposerait à une détérioration de sa position concurrentielle. Le refus de l'ordonnance obligerait ÉACL à retenir les documents pour protéger ses intérêts commerciaux et comme ils sont pertinents pour l'exercice des moyens de défense prévus par la *LCÉE*, l'impossibilité de les produire empêcherait ÉACL de présenter une défense pleine et entière. Même si en matière civile cela n'engage pas de droit protégé par la *Charte*, le droit à un procès équitable est un principe de justice fondamentale. L'ordonnance permettrait aux parties et au tribunal d'avoir accès aux documents confidentiels, et permettrait la tenue d'un contre-interrogatoire fondé sur leur contenu, favorisant ainsi la recherche de la vérité, une valeur fondamentale sous-tendant la liberté d'expression. Il peut enfin y avoir un important intérêt de sécurité publique à préserver la confidentialité de ce type de renseignements techniques.

Une ordonnance de confidentialité aurait un effet préjudiciable sur le principe de la publicité des débats judiciaires et donc sur la liberté d'expression. Plus l'ordonnance porte atteinte aux valeurs fondamentales que sont (1) la recherche de la vérité et du bien commun, (2) l'épanouissement personnel par le libre développement des pensées et des idées et (3) la participation de tous au processus politique, plus il est difficile de justifier l'ordonnance. Dans les mains des parties et de leurs experts, les documents peuvent être très utiles pour apprécier la conformité du processus d'évaluation environnementale chinois, et donc pour aider la cour à parvenir à des conclusions de fait exactes. Compte tenu de leur nature hautement technique, la production des documents confidentiels en vertu de l'ordonnance demandée favoriserait mieux l'importante valeur de la recherche de la vérité, qui

both freedom of expression and open justice would be promoted to a greater extent by submitting the confidential documents under the order sought than it would by denying the order.

Under the terms of the order sought, the only restrictions relate to the public distribution of the documents, which is a fairly minimal intrusion into the open court rule. Although the confidentiality order would restrict individual access to certain information which may be of interest to that individual, the second core value of promoting individual self-fulfilment would not be significantly affected by the confidentiality order. The third core value figures prominently in this appeal as open justice is a fundamental aspect of a democratic society. By their very nature, environmental matters carry significant public import, and openness in judicial proceedings involving environmental issues will generally attract a high degree of protection, so that the public interest is engaged here more than if this were an action between private parties involving private interests. However, the narrow scope of the order coupled with the highly technical nature of the confidential documents significantly temper the deleterious effects the confidentiality order would have on the public interest in open courts. The core freedom of expression values of seeking the truth and promoting an open political process are most closely linked to the principle of open courts, and most affected by an order restricting that openness. However, in the context of this case, the confidentiality order would only marginally impede, and in some respects would even promote, the pursuit of these values. The salutary effects of the order outweigh its deleterious effects and the order should be granted. A balancing of the various rights and obligations engaged indicates that the confidentiality order would have substantial salutary effects on AECL's right to a fair trial and freedom of expression, while the deleterious effects on the principle of open courts and freedom of expression would be minimal.

Cases Cited

Applied: *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326; *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *R. v. Mentuck*, [2001] 3 S.C.R. 442, 2001 SCC 76; *M. (A.) v. Ryan*, [1997] 1 S.C.R. 157; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927; *R. v. Keegstra*, [1990] 3 S.C.R. 697; **referred to:** *AB Hassle v. Canada (Minister of National Health and*

sous-tend à la fois la liberté d'expression et la publicité des débats judiciaires, que ne le ferait le refus de l'ordonnance.

Aux termes de l'ordonnance demandée, les seules restrictions ont trait à la distribution publique des documents, une atteinte relativement minime à la règle de la publicité des débats judiciaires. Même si l'ordonnance de confidentialité devait restreindre l'accès individuel à certains renseignements susceptibles d'intéresser quelqu'un, la deuxième valeur fondamentale, l'épanouissement personnel, ne serait pas touchée de manière significative. La troisième valeur joue un rôle primordial dans le pourvoi puisque la publicité des débats judiciaires est un aspect fondamental de la société démocratique. Par leur nature même, les questions environnementales ont une portée publique considérable, et la transparence des débats judiciaires sur les questions environnementales mérite généralement un degré élevé de protection, de sorte que l'intérêt public est en l'espèce plus engagé que s'il s'agissait d'un litige entre personnes privées à l'égard d'intérêts purement privés. Toutefois la portée étroite de l'ordonnance associée à la nature hautement technique des documents confidentiels tempère considérablement les effets préjudiciables que l'ordonnance de confidentialité pourrait avoir sur l'intérêt du public à la publicité des débats judiciaires. Les valeurs centrales de la liberté d'expression que sont la recherche de la vérité et la promotion d'un processus politique ouvert sont très étroitement liées au principe de la publicité des débats judiciaires, et sont les plus touchées par une ordonnance limitant cette publicité. Toutefois, en l'espèce, l'ordonnance de confidentialité n'entraverait que légèrement la poursuite de ces valeurs, et pourrait même les favoriser à certains égards. Ses effets bénéfiques l'emportent sur ses effets préjudiciables, et il y a lieu de l'accorder. Selon la pondération des divers droits et intérêts en jeu, l'ordonnance de confidentialité aurait des effets bénéfiques importants sur le droit de ÉACL à un procès équitable et à la liberté d'expression, et ses effets préjudiciables sur le principe de la publicité des débats judiciaires et la liberté d'expression seraient minimes.

Jurisprudence

Arrêts appliqués : *Edmonton Journal c. Alberta (Procureur général)*, [1989] 2 R.C.S. 1326; *Société Radio-Canada c. Nouveau-Brunswick (Procureur général)*, [1996] 3 R.C.S. 480; *Dagenais c. Société Radio-Canada*, [1994] 3 R.C.S. 835; *R. c. Mentuck*, [2001] 3 R.C.S. 442, 2001 CSC 76; *M. (A.) c. Ryan*, [1997] 1 R.C.S. 157; *Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 R.C.S. 927; *R. c. Keegstra*, [1990] 3 R.C.S. 697; **arrêts mentionnés :** *AB Hassle c.*

Welfare), [2000] 3 F.C. 360, aff'g (1998), 83 C.P.R. (3d) 428; *Ethyl Canada Inc. v. Canada (Attorney General)* (1998), 17 C.P.C. (4th) 278; *R. v. Oakes*, [1986] 1 S.C.R. 103; *R. v. O.N.E.*, [2001] 3 S.C.R. 478, 2001 SCC 77; *F.N. (Re)*, [2000] 1 S.C.R. 880, 2000 SCC 35; *Eli Lilly and Co. v. Novopharm Ltd.* (1994), 56 C.P.R. (3d) 437.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 1, 2(*b*).
Canadian Environmental Assessment Act, S.C. 1992, c. 37, ss. 5(1)(*b*), 8, 54, 54(2)(*b*).
Federal Court Rules, 1998, SOR/98-106, rr. 151, 312.

APPEAL from a judgment of the Federal Court of Appeal, [2000] 4 F.C. 426, 187 D.L.R. (4th) 231, 256 N.R. 1, 24 Admin. L.R. (3d) 1, [2000] F.C.J. No. 732 (QL), affirming a decision of the Trial Division, [2000] 2 F.C. 400, 178 F.T.R. 283, [1999] F.C.J. No. 1633 (QL). Appeal allowed.

J. Brett Ledger and *Peter Chapin*, for the appellant.

Timothy J. Howard and *Franklin S. Gertler*, for the respondent Sierra Club of Canada.

Graham Garton, *Q.C.*, and *J. Sanderson Graham*, for the respondents the Minister of Finance of Canada, the Minister of Foreign Affairs of Canada, the Minister of International Trade of Canada and the Attorney General of Canada.

The judgment of the Court was delivered by

IACOBUCCI J. —

I. Introduction

1 In our country, courts are the institutions generally chosen to resolve legal disputes as best they can through the application of legal principles to the facts of the case involved. One of the underlying principles of the judicial process is public openness, both in the proceedings of the dispute, and in the material that is relevant to its resolution. However, some material can be made the subject of a confidentiality order. This appeal raises the important

Canada (Ministre de la Santé nationale et du Bien-être social), [2000] 3 C.F. 360, conf. [1998] A.C.F. nº 1850 (QL); *Ethyl Canada Inc. c. Canada (Attorney General)* (1998), 17 C.P.C. (4th) 278; *R. c. Oakes*, [1986] 1 R.C.S. 103; *R. c. O.N.E.*, [2001] 3 R.C.S. 478, 2001 CSC 77; *F.N. (Re)*, [2000] 1 R.C.S. 880, 2000 CSC 35; *Eli Lilly and Co. c. Novopharm Ltd.* (1994), 56 C.P.R. (3d) 437.

Lois et règlements cités

Charte canadienne des droits et libertés, art. 1, 2*b*).
Loi canadienne sur l'évaluation environnementale, L.C. 1992, ch. 37, art. 5(1)*b*), 8, 54, 54(2) [abr. & rempl. 1993, ch. 34, art. 37].
Règles de la Cour fédérale (1998), DORS/98-106, règles 151, 312.

POURVOI contre un arrêt de la Cour d'appel fédérale, [2000] 4 C.F. 426, 187 D.L.R. (4th) 231, 256 N.R. 1, 24 Admin. L.R. (3d) 1, [2000] A.C.F. nº 732 (QL), qui a confirmé une décision de la Section de première instance, [2000] 2 C.F. 400, 178 F.T.R. 283, [1999] A.C.F. nº 1633 (QL). Pourvoi accueilli.

J. Brett Ledger et *Peter Chapin*, pour l'appelante.

Timothy J. Howard et *Franklin S. Gertler*, pour l'intimé Sierra Club du Canada.

Graham Garton, *c.r.*, et *J. Sanderson Graham*, pour les intimés le ministre des Finances du Canada, le ministre des Affaires étrangères du Canada, le ministre du Commerce international du Canada et le procureur général du Canada.

Version française du jugement de la Cour rendu par

LE JUGE IACOBUCCI —

I. Introduction

Dans notre pays, les tribunaux sont les institutions généralement choisies pour résoudre au mieux les différends juridiques par l'application de principes juridiques aux faits de chaque espèce. Un des principes sous-jacents au processus judiciaire est la transparence, tant dans la procédure suivie que dans les éléments pertinents à la solution du litige. Certains de ces éléments peuvent toutefois faire l'objet d'une ordonnance de confidentialité. Le

issues of when, and under what circumstances, a confidentiality order should be granted.

For the following reasons, I would issue the confidentiality order sought and accordingly would allow the appeal.

II. Facts

The appellant, Atomic Energy of Canada Limited ("AECL") is a Crown corporation that owns and markets CANDU nuclear technology, and is an intervener with the rights of a party in the application for judicial review by the respondent, the Sierra Club of Canada ("Sierra Club"). Sierra Club is an environmental organization seeking judicial review of the federal government's decision to provide financial assistance in the form of a $1.5 billion guaranteed loan relating to the construction and sale of two CANDU nuclear reactors to China by the appellant. The reactors are currently under construction in China, where the appellant is the main contractor and project manager.

The respondent maintains that the authorization of financial assistance by the government triggered s. 5(1)(*b*) of the *Canadian Environmental Assessment Act*, S.C. 1992, c. 37 ("*CEAA*"), which requires that an environmental assessment be undertaken before a federal authority grants financial assistance to a project. Failure to undertake such an assessment compels cancellation of the financial arrangements.

The appellant and the respondent Ministers argue that the *CEAA* does not apply to the loan transaction, and that if it does, the statutory defences available under ss. 8 and 54 apply. Section 8 describes the circumstances where Crown corporations are required to conduct environmental assessments. Section 54(2)(*b*) recognizes the validity of an environmental assessment carried out by a foreign authority provided that it is consistent with the provisions of the *CEAA*.

In the course of the application by Sierra Club to set aside the funding arrangements, the appellant

pourvoi soulève les importantes questions de savoir à quel moment et dans quelles circonstances il y a lieu de rendre une ordonnance de confidentialité.

2 Pour les motifs qui suivent, je suis d'avis de rendre l'ordonnance de confidentialité demandée et par conséquent d'accueillir le pourvoi.

II. Les faits

3 L'appelante, Énergie atomique du Canada Limitée (« ÉACL »), société d'État propriétaire et vendeuse de la technologie nucléaire CANDU, est une intervenante ayant reçu les droits de partie dans la demande de contrôle judiciaire présentée par l'intimé, Sierra Club du Canada (« Sierra Club »), un organisme environnemental. Sierra Club demande le contrôle judiciaire de la décision du gouvernement fédéral de fournir une aide financière, sous forme de garantie d'emprunt de 1,5 milliard de dollars, pour la construction et la vente à la Chine de deux réacteurs nucléaires CANDU par l'appelante. Les réacteurs sont actuellement en construction en Chine, où l'appelante est entrepreneur principal et gestionnaire de projet.

4 L'intimé soutient que l'autorisation d'aide financière du gouvernement déclenche l'application de l'al. 5(1)*b*) de la *Loi canadienne sur l'évaluation environnementale*, L.C. 1992, ch. 37 (« *LCÉE* »), qui exige une évaluation environnementale avant qu'une autorité fédérale puisse fournir une aide financière à un projet. Le défaut d'évaluation entraîne l'annulation des ententes financières.

5 Selon l'appelante et les ministres intimés, la *LCÉE* ne s'applique pas à la convention de prêt et si elle s'y applique, ils peuvent invoquer les défenses prévues aux art. 8 et 54 de cette loi. L'article 8 prévoit les circonstances dans lesquelles les sociétés d'État sont tenues de procéder à des évaluations environnementales. Le paragraphe 54(2) reconnaît la validité des évaluations environnementales effectuées par des autorités étrangères pourvu qu'elles soient compatibles avec les dispositions de la *LCÉE*.

6 Dans le cadre de la requête de Sierra Club en annulation des ententes financières, l'appelante a

filed an affidavit of Dr. Simon Pang, a senior manager of the appellant. In the affidavit, Dr. Pang referred to and summarized certain documents (the "Confidential Documents"). The Confidential Documents are also referred to in an affidavit prepared by Mr. Feng, one of AECL's experts. Prior to cross-examining Dr. Pang on his affidavit, Sierra Club made an application for the production of the Confidential Documents, arguing that it could not test Dr. Pang's evidence without access to the underlying documents. The appellant resisted production on various grounds, including the fact that the documents were the property of the Chinese authorities and that it did not have authority to disclose them. After receiving authorization by the Chinese authorities to disclose the documents on the condition that they be protected by a confidentiality order, the appellant sought to introduce the Confidential Documents under Rule 312 of the *Federal Court Rules, 1998*, SOR/98-106, and requested a confidentiality order in respect of the documents.

déposé un affidavit de M. Simon Pang, un de ses cadres supérieurs. Dans l'affidavit, M. Pang mentionne et résume certains documents (les « documents confidentiels ») qui sont également mentionnés dans un affidavit de M. Feng, un expert d'ÉACL. Avant de contre-interroger M. Pang sur son affidavit, Sierra Club a demandé par requête la production des documents confidentiels, au motif qu'il ne pouvait vérifier la validité de sa déposition sans consulter les documents de base. L'appelante s'oppose pour plusieurs raisons à la production des documents, dont le fait qu'ils sont la propriété des autorités chinoises et qu'elle n'est pas autorisée à les divulguer. Après avoir obtenu des autorités chinoises l'autorisation de communiquer les documents à la condition qu'ils soient protégés par une ordonnance de confidentialité, l'appelante a cherché à les produire en invoquant la règle 312 des *Règles de la Cour fédérale (1998)*, DORS/98-106, et a demandé une ordonnance de confidentialité à leur égard.

7 Under the terms of the order requested, the Confidential Documents would only be made available to the parties and the court; however, there would be no restriction on public access to the proceedings. In essence, what is being sought is an order preventing the dissemination of the Confidential Documents to the public.

Aux termes de l'ordonnance demandée, seules les parties et la cour auraient accès aux documents confidentiels. Aucune restriction ne serait imposée à l'accès du public aux débats. On demande essentiellement d'empêcher la diffusion des documents confidentiels au public.

8 The Confidential Documents comprise two Environmental Impact Reports on Siting and Construction Design (the "EIRs"), a Preliminary Safety Analysis Report (the "PSAR"), and the supplementary affidavit of Dr. Pang which summarizes the contents of the EIRs and the PSAR. If admitted, the EIRs and the PSAR would be attached as exhibits to the supplementary affidavit of Dr. Pang. The EIRs were prepared by the Chinese authorities in the Chinese language, and the PSAR was prepared by the appellant with assistance from the Chinese participants in the project. The documents contain a mass of technical information and comprise thousands of pages. They describe the ongoing environmental assessment of the construction site by the Chinese authorities under Chinese law.

Les documents confidentiels comprennent deux Rapports d'impact environnemental (« RIE ») sur le site et la construction, un Rapport préliminaire d'analyse sur la sécurité (« RPAS ») ainsi que l'affidavit supplémentaire de M. Pang qui résume le contenu des RIE et du RPAS. S'ils étaient admis, les rapports seraient joints en annexe de l'affidavit supplémentaire de M. Pang. Les RIE ont été préparés en chinois par les autorités chinoises, et le RPAS a été préparé par l'appelante en collaboration avec les responsables chinois du projet. Les documents contiennent une quantité considérable de renseignements techniques et comprennent des milliers de pages. Ils décrivent l'évaluation environnementale du site de construction qui est faite par les autorités chinoises en vertu des lois chinoises.

As noted, the appellant argues that it cannot introduce the Confidential Documents into evidence without a confidentiality order, otherwise it would be in breach of its obligations to the Chinese authorities. The respondent's position is that its right to cross-examine Dr. Pang and Mr. Feng on their affidavits would be effectively rendered nugatory in the absence of the supporting documents to which the affidavits referred. Sierra Club proposes to take the position that the affidavits should therefore be afforded very little weight by the judge hearing the application for judicial review.

The Federal Court of Canada, Trial Division refused to grant the confidentiality order and the majority of the Federal Court of Appeal dismissed the appeal. In his dissenting opinion, Robertson J.A. would have granted the confidentiality order.

III. Relevant Statutory Provisions

Federal Court Rules, 1998, SOR/98-106

151. (1) On motion, the Court may order that material to be filed shall be treated as confidential.

(2) Before making an order under subsection (1), the Court must be satisfied that the material should be treated as confidential, notwithstanding the public interest in open and accessible court proceedings.

IV. Judgments Below

A. *Federal Court, Trial Division*, [2000] 2 F.C. 400

Pelletier J. first considered whether leave should be granted pursuant to Rule 312 to introduce the supplementary affidavit of Dr. Pang to which the Confidential Documents were filed as exhibits. In his view, the underlying question was that of relevance, and he concluded that the documents were relevant to the issue of the appropriate remedy. Thus, in the absence of prejudice to the respondent, the affidavit should be permitted to be served and filed. He noted that the respondent would be prejudiced by delay, but since both parties had brought

9 Comme je le note plus haut, l'appelante prétend ne pas pouvoir produire les documents confidentiels en preuve sans qu'ils soient protégés par une ordonnance de confidentialité, parce que ce serait un manquement à ses obligations envers les autorités chinoises. L'intimé soutient pour sa part que son droit de contre-interroger M. Pang et M. Feng sur leurs affidavits serait pratiquement futile en l'absence des documents auxquels ils se réfèrent. Sierra Club entend soutenir que le juge saisi de la demande de contrôle judiciaire devrait donc leur accorder peu de poids.

10 La Section de première instance de la Cour fédérale du Canada a rejeté la demande d'ordonnance de confidentialité et la Cour d'appel fédérale, à la majorité, a rejeté l'appel. Le juge Robertson, dissident, était d'avis d'accorder l'ordonnance.

III. Dispositions législatives

11 *Règles de la Cour fédérale (1998)*, DORS/98-106

151. (1) La Cour peut, sur requête, ordonner que des documents ou éléments matériels qui seront déposés soient considérés comme confidentiels.

(2) Avant de rendre une ordonnance en application du paragraphe (1), la Cour doit être convaincue de la nécessité de considérer les documents ou éléments matériels comme confidentiels, étant donné l'intérêt du public à la publicité des débats judiciaires.

IV. Les décisions antérieures

A. *Cour fédérale, Section de première instance*, [2000] 2 C.F. 400

12 Le juge Pelletier examine d'abord s'il y a lieu, en vertu de la règle 312, d'autoriser la production de l'affidavit supplémentaire de M. Pang auquel sont annexés les documents confidentiels. À son avis, il s'agit d'une question de pertinence et il conclut que les documents se rapportent à la question de la réparation. En l'absence de préjudice pour l'intimé, il y a donc lieu d'autoriser la signification et le dépôt de l'affidavit. Il note que des retards seraient préjudiciables à l'intimé mais que, puisque les deux parties ont présenté des requêtes

interlocutory motions which had contributed to the delay, the desirability of having the entire record before the court outweighed the prejudice arising from the delay associated with the introduction of the documents.

13 On the issue of confidentiality, Pelletier J. concluded that he must be satisfied that the need for confidentiality was greater than the public interest in open court proceedings, and observed that the argument for open proceedings in this case was significant given the public interest in Canada's role as a vendor of nuclear technology. As well, he noted that a confidentiality order was an exception to the rule of open access to the courts, and that such an order should be granted only where absolutely necessary.

14 Pelletier J. applied the same test as that used in patent litigation for the issue of a protective order, which is essentially a confidentiality order. The granting of such an order requires the appellant to show a subjective belief that the information is confidential and that its interests would be harmed by disclosure. In addition, if the order is challenged, then the person claiming the benefit of the order must demonstrate objectively that the order is required. This objective element requires the party to show that the information has been treated as confidential, and that it is reasonable to believe that its proprietary, commercial and scientific interests could be harmed by the disclosure of the information.

15 Concluding that both the subjective part and both elements of the objective part of the test had been satisfied, he nevertheless stated: "However, I am also of the view that in public law cases, the objective test has, or should have, a third component which is whether the public interest in disclosure exceeds the risk of harm to a party arising from disclosure" (para. 23).

16 A very significant factor, in his view, was the fact that mandatory production of documents was not in issue here. The fact that the application involved a voluntary tendering of documents to advance the

interlocutoires qui ont entraîné les délais, les avantages de soumettre le dossier au complet à la cour compensent l'inconvénient du retard causé par la présentation de ces documents.

Sur la confidentialité, le juge Pelletier conclut qu'il doit être convaincu que la nécessité de protéger la confidentialité l'emporte sur l'intérêt du public à la publicité des débats judiciaires. Il note que les arguments en faveur de la publicité des débats judiciaires en l'espèce sont importants vu l'intérêt du public envers le rôle du Canada comme vendeur de technologie nucléaire. Il fait aussi remarquer que les ordonnances de confidentialité sont une exception au principe de la publicité des débats judiciaires et ne devraient être accordées que dans des cas de nécessité absolue.

Le juge Pelletier applique le même critère que pour une ordonnance conservatoire en matière de brevets, qui est essentiellement une ordonnance de confidentialité. Pour obtenir l'ordonnance, le requérant doit démontrer qu'il croit subjectivement que les renseignements sont confidentiels et que leur divulgation nuirait à ses intérêts. De plus, si l'ordonnance est contestée, le requérant doit démontrer objectivement qu'elle est nécessaire. Cet élément objectif l'oblige à démontrer que les renseignements ont toujours été traités comme étant confidentiels et qu'il est raisonnable de croire que leur divulgation risque de compromettre ses droits exclusifs, commerciaux et scientifiques.

Ayant conclu qu'il est satisfait à l'élément subjectif et aux deux volets de l'élément objectif du critère, il ajoute : « J'estime toutefois aussi que, dans les affaires de droit public, le critère objectif comporte, ou devrait comporter, un troisième volet, en l'occurrence la question de savoir si l'intérêt du public à l'égard de la divulgation l'emporte sur le préjudice que la divulgation risque de causer à une personne » (par. 23).

Il estime très important le fait qu'il ne s'agit pas en l'espèce de production obligatoire de documents. Le fait que la demande vise le dépôt volontaire de documents en vue d'étayer la thèse de l'appelante,

appellant's own cause as opposed to mandatory production weighed against granting the confidentiality order.

In weighing the public interest in disclosure against the risk of harm to AECL arising from disclosure, Pelletier J. noted that the documents the appellant wished to put before the court were prepared by others for other purposes, and recognized that the appellant was bound to protect the confidentiality of the information. At this stage, he again considered the issue of materiality. If the documents were shown to be very material to a critical issue, "the requirements of justice militate in favour of a confidentiality order. If the documents are marginally relevant, then the voluntary nature of the production argues against a confidentiality order" (para. 29). He then decided that the documents were material to a question of the appropriate remedy, a significant issue in the event that the appellant failed on the main issue.

Pelletier J. also considered the context of the case and held that since the issue of Canada's role as a vendor of nuclear technology was one of significant public interest, the burden of justifying a confidentiality order was very onerous. He found that AECL could expunge the sensitive material from the documents, or put the evidence before the court in some other form, and thus maintain its full right of defence while preserving the open access to court proceedings.

Pelletier J. observed that his order was being made without having perused the Confidential Documents because they had not been put before him. Although he noted the line of cases which holds that a judge ought not to deal with the issue of a confidentiality order without reviewing the documents themselves, in his view, given their voluminous nature and technical content as well as his lack of information as to what information was already in the public domain, he found that an examination of these documents would not have been useful.

par opposition à une production obligatoire, joue contre l'ordonnance de confidentialité.

17 En soupesant l'intérêt du public dans la divulgation et le préjudice que la divulgation risque de causer à ÉACL, le juge Pelletier note que les documents que l'appelante veut soumettre à la cour ont été rédigés par d'autres personnes à d'autres fins, et il reconnaît que l'appelante est tenue de protéger la confidentialité des renseignements. À cette étape, il examine de nouveau la question de la pertinence. Si on réussit à démontrer que les documents sont très importants sur une question cruciale, « les exigences de la justice militent en faveur du prononcé d'une ordonnance de confidentialité. Si les documents ne sont pertinents que d'une façon accessoire, le caractère facultatif de la production milite contre le prononcé de l'ordonnance de confidentialité » (par. 29). Il conclut alors que les documents sont importants pour résoudre la question de la réparation à accorder, elle-même un point important si l'appelante échoue sur la question principale.

18 Le juge Pelletier considère aussi le contexte de l'affaire et conclut que, puisque la question du rôle du Canada comme vendeur de technologies nucléaires est une importante question d'intérêt public, la charge de justifier une ordonnance de confidentialité est très onéreuse. Il conclut qu'ÉACL pourrait retrancher les éléments délicats des documents ou soumettre à la cour la même preuve sous une autre forme, et maintenir ainsi son droit à une défense complète tout en préservant la publicité des débats judiciaires.

19 Le juge Pelletier signale qu'il prononce l'ordonnance sans avoir examiné les documents confidentiels puisqu'ils n'ont pas été portés à sa connaissance. Bien qu'il mentionne la jurisprudence indiquant qu'un juge ne devrait pas se prononcer sur une demande d'ordonnance de confidentialité sans avoir examiné les documents eux-mêmes, il estime qu'il n'aurait pas été utile d'examiner les documents, vu leur volume et leur caractère technique, et sans savoir quelle part d'information était déjà dans le domaine public.

20 Pelletier J. ordered that the appellant could file the documents in current form, or in an edited version if it chose to do so. He also granted leave to file material dealing with the Chinese regulatory process in general and as applied to this project, provided it did so within 60 days.

B. *Federal Court of Appeal*, [2000] 4 F.C. 426

(1) Evans J.A. (Sharlow J.A. concurring)

21 At the Federal Court of Appeal, AECL appealed the ruling under Rule 151 of the *Federal Court Rules, 1998*, and Sierra Club cross-appealed the ruling under Rule 312.

22 With respect to Rule 312, Evans J.A. held that the documents were clearly relevant to a defence under s. 54(2)(*b*) which the appellant proposed to raise if s. 5(1)(*b*) of the *CEAA* was held to apply, and were also potentially relevant to the exercise of the court's discretion to refuse a remedy even if the Ministers were in breach of the *CEAA*. Evans J.A. agreed with Pelletier J. that the benefit to the appellant and the court of being granted leave to file the documents outweighed any prejudice to the respondent owing to delay and thus concluded that the motions judge was correct in granting leave under Rule 312.

23 On the issue of the confidentiality order, Evans J.A. considered Rule 151, and all the factors that the motions judge had weighed, including the commercial sensitivity of the documents, the fact that the appellant had received them in confidence from the Chinese authorities, and the appellant's argument that without the documents it could not mount a full answer and defence to the application. These factors had to be weighed against the principle of open access to court documents. Evans J.A. agreed with Pelletier J. that the weight to be attached to the public interest in open proceedings varied with context and held that, where a case raises issues of public significance, the principle of openness of judicial process carries greater weight as a factor in

Dans son ordonnance, le juge Pelletier autorise l'appelante à déposer les documents sous leur forme actuelle ou sous une version révisée, à son gré. Il autorise aussi l'appelante à déposer des documents concernant le processus réglementaire chinois en général et son application au projet, à condition qu'elle le fasse sous 60 jours.

B. *Cour d'appel fédérale*, [2000] 4 C.F. 426

(1) Le juge Evans (avec l'appui du juge Sharlow)

ÉACL fait appel en Cour d'appel fédérale, en vertu de la règle 151 des *Règles de la Cour fédérale (1998)*, et Sierra Club forme un appel incident en vertu de la règle 312.

Sur la règle 312, le juge Evans conclut que les documents en cause sont clairement pertinents dans une défense que l'appelante a l'intention d'invoquer en vertu du par. 54(2) si la cour conclut que l'al. 5(1)*b*) de la *LCÉE* doit s'appliquer, et pourraient l'être aussi pour l'exercice du pouvoir discrétionnaire de la cour de refuser d'accorder une réparation dans le cas où les ministres auraient enfreint la *LCÉE*. Comme le juge Pelletier, le juge Evans est d'avis que l'avantage pour l'appelante et pour la cour d'une autorisation de déposer les documents l'emporte sur tout préjudice que le retard pourrait causer à l'intimé, et conclut par conséquent que le juge des requêtes a eu raison d'accorder l'autorisation en vertu de la règle 312.

Sur l'ordonnance de confidentialité, le juge Evans examine la règle 151 et tous les facteurs que le juge des requêtes a appréciés, y compris le secret commercial attaché aux documents, le fait que l'appelante les a reçus à titre confidentiel des autorités chinoises, et l'argument de l'appelante selon lequel, sans les documents, elle ne pourrait assurer effectivement sa défense. Ces facteurs doivent être pondérés avec le principe de la publicité des documents soumis aux tribunaux. Le juge Evans convient avec le juge Pelletier que le poids à accorder à l'intérêt du public à la publicité des débats varie selon le contexte, et il conclut que lorsqu'une affaire soulève des questions de grande importance pour le public, le principe de la publicité des débats a plus de poids

the balancing process. Evans J.A. noted the public interest in the subject matter of the litigation, as well as the considerable media attention it had attracted.

In support of his conclusion that the weight assigned to the principle of openness may vary with context, Evans J.A. relied upon the decisions in *AB Hassle v. Canada (Minister of National Health and Welfare)*, [2000] 3 F.C. 360 (C.A.), where the court took into consideration the relatively small public interest at stake, and *Ethyl Canada Inc. v. Canada (Attorney General)* (1998), 17 C.P.C. (4th) 278 (Ont. Ct. (Gen. Div.)), at p. 283, where the court ordered disclosure after determining that the case was a significant constitutional case where it was important for the public to understand the issues at stake. Evans J.A. observed that openness and public participation in the assessment process are fundamental to the *CEAA*, and concluded that the motions judge could not be said to have given the principle of openness undue weight even though confidentiality was claimed for a relatively small number of highly technical documents.

Evans J.A. held that the motions judge had placed undue emphasis on the fact that the introduction of the documents was voluntary; however, it did not follow that his decision on the confidentiality order must therefore be set aside. Evans J.A. was of the view that this error did not affect the ultimate conclusion for three reasons. First, like the motions judge, he attached great weight to the principle of openness. Secondly, he held that the inclusion in the affidavits of a summary of the reports could go a long way to compensate for the absence of the originals, should the appellant choose not to put them in without a confidentiality order. Finally, if AECL submitted the documents in an expunged fashion, the claim for confidentiality would rest upon a relatively unimportant factor, i.e., the appellant's claim that it would suffer a loss of business if it breached its undertaking with the Chinese authorities.

Evans J.A. rejected the argument that the motions judge had erred in deciding the motion without

comme facteur à prendre en compte dans le processus de pondération. Le juge Evans note l'intérêt du public à l'égard de la question en litige ainsi que la couverture médiatique considérable qu'elle a suscitée.

24 À l'appui de sa conclusion que le poids accordé au principe de la publicité des débats peut varier selon le contexte, le juge Evans invoque les décisions *AB Hassle c. Canada (Ministre de la Santé nationale et du Bien-être social)*, [2000] 3 C.F. 360 (C.A.), où la cour a tenu compte du peu d'intérêt du public, et *Ethyl Canada Inc. c. Canada (Attorney General)* (1998), 17 C.P.C. (4th) 278 (C. Ont. (Div. gén.)), p. 283, où la cour a ordonné la divulgation après avoir déterminé qu'il s'agissait d'une affaire constitutionnelle importante et qu'il importait que le public comprenne ce qui était en cause. Le juge Evans fait remarquer que la transparence du processus d'évaluation et la participation du public ont une importance fondamentale pour la *LCÉE*, et il conclut qu'on ne peut prétendre que le juge des requêtes a accordé trop de poids au principe de la publicité des débats, même si la confidentialité n'est demandée que pour un nombre relativement restreint de documents hautement techniques.

25 Le juge Evans conclut que le juge des requêtes a donné trop de poids au fait que la production des documents était volontaire mais qu'il ne s'ensuit pas que sa décision au sujet de la confidentialité doive être écartée. Le juge Evans est d'avis que l'erreur n'entâche pas sa conclusion finale, pour trois motifs. Premièrement, comme le juge des requêtes, il attache une grande importance à la publicité du débat judiciaire. Deuxièmement, il conclut que l'inclusion dans les affidavits d'un résumé des rapports peut, dans une large mesure, compenser l'absence des rapports, si l'appelante décide de ne pas les déposer sans ordonnance de confidentialité. Enfin, si ÉACL déposait une version modifiée des documents, la demande de confidentialité reposerait sur un facteur relativement peu important, savoir l'argument que l'appelante perdrait des occasions d'affaires si elle violait son engagement envers les autorités chinoises.

26 Le juge Evans rejette l'argument selon lequel le juge des requêtes a commis une erreur en statuant

reference to the actual documents, stating that it was not necessary for him to inspect them, given that summaries were available and that the documents were highly technical and incompletely translated. Thus the appeal and cross-appeal were both dismissed.

(2) Robertson J.A. (dissenting)

27 Robertson J.A. disagreed with the majority for three reasons. First, in his view, the level of public interest in the case, the degree of media coverage, and the identities of the parties should not be taken into consideration in assessing an application for a confidentiality order. Instead, he held that it was the nature of the evidence for which the order is sought that must be examined.

28 In addition, he found that without a confidentiality order, the appellant had to choose between two unacceptable options: either suffering irreparable financial harm if the confidential information was introduced into evidence, or being denied the right to a fair trial because it could not mount a full defence if the evidence was not introduced.

29 Finally, he stated that the analytical framework employed by the majority in reaching its decision was fundamentally flawed as it was based largely on the subjective views of the motions judge. He rejected the contextual approach to the question of whether a confidentiality order should issue, emphasizing the need for an objective framework to combat the perception that justice is a relative concept, and to promote consistency and certainty in the law.

30 To establish this more objective framework for regulating the issuance of confidentiality orders pertaining to commercial and scientific information, he turned to the legal rationale underlying the commitment to the principle of open justice, referring to *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326. There, the Supreme Court of Canada held that open proceedings foster the search for the truth, and reflect the importance of public scrutiny of the courts.

sans avoir examiné les documents réels, affirmant que cela n'était pas nécessaire puisqu'il y avait des précis et que la documentation était hautement technique et partiellement traduite. L'appel et l'appel incident sont donc rejetés.

(2) Le juge Robertson (dissident)

Le juge Robertson se dissocie de la majorité pour trois raisons. En premier lieu, il estime que le degré d'intérêt du public dans une affaire, l'importance de la couverture médiatique et l'identité des parties ne devraient pas être pris en considération pour statuer sur une demande d'ordonnance de confidentialité. Selon lui, il faut plutôt examiner la nature de la preuve que protégerait l'ordonnance de confidentialité.

Il estime aussi qu'à défaut d'ordonnance de confidentialité, l'appelante doit choisir entre deux options inacceptables : subir un préjudice financier irréparable si les renseignements confidentiels sont produits en preuve, ou être privée de son droit à un procès équitable parce qu'elle ne peut se défendre pleinement si la preuve n'est pas produite.

Finalement, il dit que le cadre analytique utilisé par les juges majoritaires pour arriver à leur décision est fondamentalement défectueux en ce qu'il est fondé en grande partie sur le point de vue subjectif du juge des requêtes. Il rejette l'approche contextuelle sur la question de l'ordonnance de confidentialité, soulignant la nécessité d'un cadre d'analyse objectif pour combattre la perception que la justice est un concept relatif et pour promouvoir la cohérence et la certitude en droit.

Pour établir ce cadre plus objectif appelé à régir la délivrance d'ordonnances de confidentialité en matière de renseignements commerciaux et scientifiques, il examine le fondement juridique du principe de la publicité du processus judiciaire, en citant l'arrêt de notre Cour, *Edmonton Journal c. Alberta (Procureur général)*, [1989] 2 R.C.S. 1326, qui conclut que la publicité des débats favorise la recherche de la vérité et témoigne de l'importance de soumettre le travail des tribunaux à l'examen public.

Robertson J.A. stated that although the principle of open justice is a reflection of the basic democratic value of accountability in the exercise of judicial power, in his view, the principle that justice itself must be secured is paramount. He concluded that justice as an overarching principle means that exceptions occasionally must be made to rules or principles.

He observed that, in the area of commercial law, when the information sought to be protected concerns "trade secrets", this information will not be disclosed during a trial if to do so would destroy the owner's proprietary rights and expose him or her to irreparable harm in the form of financial loss. Although the case before him did not involve a trade secret, he nevertheless held that the same treatment could be extended to commercial or scientific information which was acquired on a confidential basis and attached the following criteria as conditions precedent to the issuance of a confidentiality order (at para. 13):

(1) the information is of a confidential nature as opposed to facts which one would like to keep confidential; (2) the information for which confidentiality is sought is not already in the public domain; (3) on a balance of probabilities the party seeking the confidentiality order would suffer irreparable harm if the information were made public; (4) the information is relevant to the legal issues raised in the case; (5) correlatively, the information is "necessary" to the resolution of those issues; (6) the granting of a confidentiality order does not unduly prejudice the opposing party; and (7) the public interest in open court proceedings does not override the private interests of the party seeking the confidentiality order. The onus in establishing that criteria one to six are met is on the party seeking the confidentiality order. Under the seventh criterion, it is for the opposing party to show that a *prima facie* right to a protective order has been overtaken by the need to preserve the openness of the court proceedings. In addressing these criteria one must bear in mind two of the threads woven into the fabric of the principle of open justice: the search for truth and the preservation of the rule of law. As stated at the outset, I do not believe that the perceived degree of public importance of a case is a relevant consideration.

Selon le juge Robertson, même si le principe de la publicité du processus judiciaire reflète la valeur fondamentale que constitue dans une démocratie l'imputabilité dans l'exercice du pouvoir judiciaire, le principe selon lequel il faut que justice soit faite doit, à son avis, l'emporter. Il conclut que la justice vue comme principe universel signifie que les règles ou les principes doivent parfois souffrir des exceptions.

Il fait observer qu'en droit commercial, lorsque les renseignements qu'on cherche à protéger ont trait à des « secrets industriels », ils ne sont pas divulgués au procès lorsque cela aurait pour effet d'annihiler les droits du propriétaire et l'exposerait à un préjudice financier irréparable. Il conclut que, même si l'espèce ne porte pas sur des secrets industriels, on peut traiter de la même façon des renseignements commerciaux et scientifiques acquis sur une base confidentielle, et il établit les critères suivants comme conditions à la délivrance d'une ordonnance de confidentialité (au par. 13) :

1) les renseignements sont de nature confidentielle et non seulement des faits qu'une personne désire ne pas divulguer; 2) les renseignements qu'on veut protéger ne sont pas du domaine public; 3) selon la prépondérance des probabilités, la partie qui veut obtenir une ordonnance de confidentialité subirait un préjudice irréparable si les renseignements étaient rendus publics; 4) les renseignements sont pertinents dans le cadre de la résolution des questions juridiques soulevées dans le litige; 5) en même temps, les renseignements sont « nécessaires » à la résolution de ces questions; 6) l'octroi d'une ordonnance de confidentialité ne cause pas un préjudice grave à la partie adverse; 7) l'intérêt du public à la publicité des débats judiciaires ne prime pas les intérêts privés de la partie qui sollicite l'ordonnance de confidentialité. Le fardeau de démontrer que les critères un à six sont respectés incombe à la partie qui cherche à obtenir l'ordonnance de confidentialité. Pour le septième critère, c'est la partie adverse qui doit démontrer que le droit *prima facie* à une ordonnance de non-divulgation doit céder le pas au besoin de maintenir la publicité des débats judiciaires. En utilisant ces critères, il y a lieu de tenir compte de deux des fils conducteurs qui sous-tendent le principe de la publicité des débats judiciaires : la recherche de la vérité et la sauvegarde de la primauté du droit. Comme je l'ai dit au tout début, je ne crois pas que le degré d'importance qu'on croit que le public accorde à une affaire soit une considération pertinente.

33 In applying these criteria to the circumstances of the case, Robertson J.A. concluded that the confidentiality order should be granted. In his view, the public interest in open court proceedings did not override the interests of AECL in maintaining the confidentiality of these highly technical documents.

34 Robertson J.A. also considered the public interest in the need to ensure that site plans for nuclear installations were not, for example, posted on a Web site. He concluded that a confidentiality order would not undermine the two primary objectives underlying the principle of open justice: truth and the rule of law. As such, he would have allowed the appeal and dismissed the cross-appeal.

V. Issues

35 A. What is the proper analytical approach to be applied to the exercise of judicial discretion where a litigant seeks a confidentiality order under Rule 151 of the *Federal Court Rules, 1998*?

B. Should the confidentiality order be granted in this case?

VI. Analysis

A. *The Analytical Approach to the Granting of a Confidentiality Order*

(1) The General Framework: Herein the *Dagenais* Principles

36 The link between openness in judicial proceedings and freedom of expression has been firmly established by this Court. In *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480, at para. 23, La Forest J. expressed the relationship as follows:

> The principle of open courts is inextricably tied to the rights guaranteed by s. 2(*b*). Openness permits public access to information about the courts, which in turn permits the public to discuss and put forward opinions and criticisms of court practices and proceedings. While the freedom to express ideas and opinions about the operation of the courts is clearly within the ambit of the

Appliquant ces critères aux circonstances de l'espèce, le juge Robertson conclut qu'il y a lieu de rendre l'ordonnance de confidentialité. Selon lui, l'intérêt du public dans la publicité des débats judiciaires ne prime pas l'intérêt de ÉACL à préserver le caractère confidentiel de ces documents hautement techniques.

Le juge Robertson traite aussi de l'intérêt du public à ce qu'il soit garanti que les plans de site d'installations nucléaires ne seront pas, par exemple, affichés sur un site Web. Il conclut qu'une ordonnance de confidentialité n'aurait aucun impact négatif sur les deux objectifs primordiaux du principe de la publicité des débats judiciaires, savoir la vérité et la primauté du droit. Il aurait par conséquent accueilli l'appel et rejeté l'appel incident.

V. Questions en litige

A. Quelle méthode d'analyse faut-il appliquer à l'exercice du pouvoir judiciaire discrétionnaire lorsqu'une partie demande une ordonnance de confidentialité en vertu de la règle 151 des *Règles de la Cour fédérale (1998)*?

B. Y a-t-il lieu d'accorder l'ordonnance de confidentialité en l'espèce?

VI. Analyse

A. *Méthode d'analyse applicable aux ordonnances de confidentialité*

(1) Le cadre général : les principes de l'arrêt *Dagenais*

Le lien entre la publicité des procédures judiciaires et la liberté d'expression est solidement établi dans *Société Radio-Canada c. Nouveau-Brunswick (Procureur général)*, [1996] 3 R.C.S. 480. Le juge La Forest l'exprime en ces termes au par. 23 :

> Le principe de la publicité des débats en justice est inextricablement lié aux droits garantis à l'al. 2*b*). Grâce à ce principe, le public a accès à l'information concernant les tribunaux, ce qui lui permet ensuite de discuter des pratiques des tribunaux et des procédures qui s'y déroulent, et d'émettre des opinions et des critiques à cet égard. La liberté d'exprimer des idées et des opinions sur

freedom guaranteed by s. 2(*b*), so too is the right of members of the public to obtain information about the courts in the first place.

Under the order sought, public access and public scrutiny of the Confidential Documents would be restricted; this would clearly infringe the public's freedom of expression guarantee.

A discussion of the general approach to be taken in the exercise of judicial discretion to grant a confidentiality order should begin with the principles set out by this Court in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835. Although that case dealt with the common law jurisdiction of the court to order a publication ban in the criminal law context, there are strong similarities between publication bans and confidentiality orders in the context of judicial proceedings. In both cases a restriction on freedom of expression is sought in order to preserve or promote an interest engaged by those proceedings. As such, the fundamental question for a court to consider in an application for a publication ban or a confidentiality order is whether, in the circumstances, the right to freedom of expression should be compromised.

Although in each case freedom of expression will be engaged in a different context, the *Dagenais* framework utilizes overarching *Canadian Charter of Rights and Freedoms* principles in order to balance freedom of expression with other rights and interests, and thus can be adapted and applied to various circumstances. As a result, the analytical approach to the exercise of discretion under Rule 151 should echo the underlying principles laid out in *Dagenais*, although it must be tailored to the specific rights and interests engaged in this case.

Dagenais dealt with an application by four accused persons under the court's common law jurisdiction requesting an order prohibiting the broadcast of a television programme dealing with the physical and sexual abuse of young boys at

le fonctionnement des tribunaux relève clairement de la liberté garantie à l'al. 2*b*), mais en relève également le droit du public d'obtenir au préalable de l'information sur les tribunaux.

L'ordonnance sollicitée aurait pour effet de limiter l'accès du public aux documents confidentiels et leur examen public; cela porterait clairement atteinte à la garantie de la liberté d'expression du public.

37 L'examen de la méthode générale à suivre dans l'exercice du pouvoir discrétionnaire d'accorder une ordonnance de confidentialité devrait commencer par les principes établis par la Cour dans *Dagenais c. Société Radio-Canada*, [1994] 3 R.C.S. 835. Cette affaire portait sur le pouvoir discrétionnaire judiciaire, issu de la common law, de rendre des ordonnances de non-publication dans le cadre de procédures criminelles, mais il y a de fortes ressemblances entre les interdictions de publication et les ordonnances de confidentialité dans le contexte des procédures judiciaires. Dans les deux cas, on cherche à restreindre la liberté d'expression afin de préserver ou de promouvoir un intérêt en jeu dans les procédures. En ce sens, la question fondamentale que doit résoudre le tribunal auquel on demande une interdiction de publication ou une ordonnance de confidentialité est de savoir si, dans les circonstances, il y a lieu de restreindre le droit à la liberté d'expression.

38 Même si, dans chaque cas, la liberté d'expression entre en jeu dans un contexte différent, le cadre établi dans *Dagenais* fait appel aux principes déterminants de la *Charte canadienne des droits et libertés* afin de pondérer la liberté d'expression avec d'autres droits et intérêts, et peut donc être adapté et appliqué à diverses circonstances. L'analyse de l'exercice du pouvoir discrétionnaire sous le régime de la règle 151 devrait par conséquent refléter les principes sous-jacents établis par *Dagenais*, même s'il faut pour cela l'ajuster aux droits et intérêts précis qui sont en jeu en l'espèce.

39 L'affaire *Dagenais* porte sur une requête par laquelle quatre accusés demandaient à la cour de rendre, en vertu de sa compétence de common law, une ordonnance interdisant la diffusion d'une émission de télévision décrivant des abus physiques et

religious institutions. The applicants argued that because the factual circumstances of the programme were very similar to the facts at issue in their trials, the ban was necessary to preserve the accuseds' right to a fair trial.

40 Lamer C.J. found that the common law discretion to order a publication ban must be exercised within the boundaries set by the principles of the *Charter*. Since publication bans necessarily curtail the freedom of expression of third parties, he adapted the pre-*Charter* common law rule such that it balanced the right to freedom of expression with the right to a fair trial of the accused in a way which reflected the substance of the test from *R. v. Oakes*, [1986] 1 S.C.R. 103. At p. 878 of *Dagenais*, Lamer C.J. set out his reformulated test:

> A publication ban should only be ordered when:
>
> (a) Such a ban is necessary in order to prevent a real and substantial risk to the fairness of the trial, because reasonably available alternative measures will not prevent the risk; and
>
> (b) The salutary effects of the publication ban outweigh the deleterious effects to the free expression of those affected by the ban. [Emphasis in original.]

41 In *New Brunswick*, *supra*, this Court modified the *Dagenais* test in the context of the related issue of how the discretionary power under s. 486(1) of the *Criminal Code*, R.S.C. 1985, c. C-46, to exclude the public from a trial should be exercised. That case dealt with an appeal from the trial judge's order excluding the public from the portion of a sentencing proceeding for sexual assault and sexual interference dealing with the specific acts committed by the accused on the basis that it would avoid "undue hardship" to both the victims and the accused.

42 La Forest J. found that s. 486(1) was a restriction on the s. 2(*b*) right to freedom of expression in that it provided a "discretionary bar on public and media access to the courts": *New Brunswick*, at para. 33;

sexuels infligés à de jeunes garçons dans des établissements religieux. Les requérants soutenaient que l'interdiction était nécessaire pour préserver leur droit à un procès équitable, parce que les faits racontés dans l'émission ressemblaient beaucoup aux faits en cause dans leurs procès.

Le juge en chef Lamer conclut que le pouvoir discrétionnaire de common law d'ordonner l'interdiction de publication doit être exercé dans les limites prescrites par les principes de la *Charte*. Puisque les ordonnances de non-publication restreignent nécessairement la liberté d'expression de tiers, il adapte la règle de common law qui s'appliquait avant l'entrée en vigueur de la *Charte* de façon à établir un juste équilibre entre le droit à la liberté d'expression et le droit de l'accusé à un procès équitable, d'une façon qui reflète l'essence du critère énoncé dans *R. c. Oakes*, [1986] 1 R.C.S. 103. À la page 878 de *Dagenais*, le juge en chef Lamer énonce le critère reformulé :

> Une ordonnance de non-publication ne doit être rendue que si :
>
> a) elle est nécessaire pour écarter le risque réel et important que le procès soit inéquitable, vu l'absence d'autres mesures raisonnables pouvant écarter ce risque;
>
> b) ses effets bénéfiques sont plus importants que ses effets préjudiciables sur la libre expression de ceux qui sont touchés par l'ordonnance. [Souligné dans l'original.]

Dans *Nouveau-Brunswick*, précité, la Cour modifie le critère de l'arrêt *Dagenais* dans le contexte de la question voisine de l'exercice du pouvoir discrétionnaire d'ordonner l'exclusion du public d'un procès en vertu du par. 486(1) du *Code criminel*, L.R.C. 1985, ch. C-46. Il s'agissait d'un appel d'une décision du juge du procès d'ordonner l'exclusion du public de la partie des procédures de détermination de la peine pour agression sexuelle et contacts sexuels portant sur les actes précis commis par l'accusé, au motif que cela éviterait un « préjudice indu » aux victimes et à l'accusé.

Le juge La Forest conclut que le par. 486(1) limite la liberté d'expression garantie à l'al. 2*b*) en créant un « pouvoir discrétionnaire permettant d'interdire au public et aux médias l'accès aux

however he found this infringement to be justified under s. 1 provided that the discretion was exercised in accordance with the *Charter*. Thus, the approach taken by La Forest J. at para. 69 to the exercise of discretion under s. 486(1) of the *Criminal Code*, closely mirrors the *Dagenais* common law test:

(a) the judge must consider the available options and consider whether there are any other reasonable and effective alternatives available;

(b) the judge must consider whether the order is limited as much as possible; and

(c) the judge must weigh the importance of the objectives of the particular order and its probable effects against the importance of openness and the particular expression that will be limited in order to ensure that the positive and negative effects of the order are proportionate.

In applying this test to the facts of the case, La Forest J. found that the evidence of the potential undue hardship consisted mainly in the Crown's submission that the evidence was of a "delicate nature" and that this was insufficient to override the infringement on freedom of expression.

This Court has recently revisited the granting of a publication ban under the court's common law jurisdiction in *R. v. Mentuck*, [2001] 3 S.C.R. 442, 2001 SCC 76, and its companion case *R. v. O.N.E.*, [2001] 3 S.C.R. 478, 2001 SCC 77. In *Mentuck*, the Crown moved for a publication ban to protect the identity of undercover police officers and operational methods employed by the officers in their investigation of the accused. The accused opposed the motion as an infringement of his right to a fair and public hearing under s. 11(*d*) of the *Charter*. The order was also opposed by two intervening newspapers as an infringement of their right to freedom of expression.

The Court noted that, while *Dagenais* dealt with the balancing of freedom of expression on the one hand, and the right to a fair trial of the accused on the other, in the case before it, both the right of the

tribunaux » (*Nouveau-Brunswick*, par. 33). Il considère toutefois que l'atteinte peut être justifiée en vertu de l'article premier pourvu que le pouvoir discrétionnaire soit exercé conformément à la *Charte*. Donc l'analyse de l'exercice du pouvoir discrétionnaire en vertu du par. 486(1) du *Code criminel*, décrite par le juge La Forest au par. 69, concorde étroitement avec le critère de common law établi par *Dagenais* :

a) le juge doit envisager les solutions disponibles et se demander s'il existe d'autres mesures de rechange raisonnables et efficaces;

b) il doit se demander si l'ordonnance a une portée aussi limitée que possible; et

c) il doit comparer l'importance des objectifs de l'ordonnance et de ses effets probables avec l'importance de la publicité des procédures et l'activité d'expression qui sera restreinte, afin de veiller à ce que les effets positifs et négatifs de l'ordonnance soient proportionnels.

Appliquant cette analyse aux faits de l'espèce, le juge La Forest conclut que la preuve du risque de préjudice indu consiste principalement en la prétention de l'avocat du ministère public quant à la « nature délicate » des faits relatifs aux infractions et que cela ne suffit pas pour justifier l'atteinte à la liberté d'expression.

43 La Cour a récemment réexaminé la question des interdictions de publication prononcées par un tribunal en vertu de sa compétence de common law dans *R. c. Mentuck*, [2001] 3 R.C.S. 442, 2001 CSC 76, et l'arrêt connexe *R. c. O.N.E.*, [2001] 3 R.C.S. 478, 2001 CSC 77. Dans *Mentuck*, le ministère public demandait l'interdiction de publication en vue de protéger l'identité de policiers banalisés et leurs méthodes d'enquête. L'accusé s'opposait à la demande en soutenant que l'interdiction porterait atteinte à son droit à un procès public et équitable protégé par l'al. 11*d*) de la *Charte*. Deux journaux intervenants s'opposaient aussi à la requête, en faisant valoir qu'elle porterait atteinte à leur droit à la liberté d'expression.

44 La Cour fait remarquer que *Dagenais* traite de la pondération de la liberté d'expression, d'une part, et du droit de l'accusé à un procès équitable, d'autre part, tandis que dans l'affaire dont elle est saisie, le

accused to a fair and public hearing, and freedom of expression weighed in favour of denying the publication ban. These rights were balanced against interests relating to the proper administration of justice, in particular, protecting the safety of police officers and preserving the efficacy of undercover police operations.

45 In spite of this distinction, the Court noted that underlying the approach taken in both *Dagenais* and *New Brunswick* was the goal of ensuring that the judicial discretion to order publication bans is subject to no lower a standard of compliance with the *Charter* than legislative enactment. This goal is furthered by incorporating the essence of s. 1 of the *Charter* and the *Oakes* test into the publication ban test. Since this same goal applied in the case before it, the Court adopted a similar approach to that taken in *Dagenais*, but broadened the *Dagenais* test (which dealt specifically with the right of an accused to a fair trial) such that it could guide the exercise of judicial discretion where a publication ban is requested in order to preserve any important aspect of the proper administration of justice. At para. 32, the Court reformulated the test as follows:

A publication ban should only be ordered when:

(a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and

(b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.

46 The Court emphasized that under the first branch of the test, three important elements were subsumed under the "necessity" branch. First, the risk in question must be a serious risk well grounded in the evidence. Second, the phrase "proper administration of justice" must be carefully interpreted so as not to

droit de l'accusé à un procès public et équitable tout autant que la liberté d'expression militent en faveur du rejet de la requête en interdiction de publication. Ces droits ont été soupesés avec l'intérêt de la bonne administration de la justice, en particulier la protection de la sécurité des policiers et le maintien de l'efficacité des opérations policières secrètes.

Malgré cette distinction, la Cour note que la méthode retenue dans *Dagenais* et *Nouveau-Brunswick* a pour objectif de garantir que le pouvoir discrétionnaire des tribunaux d'ordonner des interdictions de publication n'est pas assujetti à une norme de conformité à la *Charte* moins exigeante que la norme applicable aux dispositions législatives. Elle vise cet objectif en incorporant l'essence de l'article premier de la *Charte* et le critère *Oakes* dans l'analyse applicable aux interdictions de publication. Comme le même objectif s'applique à l'affaire dont elle est saisie, la Cour adopte une méthode semblable à celle de *Dagenais*, mais en élargissant le critère énoncé dans cet arrêt (qui portait spécifiquement sur le droit de l'accusé à un procès équitable) de manière à fournir un guide à l'exercice du pouvoir discrétionnaire des tribunaux dans les requêtes en interdiction de publication, afin de protéger tout aspect important de la bonne administration de la justice. La Cour reformule le critère en ces termes (au par. 32) :

Une ordonnance de non-publication ne doit être rendue que si :

a) elle est nécessaire pour écarter le risque sérieux pour la bonne administration de la justice, vu l'absence d'autres mesures raisonnables pouvant écarter ce risque;

b) ses effets bénéfiques sont plus importants que ses effets préjudiciables sur les droits et les intérêts des parties et du public, notamment ses effets sur le droit à la libre expression, sur le droit de l'accusé à un procès public et équitable, et sur l'efficacité de l'administration de la justice.

La Cour souligne que dans le premier volet de l'analyse, trois éléments importants sont subsumés sous la notion de « nécessité ». En premier lieu, le risque en question doit être sérieux et bien étayé par la preuve. En deuxième lieu, l'expression « bonne administration de la justice » doit être interprétée

allow the concealment of an excessive amount of information. Third, the test requires the judge ordering the ban to consider not only whether reasonable alternatives are available, but also to restrict the ban as far as possible without sacrificing the prevention of the risk.

At para. 31, the Court also made the important observation that the proper administration of justice will not necessarily involve *Charter* rights, and that the ability to invoke the *Charter* is not a necessary condition for a publication ban to be granted:

> The [common law publication ban] rule can accommodate orders that must occasionally be made in the interests of the administration of justice, which encompass more than fair trial rights. As the test is intended to "reflec[t] the substance of the *Oakes* test", we cannot require that *Charter* rights be the only legitimate objective of such orders any more than we require that government action or legislation in violation of the *Charter* be justified exclusively by the pursuit of another *Charter* right. [Emphasis added.]

The Court also anticipated that, in appropriate circumstances, the *Dagenais* framework could be expanded even further in order to address requests for publication bans where interests other than the administration of justice were involved.

Mentuck is illustrative of the flexibility of the *Dagenais* approach. Since its basic purpose is to ensure that the judicial discretion to deny public access to the courts is exercised in accordance with *Charter* principles, in my view, the *Dagenais* model can and should be adapted to the situation in the case at bar where the central issue is whether judicial discretion should be exercised so as to exclude confidential information from a public proceeding. As in *Dagenais*, *New Brunswick* and *Mentuck*, granting the confidentiality order will have a negative effect on the *Charter* right to freedom of expression, as well as the principle of open and accessible court proceedings, and, as in those cases, courts must ensure that the discretion to grant the order is exercised in accordance with *Charter* principles.

judicieusement de façon à ne pas empêcher la divulgation d'un nombre excessif de renseignements. En troisième lieu, le critère exige non seulement que le juge qui prononce l'ordonnance détermine s'il existe des mesures de rechange raisonnables, mais aussi qu'il limite l'ordonnance autant que possible sans pour autant sacrifier la prévention du risque.

47 Au paragraphe 31, la Cour fait aussi l'importante observation que la bonne administration de la justice n'implique pas nécessairement des droits protégés par la *Charte*, et que la possibilité d'invoquer la *Charte* n'est pas une condition nécessaire à l'obtention d'une interdiction de publication :

> Elle [la règle de common law] peut s'appliquer aux ordonnances qui doivent parfois être rendues dans l'intérêt de l'administration de la justice, qui englobe davantage que le droit à un procès équitable. Comme on veut que le critère « reflète [. . .] l'essence du critère énoncé dans l'arrêt *Oakes* », nous ne pouvons pas exiger que ces ordonnances aient pour seul objectif légitime les droits garantis par la *Charte*, pas plus que nous exigeons que les actes gouvernementaux et les dispositions législatives contrevenant à la *Charte* soient justifiés exclusivement par la recherche d'un autre droit garanti par la *Charte*. [Je souligne.]

La Cour prévoit aussi que, dans les cas voulus, le critère de *Dagenais* pourrait être élargi encore davantage pour régir des requêtes en interdiction de publication mettant en jeu des questions autres que l'administration de la justice.

48 *Mentuck* illustre bien la souplesse de la méthode *Dagenais*. Comme elle a pour objet fondamental de garantir que le pouvoir discrétionnaire d'interdire l'accès du public aux tribunaux est exercé conformément aux principes de la *Charte*, à mon avis, le modèle *Dagenais* peut et devrait être adapté à la situation de la présente espèce, où la question centrale est l'exercice du pouvoir discrétionnaire du tribunal d'exclure des renseignements confidentiels au cours d'une procédure publique. Comme dans *Dagenais*, *Nouveau-Brunswick* et *Mentuck*, une ordonnance de confidentialité aura un effet négatif sur le droit à la liberté d'expression garanti par la *Charte*, de même que sur le principe de la publicité des débats judiciaires et, comme dans ces affaires, les tribunaux doivent veiller à ce que le

However, in order to adapt the test to the context of this case, it is first necessary to determine the particular rights and interests engaged by this application.

(2) The Rights and Interests of the Parties

49 The immediate purpose for AECL's confidentiality request relates to its commercial interests. The information in question is the property of the Chinese authorities. If the appellant were to disclose the Confidential Documents, it would be in breach of its contractual obligations and suffer a risk of harm to its competitive position. This is clear from the findings of fact of the motions judge that AECL was bound by its commercial interests and its customer's property rights not to disclose the information (para. 27), and that such disclosure could harm the appellant's commercial interests (para. 23).

50 Aside from this direct commercial interest, if the confidentiality order is denied, then in order to protect its commercial interests, the appellant will have to withhold the documents. This raises the important matter of the litigation context in which the order is sought. As both the motions judge and the Federal Court of Appeal found that the information contained in the Confidential Documents was relevant to defences available under the *CEAA*, the inability to present this information hinders the appellant's capacity to make full answer and defence, or, expressed more generally, the appellant's right, as a civil litigant, to present its case. In that sense, preventing the appellant from disclosing these documents on a confidential basis infringes its right to a fair trial. Although in the context of a civil proceeding this does not engage a *Charter* right, the right to a fair trial generally can be viewed as a fundamental principle of justice: *M. (A.) v. Ryan*, [1997] 1 S.C.R. 157, at para. 84, *per* L'Heureux-Dubé J. (dissenting, but not on that point). Although this fair trial right is directly relevant to the appellant, there is also a general public interest in protecting the right to a fair trial. Indeed, as a general proposition, all disputes in the courts should be decided under a fair trial standard. The legitimacy of the judicial process alone

pouvoir discrétionnaire d'accorder l'ordonnance soit exercé conformément aux principes de la *Charte*. Toutefois, pour adapter le critère au contexte de la présente espèce, il faut d'abord définir les droits et intérêts particuliers qui entrent en jeu.

(2) Les droits et les intérêts des parties

L'objet immédiat de la demande d'ordonnance de confidentialité d'ÉACL a trait à ses intérêts commerciaux. Les renseignements en question appartiennent aux autorités chinoises. Si l'appelante divulguait les documents confidentiels, elle manquerait à ses obligations contractuelles et s'exposerait à une détérioration de sa position concurrentielle. Il ressort clairement des conclusions de fait du juge des requêtes qu'ÉACL est tenue, par ses intérêts commerciaux et par les droits de propriété de son client, de ne pas divulguer ces renseignements (par. 27), et que leur divulgation risque de nuire aux intérêts commerciaux de l'appelante (par. 23).

Indépendamment de cet intérêt commercial direct, en cas de refus de l'ordonnance de confidentialité, l'appelante devra, pour protéger ses intérêts commerciaux, s'abstenir de produire les documents. Cela soulève l'importante question du contexte de la présentation de la demande. Comme le juge des requêtes et la Cour d'appel fédérale concluent tous deux que l'information contenue dans les documents confidentiels est pertinente pour les moyens de défense prévus par la *LCÉE*, le fait de ne pouvoir la produire nuit à la capacité de l'appelante de présenter une défense pleine et entière ou, plus généralement, au droit de l'appelante, en sa qualité de justiciable civile, de défendre sa cause. En ce sens, empêcher l'appelante de divulguer ces documents pour des raisons de confidentialité porte atteinte à son droit à un procès équitable. Même si en matière civile cela n'engage pas de droit protégé par la *Charte*, le droit à un procès équitable peut généralement être considéré comme un principe de justice fondamentale : *M. (A.) c. Ryan*, [1997] 1 R.C.S. 157, par. 84, le juge L'Heureux-Dubé (dissidente, mais non sur ce point). Le droit à un procès équitable intéresse directement l'appelante, mais le public a aussi un intérêt général à la protection du droit à un procès équitable. À vrai dire, le principe

demands as much. Similarly, courts have an interest in having all relevant evidence before them in order to ensure that justice is done.

Thus, the interests which would be promoted by a confidentiality order are the preservation of commercial and contractual relations, as well as the right of civil litigants to a fair trial. Related to the latter are the public and judicial interests in seeking the truth and achieving a just result in civil proceedings.

In opposition to the confidentiality order lies the fundamental principle of open and accessible court proceedings. This principle is inextricably tied to freedom of expression enshrined in s. 2(*b*) of the *Charter*: *New Brunswick*, *supra*, at para. 23. The importance of public and media access to the courts cannot be understated, as this access is the method by which the judicial process is scrutinized and criticized. Because it is essential to the administration of justice that justice is done and is seen to be done, such public scrutiny is fundamental. 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.

(3) Adapting the *Dagenais* Test to the Rights and Interests of the Parties

Applying the rights and interests engaged in this case to the analytical framework of *Dagenais* and subsequent cases discussed above, the test for whether a confidentiality order ought to be granted in a case such as this one should be framed as follows:

A confidentiality order under Rule 151 should only be granted when:

(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

général est que tout litige porté devant les tribunaux doit être tranché selon la norme du procès équitable. La légitimité du processus judiciaire n'exige pas moins. De même, les tribunaux ont intérêt à ce que toutes les preuves pertinentes leur soient présentées pour veiller à ce que justice soit faite.

51 Ainsi, les intérêts que favoriserait l'ordonnance de confidentialité seraient le maintien de relations commerciales et contractuelles, de même que le droit des justiciables civils à un procès équitable. Est lié à ce dernier droit l'intérêt du public et du judiciaire dans la recherche de la vérité et la solution juste des litiges civils.

52 Milite contre l'ordonnance de confidentialité le principe fondamental de la publicité des débats judiciaires. Ce principe est inextricablement lié à la liberté d'expression constitutionnalisée à l'al. 2*b*) de la *Charte* : *Nouveau-Brunswick*, précité, par. 23. L'importance de l'accès du public et des médias aux tribunaux ne peut être sous-estimée puisque l'accès est le moyen grâce auquel le processus judiciaire est soumis à l'examen et à la critique. Comme il est essentiel à l'administration de la justice que justice soit faite et soit perçue comme l'étant, cet examen public est fondamental. Le principe de la publicité des procédures judiciaires a été décrit comme le « souffle même de la justice », la garantie de l'absence d'arbitraire dans l'administration de la justice : *Nouveau-Brunswick*, par. 22.

(3) Adaptation de l'analyse de *Dagenais* aux droits et intérêts des parties

53 Pour appliquer aux droits et intérêts en jeu en l'espèce l'analyse de *Dagenais* et des arrêts subséquents précités, il convient d'énoncer de la façon suivante les conditions applicables à une ordonnance de confidentialité dans un cas comme l'espèce :

Une ordonnance de confidentialité en vertu de la règle 151 ne doit être rendue que si :

a) elle est nécessaire pour écarter un risque sérieux pour un intérêt important, y compris un intérêt commercial, dans le contexte d'un litige, en l'absence d'autres options raisonnables pour écarter ce risque;

(b) the salutary effects of the confidentiality 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.

b) ses effets bénéfiques, y compris ses effets sur le droit des justiciables civils à un procès équitable, l'emportent sur ses effets préjudiciables, y compris ses effets sur la liberté d'expression qui, dans ce contexte, comprend l'intérêt du public dans la publicité des débats judiciaires.

54 As in *Mentuck*, I would add that three important elements are subsumed under the first branch of this test. First, the risk in question must be real and substantial, in that the risk is well grounded in the evidence, and poses a serious threat to the commercial interest in question.

Comme dans *Mentuck*, j'ajouterais que trois éléments importants sont subsumés sous le premier volet de l'analyse. En premier lieu, le risque en cause doit être réel et important, en ce qu'il est bien étayé par la preuve et menace gravement l'intérêt commercial en question.

55 In addition, the phrase "important commercial interest" is in need of some clarification. In order to qualify as an "important commercial interest", the interest in question cannot merely be specific to the party requesting the order; the interest must be one which can be expressed in terms of a public interest in confidentiality. For example, a private company could not argue simply that the existence of a particular contract should not be made public because to do so would cause the company to lose business, thus harming its commercial interests. However, if, as in this case, exposure of information would cause a breach of a confidentiality agreement, then the commercial interest affected can be characterized more broadly as the general commercial interest of preserving confidential information. Simply put, if there is no general principle at stake, there can be no "important commercial interest" for the purposes of this test. Or, in the words of Binnie J. in *F.N. (Re)*, [2000] 1 S.C.R. 880, 2000 SCC 35, at para. 10, the open court rule only yields "where the public interest in confidentiality outweighs the public interest in openness" (emphasis added).

De plus, l'expression « intérêt commercial important » exige une clarification. Pour être qualifié d'« intérêt commercial important », l'intérêt en question ne doit pas se rapporter uniquement et spécifiquement à la partie qui demande l'ordonnance de confidentialité; il doit s'agir d'un intérêt qui peut se définir en termes d'intérêt public à la confidentialité. Par exemple, une entreprise privée ne pourrait simplement prétendre que l'existence d'un contrat donné ne devrait pas être divulguée parce que cela lui ferait perdre des occasions d'affaires, et que cela nuirait à ses intérêts commerciaux. Si toutefois, comme en l'espèce, la divulgation de renseignements doit entraîner un manquement à une entente de non-divulgation, on peut alors parler plus largement de l'intérêt commercial général dans la protection des renseignements confidentiels. Simplement, si aucun principe général n'entre en jeu, il ne peut y avoir d'« intérêt commercial important » pour les besoins de l'analyse. Ou, pour citer le juge Binnie dans *F.N. (Re)*, [2000] 1 R.C.S. 880, 2000 CSC 35, par. 10, la règle de la publicité des débats judiciaires ne cède le pas que « dans les cas où le droit du public à la confidentialité l'emporte sur le droit du public à l'accessibilité » (je souligne).

56 In addition to the above requirement, courts must be cautious in determining what constitutes an "important commercial interest". It must be remembered that a confidentiality order involves an infringement on freedom of expression. Although the balancing of the commercial interest with freedom of expression takes place under the second

Outre l'exigence susmentionnée, les tribunaux doivent déterminer avec prudence ce qui constitue un « intérêt commercial important ». Il faut rappeler qu'une ordonnance de confidentialité implique une atteinte à la liberté d'expression. Même si la pondération de l'intérêt commercial et de la liberté d'expression intervient à la deuxième étape

branch of the test, courts must be alive to the fundamental importance of the open court rule. See generally Muldoon J. in *Eli Lilly and Co. v. Novopharm Ltd.* (1994), 56 C.P.R. (3d) 437 (F.C.T.D.), at p. 439.

Finally, the phrase "reasonably alternative measures" requires the judge to consider not only whether reasonable alternatives to a confidentiality order are available, but also to restrict the order as much as is reasonably possible while preserving the commercial interest in question.

B. *Application of the Test to this Appeal*

(1) Necessity

At this stage, it must be determined whether disclosure of the Confidential Documents would impose a serious risk on an important commercial interest of the appellant, and whether there are reasonable alternatives, either to the order itself, or to its terms.

The commercial interest at stake here relates to the objective of preserving contractual obligations of confidentiality. The appellant argues that it will suffer irreparable harm to its commercial interests if the Confidential Documents are disclosed. In my view, the preservation of confidential information constitutes a sufficiently important commercial interest to pass the first branch of the test as long as certain criteria relating to the information are met.

Pelletier J. noted that the order sought in this case was similar in nature to an application for a protective order which arises in the context of patent litigation. Such an order requires the applicant to demonstrate that the information in question has been treated at all relevant times as confidential and that on a balance of probabilities its proprietary, commercial and scientific interests could reasonably be harmed by the disclosure of the information: *AB Hassle v. Canada (Minister of National Health and Welfare)* (1998), 83 C.P.R. (3d) 428 (F.C.T.D.), at p. 434. To this I would add the requirement proposed

de l'analyse, les tribunaux doivent avoir pleinement conscience de l'importance fondamentale de la règle de la publicité des débats judiciaires. Voir généralement *Eli Lilly and Co. c. Novopharm Ltd.* (1994), 56 C.P.R. (3d) 437 (C.F. 1re inst.), p. 439, le juge Muldoon.

57 Enfin, l'expression « autres options raisonnables » oblige le juge non seulement à se demander s'il existe des mesures raisonnables autres que l'ordonnance de confidentialité, mais aussi à restreindre l'ordonnance autant qu'il est raisonnablement possible de le faire tout en préservant l'intérêt commercial en question.

B. *Application de l'analyse en l'espèce*

(1) Nécessité

58 À cette étape, il faut déterminer si la divulgation des documents confidentiels ferait courir un risque sérieux à un intérêt commercial important de l'appelante, et s'il existe d'autres solutions raisonnables que l'ordonnance elle-même, ou ses modalités.

59 L'intérêt commercial en jeu en l'espèce a trait à la préservation d'obligations contractuelles de confidentialité. L'appelante fait valoir qu'un préjudice irréparable sera causé à ses intérêts commerciaux si les documents confidentiels sont divulgués. À mon avis, la préservation de renseignements confidentiels est un intérêt commercial suffisamment important pour satisfaire au premier volet de l'analyse dès lors que certaines conditions relatives aux renseignements sont réunies.

60 Le juge Pelletier souligne que l'ordonnance sollicitée en l'espèce s'apparente à une ordonnance conservatoire en matière de brevets. Pour l'obtenir, le requérant doit démontrer que les renseignements en question ont toujours été traités comme des renseignements confidentiels et que, selon la prépondérance des probabilités, il est raisonnable de penser que leur divulgation risquerait de compromettre ses droits exclusifs, commerciaux et scientifiques : *AB Hassle c. Canada (Ministre de la Santé nationale et du Bien-être social)*, [1998] A.C.F. no 1850 (QL) (C.F. 1re inst.), par. 29-30. J'ajouterais à cela

by Robertson J.A. that the information in question must be of a "confidential nature" in that it has been "accumulated with a reasonable expectation of it being kept confidential" as opposed to "facts which a litigant would like to keep confidential by having the courtroom doors closed" (para. 14).

61 Pelletier J. found as a fact that the *AB Hassle* test had been satisfied in that the information had clearly been treated as confidential both by the appellant and by the Chinese authorities, and that, on a balance of probabilities, disclosure of the information could harm the appellant's commercial interests (para. 23). As well, Robertson J.A. found that the information in question was clearly of a confidential nature as it was commercial information, consistently treated and regarded as confidential, that would be of interest to AECL's competitors (para. 16). Thus, the order is sought to prevent a serious risk to an important commercial interest.

62 The first branch of the test also requires the consideration of alternative measures to the confidentiality order, as well as an examination of the scope of the order to ensure that it is not overly broad. Both courts below found that the information contained in the Confidential Documents was relevant to potential defences available to the appellant under the *CEAA* and this finding was not appealed at this Court. Further, I agree with the Court of Appeal's assertion (at para. 99) that, given the importance of the documents to the right to make full answer and defence, the appellant is, practically speaking, compelled to produce the documents. Given that the information is necessary to the appellant's case, it remains only to determine whether there are reasonably alternative means by which the necessary information can be adduced without disclosing the confidential information.

63 Two alternatives to the confidentiality order were put forward by the courts below. The motions judge suggested that the Confidential Documents could be expunged of their commercially sensitive contents, and edited versions of the documents could be

l'exigence proposée par le juge Robertson que les renseignements soient « de nature confidentielle » en ce qu'ils ont été « recueillis dans l'expectative raisonnable qu'ils resteront confidentiels », par opposition à « des faits qu'une partie à un litige voudrait garder confidentiels en obtenant le huis clos » (par. 14).

Le juge Pelletier constate que le critère établi dans *AB Hassle* est respecté puisque tant l'appelante que les autorités chinoises ont toujours considéré les renseignements comme confidentiels et que, selon la prépondérance des probabilités, leur divulgation risque de nuire aux intérêts commerciaux de l'appelante (par. 23). Le juge Robertson conclut lui aussi que les renseignements en question sont clairement confidentiels puisqu'il s'agit de renseignements commerciaux, uniformément reconnus comme étant confidentiels, qui présentent un intérêt pour les concurrents d'ÉACL (par. 16). Par conséquent, l'ordonnance est demandée afin de prévenir un risque sérieux de préjudice à un intérêt commercial important.

Le premier volet de l'analyse exige aussi l'examen d'options raisonnables autres que l'ordonnance de confidentialité, et de la portée de l'ordonnance pour s'assurer qu'elle n'est pas trop vaste. Les deux jugements antérieurs en l'espèce concluent que les renseignements figurant dans les documents confidentiels sont pertinents pour les moyens de défense offerts à l'appelante en vertu de la *LCÉE*, et cette conclusion n'est pas portée en appel devant notre Cour. De plus, je suis d'accord avec la Cour d'appel lorsqu'elle affirme (au par. 99) que vu l'importance des documents pour le droit de présenter une défense pleine et entière, l'appelante est pratiquement forcée de les produire. Comme les renseignements sont nécessaires à la cause de l'appelante, il ne reste qu'à déterminer s'il existe d'autres options raisonnables pour communiquer les renseignements nécessaires sans divulguer de renseignements confidentiels.

Deux options autres que l'ordonnance de confidentialité sont mentionnées dans les décisions antérieures. Le juge des requêtes suggère de retrancher des documents les passages commercialement délicats et de produire les versions ainsi modifiées.

filed. As well, the majority of the Court of Appeal, in addition to accepting the possibility of expungement, was of the opinion that the summaries of the Confidential Documents included in the affidavits could go a long way to compensate for the absence of the originals. If either of these options is a reasonable alternative to submitting the Confidential Documents under a confidentiality order, then the order is not necessary, and the application does not pass the first branch of the test.

There are two possible options with respect to expungement, and in my view, there are problems with both of these. The first option would be for AECL to expunge the confidential information without disclosing the expunged material to the parties and the court. However, in this situation the filed material would still differ from the material used by the affiants. It must not be forgotten that this motion arose as a result of Sierra Club's position that the summaries contained in the affidavits should be accorded little or no weight without the presence of the underlying documents. Even if the relevant information and the confidential information were mutually exclusive, which would allow for the disclosure of all the information relied on in the affidavits, this relevancy determination could not be tested on cross-examination because the expunged material would not be available. Thus, even in the best case scenario, where only irrelevant information needed to be expunged, the parties would be put in essentially the same position as that which initially generated this appeal, in the sense that, at least some of the material relied on to prepare the affidavits in question would not be available to Sierra Club.

Further, I agree with Robertson J.A. that this best case scenario, where the relevant and the confidential information do not overlap, is an untested assumption (para. 28). Although the documents themselves were not put before the courts on this motion, given that they comprise thousands of pages of detailed information, this assumption is at best optimistic. The expungement alternative would be further complicated by the fact that the Chinese

La majorité en Cour d'appel estime que, outre cette possibilité d'épuration des documents, l'inclusion dans les affidavits d'un résumé des documents confidentiels pourrait, dans une large mesure, compenser l'absence des originaux. Si l'une ou l'autre de ces deux options peut raisonnablement se substituer au dépôt des documents confidentiels aux termes d'une ordonnance de confidentialité, alors l'ordonnance n'est pas nécessaire et la requête ne franchit pas la première étape de l'analyse.

64 Il existe deux possibilités pour l'épuration des documents et, selon moi, elles comportent toutes deux des problèmes. La première serait que ÉACL retranche les renseignements confidentiels sans divulguer les éléments retranchés ni aux parties ni au tribunal. Toutefois, dans cette situation, la documentation déposée serait encore différente de celle utilisée pour les affidavits. Il ne faut pas perdre de vue que la requête découle de l'argument de Sierra Club selon lequel le tribunal ne devrait accorder que peu ou pas de poids aux résumés sans la présence des documents de base. Même si on pouvait totalement séparer les renseignements pertinents et les renseignements confidentiels, ce qui permettrait la divulgation de tous les renseignements sur lesquels se fondent les affidavits, l'appréciation de leur pertinence ne pourrait pas être mise à l'épreuve en contre-interrogatoire puisque la documentation retranchée ne serait pas disponible. Par conséquent, même dans le meilleur cas de figure, où l'on n'aurait qu'à retrancher les renseignements non pertinents, les parties se retrouveraient essentiellement dans la même situation que celle qui a donné lieu au pourvoi, en ce sens qu'au moins une partie des documents ayant servi à la préparation des affidavits en question ne serait pas mise à la disposition de Sierra Club.

65 De plus, je partage l'opinion du juge Robertson que ce meilleur cas de figure, où les renseignements pertinents et les renseignements confidentiels ne se recoupent pas, est une hypothèse non confirmée (par. 28). Même si les documents eux-mêmes n'ont pas été produits devant les tribunaux dans le cadre de la présente requête, parce qu'ils comprennent des milliers de pages de renseignements détaillés, cette hypothèse est au mieux optimiste. L'option de

authorities require prior approval for any request by AECL to disclose information.

66 The second option is that the expunged material be made available to the court and the parties under a more narrowly drawn confidentiality order. Although this option would allow for slightly broader public access than the current confidentiality request, in my view, this minor restriction to the current confidentiality request is not a viable alternative given the difficulties associated with expungement in these circumstances. The test asks whether there are reasonably alternative measures; it does not require the adoption of the absolutely least restrictive option. With respect, in my view, expungement of the Confidential Documents would be a virtually unworkable and ineffective solution that is not reasonable in the circumstances.

67 A second alternative to a confidentiality order was Evans J.A.'s suggestion that the summaries of the Confidential Documents included in the affidavits "may well go a long way to compensate for the absence of the originals" (para. 103). However, he appeared to take this fact into account merely as a factor to be considered when balancing the various interests at stake. I would agree that at this threshold stage to rely on the summaries alone, in light of the intention of Sierra Club to argue that they should be accorded little or no weight, does not appear to be a "reasonably alternative measure" to having the underlying documents available to the parties.

68 With the above considerations in mind, I find the confidentiality order necessary in that disclosure of the Confidential Documents would impose a serious risk on an important commercial interest of the appellant, and that there are no reasonably alternative measures to granting the order.

(2) The Proportionality Stage

69 As stated above, at this stage, the salutary effects of the confidentiality order, including the effects on the appellant's right to a fair trial, must be weighed against the deleterious effects of the confidentiality order, including the effects on the right to free

l'épuration serait en outre compliquée par le fait que les autorités chinoises exigent l'approbation préalable de toute demande de divulgation de renseignements de la part d'ÉACL.

La deuxième possibilité serait de mettre les documents supprimés à la disposition du tribunal et des parties en vertu d'une ordonnance de confidentialité plus restreinte. Bien que cela permettrait un accès public un peu plus large que ne le ferait l'ordonnance de confidentialité sollicitée, selon moi, cette restriction mineure à la requête n'est pas une option viable étant donné les difficultés liées à l'épuration dans les circonstances. Il s'agit de savoir s'il y a d'autres options raisonnables et non d'adopter l'option qui soit absolument la moins restrictive. Avec égards, j'estime que l'épuration des documents confidentiels serait une solution virtuellement impraticable et inefficace qui n'est pas raisonnable dans les circonstances.

Une deuxième option autre que l'ordonnance de confidentialité serait, selon le juge Evans, l'inclusion dans les affidavits d'un résumé des documents confidentiels pour « dans une large mesure, compenser [leur] absence » (par. 103). Il ne semble toutefois envisager ce fait qu'à titre de facteur à considérer dans la pondération des divers intérêts en cause. Je conviens qu'à cette étape liminaire, se fonder uniquement sur les résumés en connaissant l'intention de Sierra Club de plaider leur faiblesse ou l'absence de valeur probante, ne semble pas être une « autre option raisonnable » à la communication aux parties des documents de base.

Vu les facteurs susmentionnés, je conclus que l'ordonnance de confidentialité est nécessaire en ce que la divulgation des documents confidentiels ferait courir un risque sérieux à un intérêt commercial important de l'appelante, et qu'il n'existe pas d'autres options raisonnables.

(2) L'étape de la proportionnalité

Comme on le mentionne plus haut, à cette étape, les effets bénéfiques de l'ordonnance de confidentialité, y compris ses effets sur le droit de l'appelante à un procès équitable, doivent être pondérés avec ses effets préjudiciables, y compris ses effets sur le droit

expression, which in turn is connected to the principle of open and accessible court proceedings. This balancing will ultimately determine whether the confidentiality order ought to be granted.

(a) *Salutary Effects of the Confidentiality Order*

As discussed above, the primary interest that would be promoted by the confidentiality order is the public interest in the right of a civil litigant to present its case, or, more generally, the fair trial right. Because the fair trial right is being invoked in this case in order to protect commercial, not liberty, interests of the appellant, the right to a fair trial in this context is not a *Charter* right; however, a fair trial for all litigants has been recognized as a fundamental principle of justice: *Ryan*, *supra*, at para. 84. It bears repeating that there are circumstances where, in the absence of an affected *Charter* right, the proper administration of justice calls for a confidentiality order: *Mentuck*, *supra*, at para. 31. In this case, the salutary effects that such an order would have on the administration of justice relate to the ability of the appellant to present its case, as encompassed by the broader fair trial right.

The Confidential Documents have been found to be relevant to defences that will be available to the appellant in the event that the *CEAA* is found to apply to the impugned transaction and, as discussed above, the appellant cannot disclose the documents without putting its commercial interests at serious risk of harm. As such, there is a very real risk that, without the confidentiality order, the ability of the appellant to mount a successful defence will be seriously curtailed. I conclude, therefore, that the confidentiality order would have significant salutary effects on the appellant's right to a fair trial.

Aside from the salutary effects on the fair trial interest, the confidentiality order would also have a beneficial impact on other important rights and interests. First, as I discuss in more detail below, the confidentiality order would allow all parties and the court access to the Confidential Documents, and

à la liberté d'expression, qui à son tour est lié au principe de la publicité des débats judiciaires. Cette pondération déterminera finalement s'il y a lieu d'accorder l'ordonnance de confidentialité.

a) *Les effets bénéfiques de l'ordonnance de confidentialité*

70 Comme nous l'avons vu, le principal intérêt qui serait promu par l'ordonnance de confidentialité est l'intérêt du public à la protection du droit du justiciable civil de faire valoir sa cause ou, de façon plus générale, du droit à un procès équitable. Puisque l'appelante l'invoque en l'espèce pour protéger ses intérêts commerciaux et non son droit à la liberté, le droit à un procès équitable dans ce contexte n'est pas un droit visé par la *Charte*; toutefois, le droit à un procès équitable pour tous les justiciables a été reconnu comme un principe de justice fondamentale : *Ryan*, précité, par. 84. Il y a lieu de rappeler qu'il y a des circonstances où, en l'absence de violation d'un droit garanti par la *Charte*, la bonne administration de la justice exige une ordonnance de confidentialité : *Mentuck*, précité, par. 31. En l'espèce, les effets bénéfiques d'une telle ordonnance sur l'administration de la justice tiennent à la capacité de l'appelante de soutenir sa cause, dans le cadre du droit plus large à un procès équitable.

71 Les documents confidentiels ont été jugés pertinents en ce qui a trait aux moyens de défense que l'appelante pourrait invoquer s'il est jugé que la *LCÉE* s'applique à l'opération attaquée et, comme nous l'avons vu, l'appelante ne peut communiquer les documents sans risque sérieux pour ses intérêts commerciaux. De ce fait, il existe un risque bien réel que, sans l'ordonnance de confidentialité, la capacité de l'appelante à mener à bien sa défense soit gravement réduite. Je conclus par conséquent que l'ordonnance de confidentialité aurait d'importants effets bénéfiques pour le droit de l'appelante à un procès équitable.

72 En plus des effets bénéfiques pour le droit à un procès équitable, l'ordonnance de confidentialité aurait aussi des incidences favorables sur d'autres droits et intérêts importants. En premier lieu, comme je l'exposerai plus en détail ci-après, l'ordonnance de confidentialité permettrait aux parties ainsi qu'au

permit cross-examination based on their contents. By facilitating access to relevant documents in a judicial proceeding, the order sought would assist in the search for truth, a core value underlying freedom of expression.

73 Second, I agree with the observation of Robertson J.A. that, as the Confidential Documents contain detailed technical information pertaining to the construction and design of a nuclear installation, it may be in keeping with the public interest to prevent this information from entering the public domain (para. 44). Although the exact contents of the documents remain a mystery, it is apparent that they contain technical details of a nuclear installation, and there may well be a substantial public security interest in maintaining the confidentiality of such information.

(b) *Deleterious Effects of the Confidentiality Order*

74 Granting the confidentiality order would have a negative effect on the open court principle, as the public would be denied access to the contents of the Confidential Documents. As stated above, the principle of open courts is inextricably tied to the s. 2(*b*) *Charter* right to freedom of expression, and public scrutiny of the courts is a fundamental aspect of the administration of justice: *New Brunswick*, *supra*, at paras. 22-23. Although as a general principle, the importance of open courts cannot be overstated, it is necessary to examine, in the context of this case, the particular deleterious effects on freedom of expression that the confidentiality order would have.

75 Underlying freedom of expression are the core values of (1) seeking the truth and the common good; (2) promoting self-fulfilment of individuals by allowing them to develop thoughts and ideas as they see fit; and (3) ensuring that participation in the political process is open to all persons: *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R.

tribunal d'avoir accès aux documents confidentiels, et permettrait la tenue d'un contre-interrogatoire fondé sur leur contenu. En facilitant l'accès aux documents pertinents dans une procédure judiciaire, l'ordonnance sollicitée favoriserait la recherche de la vérité, qui est une valeur fondamentale sous-tendant la liberté d'expression.

En deuxième lieu, je suis d'accord avec l'observation du juge Robertson selon laquelle puisque les documents confidentiels contiennent des renseignements techniques détaillés touchant la construction et la conception d'une installation nucléaire, il peut être nécessaire, dans l'intérêt public, d'empêcher que ces renseignements tombent dans le domaine public (par. 44). Même si le contenu exact des documents demeure un mystère, il est évident qu'ils comprennent des détails techniques d'une installation nucléaire et il peut bien y avoir un important intérêt de sécurité publique à préserver la confidentialité de ces renseignements.

b) *Les effets préjudiciables de l'ordonnance de confidentialité*

Une ordonnance de confidentialité aurait un effet préjudiciable sur le principe de la publicité des débats judiciaires, puisqu'elle priverait le public de l'accès au contenu des documents confidentiels. Comme on le dit plus haut, le principe de la publicité des débats judiciaires est inextricablement lié au droit à la liberté d'expression protégé par l'al. 2*b*) de la *Charte*, et la vigilance du public envers les tribunaux est un aspect fondamental de l'administration de la justice : *Nouveau-Brunswick*, précité, par. 22-23. Même si, à titre de principe général, l'importance de la publicité des débats judiciaires ne peut être sous-estimée, il faut examiner, dans le contexte de l'espèce, les effets préjudiciables particuliers que l'ordonnance de confidentialité aurait sur la liberté d'expression.

Les valeurs fondamentales qui sous-tendent la liberté d'expression sont (1) la recherche de la vérité et du bien commun; (2) l'épanouissement personnel par le libre développement des pensées et des idées; et (3) la participation de tous au processus politique : *Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 R.C.S. 927, p. 976; *R. c. Keegstra*, [1990]

927, at p. 976; *R. v. Keegstra*, [1990] 3 S.C.R. 697, at pp. 762-64, *per* Dickson C.J. *Charter* jurisprudence has established that the closer the speech in question lies to these core values, the harder it will be to justify a s. 2(*b*) infringement of that speech under s. 1 of the *Charter*: *Keegstra*, at pp. 760-61. Since the main goal in this case is to exercise judicial discretion in a way which conforms to *Charter* principles, a discussion of the deleterious effects of the confidentiality order on freedom of expression should include an assessment of the effects such an order would have on the three core values. The more detrimental the order would be to these values, the more difficult it will be to justify the confidentiality order. Similarly, minor effects of the order on the core values will make the confidentiality order easier to justify.

Seeking the truth is not only at the core of freedom of expression, but it has also been recognized as a fundamental purpose behind the open court rule, as the open examination of witnesses promotes an effective evidentiary process: *Edmonton Journal*, *supra*, at pp. 1357-58, *per* Wilson J. Clearly the confidentiality order, by denying public and media access to documents relied on in the proceedings, would impede the search for truth to some extent. Although the order would not exclude the public from the courtroom, the public and the media would be denied access to documents relevant to the evidentiary process.

However, as mentioned above, to some extent the search for truth may actually be promoted by the confidentiality order. This motion arises as a result of Sierra Club's argument that it must have access to the Confidential Documents in order to test the accuracy of Dr. Pang's evidence. If the order is denied, then the most likely scenario is that the appellant will not submit the documents with the unfortunate result that evidence which may be relevant to the proceedings will not be available to Sierra Club or the court. As a result, Sierra Club will not be able to fully test the accuracy of Dr. Pang's evidence on cross-examination. In addition, the court will not have the benefit of this cross-examination or

3 R.C.S. 697, p. 762-764, le juge en chef Dickson. La jurisprudence de la *Charte* établit que plus l'expression en cause est au cœur de ces valeurs fondamentales, plus il est difficile de justifier, en vertu de l'article premier de la *Charte*, une atteinte à l'al. 2*b*) à son égard : *Keegstra*, p. 760-761. Comme l'objectif principal en l'espèce est d'exercer un pouvoir discrétionnaire dans le respect des principes de la *Charte*, l'examen des effets préjudiciables de l'ordonnance de confidentialité sur la liberté d'expression devrait comprendre une appréciation des effets qu'elle aurait sur les trois valeurs fondamentales. Plus l'ordonnance de confidentialité porte préjudice à ces valeurs, plus il est difficile de la justifier. Inversement, des effets mineurs sur les valeurs fondamentales rendent l'ordonnance de confidentialité plus facile à justifier.

76 La recherche de la vérité est non seulement au cœur de la liberté d'expression, elle est aussi reconnue comme un objectif fondamental de la règle de la publicité des débats judiciaires, puisque l'examen public des témoins favorise l'efficacité du processus de présentation de la preuve : *Edmonton Journal*, précité, p. 1357-1358, le juge Wilson. À l'évidence, en enlevant au public et aux médias l'accès aux documents invoqués dans les procédures, l'ordonnance de confidentialité nuirait jusqu'à un certain point à la recherche de la vérité. L'ordonnance n'exclurait pas le public de la salle d'audience, mais le public et les médias n'auraient pas accès aux documents pertinents quant à la présentation de la preuve.

77 Toutefois, comme nous l'avons vu plus haut, la recherche de la vérité peut jusqu'à un certain point être favorisée par l'ordonnance de confidentialité. La présente requête résulte de l'argument de Sierra Club selon lequel il doit avoir accès aux documents confidentiels pour vérifier l'exactitude de la déposition de M. Pang. Si l'ordonnance est refusée, le scénario le plus probable est que l'appelante s'abstiendra de déposer les documents, avec la conséquence fâcheuse que des preuves qui peuvent être pertinentes ne seront pas portées à la connaissance de Sierra Club ou du tribunal. Par conséquent, Sierra Club ne sera pas en mesure de vérifier complètement l'exactitude de la preuve de M. Pang en contre-

documentary evidence, and will be required to draw conclusions based on an incomplete evidentiary record. This would clearly impede the search for truth in this case.

78 As well, it is important to remember that the confidentiality order would restrict access to a relatively small number of highly technical documents. The nature of these documents is such that the general public would be unlikely to understand their contents, and thus they would contribute little to the public interest in the search for truth in this case. However, in the hands of the parties and their respective experts, the documents may be of great assistance in probing the truth of the Chinese environmental assessment process, which would in turn assist the court in reaching accurate factual conclusions. Given the nature of the documents, in my view, the important value of the search for truth which underlies both freedom of expression and open justice would be promoted to a greater extent by submitting the Confidential Documents under the order sought than it would by denying the order, and thereby preventing the parties and the court from relying on the documents in the course of the litigation.

79 In addition, under the terms of the order sought, the only restrictions on these documents relate to their public distribution. The Confidential Documents would be available to the court and the parties, and public access to the proceedings would not be impeded. As such, the order represents a fairly minimal intrusion into the open court rule, and thus would not have significant deleterious effects on this principle.

80 The second core value underlying freedom of speech, namely, the promotion of individual self-fulfilment by allowing open development of thoughts and ideas, focusses on individual expression, and thus does not closely relate to the open court principle which involves institutional expression. Although the confidentiality order would

interrogatoire. De plus, le tribunal ne bénéficiera pas du contre-interrogatoire ou de cette preuve documentaire, et il lui faudra tirer des conclusions fondées sur un dossier de preuve incomplet. Cela nuira manifestement à la recherche de la vérité en l'espèce.

De plus, il importe de rappeler que l'ordonnance de confidentialité ne restreindrait l'accès qu'à un nombre relativement peu élevé de documents hautement techniques. La nature de ces documents est telle que le public en général est peu susceptible d'en comprendre le contenu, de sorte qu'ils contribueraient peu à l'intérêt du public à la recherche de la vérité en l'espèce. Toutefois, dans les mains des parties et de leurs experts respectifs, les documents peuvent être très utiles pour apprécier la conformité du processus d'évaluation environnementale chinois, ce qui devrait aussi aider le tribunal à tirer des conclusions de fait exactes. À mon avis, compte tenu de leur nature, la production des documents confidentiels en vertu de l'ordonnance de confidentialité sollicitée favoriserait mieux l'importante valeur de la recherche de la vérité, qui sous-tend à la fois la liberté d'expression et la publicité des débats judiciaires, que ne le ferait le rejet de la demande qui aurait pour effet d'empêcher les parties et le tribunal de se fonder sur les documents au cours de l'instance.

De plus, aux termes de l'ordonnance demandée, les seules restrictions imposées à l'égard de ces documents ont trait à leur distribution publique. Les documents confidentiels seraient mis à la disposition du tribunal et des parties, et il n'y aurait pas d'entrave à l'accès du public aux procédures. À ce titre, l'ordonnance représente une atteinte relativement minime à la règle de la publicité des débats judiciaires et elle n'aurait donc pas d'effets préjudiciables importants sur ce principe.

La deuxième valeur fondamentale sous-jacente à la liberté d'expression, la promotion de l'épanouissement personnel par le libre développement de la pensée et des idées, est centrée sur l'expression individuelle et n'est donc pas étroitement liée au principe de la publicité des débats judiciaires qui concerne l'expression institutionnelle. Même

restrict individual access to certain information which may be of interest to that individual, I find that this value would not be significantly affected by the confidentiality order.

si l'ordonnance de confidentialité devait restreindre l'accès individuel à certains renseignements susceptibles d'intéresser quelqu'un, j'estime que cette valeur ne serait pas touchée de manière significative.

The third core value, open participation in the political process, figures prominently in this appeal, as open justice is a fundamental aspect of a democratic society. This connection was pointed out by Cory J. in *Edmonton Journal*, *supra*, at p. 1339:

> It can be seen that freedom of expression is of fundamental importance to a democratic society. It is also essential to a democracy and crucial to the rule of law that the courts are seen to function openly. The press must be free to comment upon court proceedings to ensure that the courts are, in fact, seen by all to operate openly in the penetrating light of public scrutiny.

81 La troisième valeur fondamentale, la libre participation au processus politique, joue un rôle primordial dans le pourvoi puisque la publicité des débats judiciaires est un aspect fondamental de la société démocratique. Ce lien est souligné par le juge Cory dans *Edmonton Journal*, précité, p. 1339 :

> On voit que la liberté d'expression est d'une importance fondamentale dans une société démocratique. Il est également essentiel dans une démocratie et fondamental pour la primauté du droit que la transparence du fonctionnement des tribunaux soit perçue comme telle. La presse doit être libre de commenter les procédures judiciaires pour que, dans les faits, chacun puisse constater que les tribunaux fonctionnent publiquement sous les regards pénétrants du public.

Although there is no doubt as to the importance of open judicial proceedings to a democratic society, there was disagreement in the courts below as to whether the weight to be assigned to the open court principle should vary depending on the nature of the proceeding.

Même si on ne peut douter de l'importance de la publicité des débats judiciaires dans une société démocratique, les décisions antérieures divergent sur la question de savoir si le poids à accorder au principe de la publicité des débats judiciaires devrait varier en fonction de la nature de la procédure.

On this issue, Robertson J.A. was of the view that the nature of the case and the level of media interest were irrelevant considerations. On the other hand, Evans J.A. held that the motions judge was correct in taking into account that this judicial review application was one of significant public and media interest. In my view, although the public nature of the case may be a factor which strengthens the importance of open justice in a particular case, the level of media interest should not be taken into account as an independent consideration.

82 Sur ce point, le juge Robertson estime que la nature de l'affaire et le degré d'intérêt des médias sont des considérations dénuées de pertinence. Le juge Evans estime quant à lui que le juge des requêtes a eu raison de tenir compte du fait que la demande de contrôle judiciaire suscite beaucoup d'intérêt de la part du public et des médias. À mon avis, même si la nature publique de l'affaire peut être un facteur susceptible de renforcer l'importance de la publicité des débats judiciaires dans une espèce particulière, le degré d'intérêt des médias ne devrait pas être considéré comme facteur indépendant.

Since cases involving public institutions will generally relate more closely to the core value of public participation in the political process, the public nature of a proceeding should be taken into consideration when assessing the merits of a confidentiality order. It is important to note that this core value will always be engaged where the open court

83 Puisque les affaires concernant des institutions publiques ont généralement un lien plus étroit avec la valeur fondamentale de la participation du public au processus politique, la nature publique d'une instance devrait être prise en considération dans l'évaluation du bien-fondé d'une ordonnance de confidentialité. Il importe de noter que cette valeur

principle is engaged owing to the importance of open justice to a democratic society. However, where the political process is also engaged by the substance of the proceedings, the connection between open proceedings and public participation in the political process will increase. As such, I agree with Evans J.A. in the court below where he stated, at para. 87:

> While all litigation is important to the parties, and there is a public interest in ensuring the fair and appropriate adjudication of all litigation that comes before the courts, some cases raise issues that transcend the immediate interests of the parties and the general public interest in the due administration of justice, and have a much wider public interest significance.

84 This motion relates to an application for judicial review of a decision by the government to fund a nuclear energy project. Such an application is clearly of a public nature, as it relates to the distribution of public funds in relation to an issue of demonstrated public interest. Moreover, as pointed out by Evans J.A., openness and public participation are of fundamental importance under the *CEAA*. Indeed, by their very nature, environmental matters carry significant public import, and openness in judicial proceedings involving environmental issues will generally attract a high degree of protection. In this regard, I agree with Evans J.A. that the public interest is engaged here more than it would be if this were an action between private parties relating to purely private interests.

85 However, with respect, to the extent that Evans J.A. relied on media interest as an indicium of public interest, this was an error. In my view, it is important to distinguish public interest, from media interest, and I agree with Robertson J.A. that media exposure cannot be viewed as an impartial measure of public interest. It is the public nature of the proceedings which increases the need for openness, and this public nature is not necessarily reflected by the media desire to probe the facts of the case.

fondamentale sera toujours engagée lorsque sera mis en cause le principe de la publicité des débats judiciaires, vu l'importance de la transparence judiciaire dans une société démocratique. Toutefois, le lien entre la publicité des débats judiciaires et la participation du public dans le processus politique s'accentue lorsque le processus politique est également engagé par la substance de la procédure. Sous ce rapport, je suis d'accord avec ce que dit le juge Evans (au par. 87) :

> Bien que tous les litiges soient importants pour les parties, et qu'il en va de l'intérêt du public que les affaires soumises aux tribunaux soient traitées de façon équitable et appropriée, certaines affaires soulèvent des questions qui transcendent les intérêts immédiats des parties ainsi que l'intérêt du public en général dans la bonne administration de la justice, et qui ont une signification beaucoup plus grande pour le public.

La requête est liée à une demande de contrôle judiciaire d'une décision du gouvernement de financer un projet d'énergie nucléaire. La demande est clairement de nature publique, puisqu'elle a trait à la distribution de fonds publics en rapport avec une question dont l'intérêt public a été démontré. De plus, comme le souligne le juge Evans, la transparence du processus et la participation du public ont une importance fondamentale sous le régime de la *LCÉE*. En effet, par leur nature même, les questions environnementales ont une portée publique considérable, et la transparence des débats judiciaires sur les questions environnementales mérite généralement un degré élevé de protection. À cet égard, je suis d'accord avec le juge Evans pour conclure que l'intérêt public est en l'espèce plus engagé que s'il s'agissait d'un litige entre personnes privées à l'égard d'intérêts purement privés.

J'estime toutefois avec égards que, dans la mesure où il se fonde sur l'intérêt des médias comme indice de l'intérêt du public, le juge Evans fait erreur. À mon avis, il est important d'établir une distinction entre l'intérêt du public et l'intérêt des médias et, comme le juge Robertson, je note que la couverture médiatique ne peut être considérée comme une mesure impartiale de l'intérêt public. C'est la nature publique de l'instance qui accentue le besoin de transparence, et cette nature publique ne se reflète

I reiterate the caution given by Dickson C.J. in *Keegstra*, *supra*, at p. 760, where he stated that, while the speech in question must be examined in light of its relation to the core values, "we must guard carefully against judging expression according to its popularity".

Although the public interest in open access to the judicial review application as a whole is substantial, in my view, it is also important to bear in mind the nature and scope of the information for which the order is sought in assigning weight to the public interest. With respect, the motions judge erred in failing to consider the narrow scope of the order when he considered the public interest in disclosure, and consequently attached excessive weight to this factor. In this connection, I respectfully disagree with the following conclusion of Evans J.A., at para. 97:

> Thus, having considered the nature of this litigation, and having assessed the extent of public interest in the openness of the proceedings in the case before him, the Motions Judge cannot be said in all the circumstances to have given this factor undue weight, even though confidentiality is claimed for only three documents among the small mountain of paper filed in this case, and their content is likely to be beyond the comprehension of all but those equipped with the necessary technical expertise.

Open justice is a fundamentally important principle, particularly when the substance of the proceedings is public in nature. However, this does not detract from the duty to attach weight to this principle in accordance with the specific limitations on openness that the confidentiality order would have. As Wilson J. observed in *Edmonton Journal*, *supra*, at pp. 1353-54:

> One thing seems clear and that is that one should not balance one value at large and the conflicting value in its context. To do so could well be to pre-judge the issue by placing more weight on the value developed at large than is appropriate in the context of the case.

pas nécessairement dans le désir des médias d'examiner les faits de l'affaire. Je réitère l'avertissement donné par le juge en chef Dickson dans *Keegstra*, précité, p. 760, où il dit que même si l'expression en cause doit être examinée dans ses rapports avec les valeurs fondamentales, « nous devons veiller à ne pas juger l'expression en fonction de sa popularité ».

86

Même si l'intérêt du public à la publicité de la demande de contrôle judiciaire dans son ensemble est important, à mon avis, il importe tout autant de prendre en compte la nature et la portée des renseignements visés par l'ordonnance demandée, lorsqu'il s'agit d'apprécier le poids de l'intérêt public. Avec égards, le juge des requêtes a commis une erreur en ne tenant pas compte de la portée limitée de l'ordonnance dans son appréciation de l'intérêt du public à la communication et en accordant donc un poids excessif à ce facteur. Sous ce rapport, je ne partage pas la conclusion suivante du juge Evans (au par. 97) :

> Par conséquent, on ne peut dire qu'après que le juge des requêtes eut examiné la nature de ce litige et évalué l'importance de l'intérêt du public à la publicité des procédures, il aurait dans les circonstances accordé trop d'importance à ce facteur, même si la confidentialité n'est demandée que pour trois documents parmi la montagne de documents déposés en l'instance et que leur contenu dépasse probablement les connaissances de ceux qui n'ont pas l'expertise technique nécessaire.

La publicité des débats judiciaires est un principe fondamentalement important, surtout lorsque la substance de la procédure est de nature publique. Cela ne libère toutefois aucunement de l'obligation d'apprécier le poids à accorder à ce principe en fonction des limites particulières qu'imposerait l'ordonnance de confidentialité à la publicité des débats. Comme le dit le juge Wilson dans *Edmonton Journal*, précité, p. 1353-1354 :

> Une chose semble claire et c'est qu'il ne faut pas évaluer une valeur selon la méthode générale et l'autre valeur en conflit avec elle selon la méthode contextuelle. Agir ainsi pourrait fort bien revenir à préjuger de l'issue du litige en donnant à la valeur examinée de manière générale plus d'importance que ne l'exige le contexte de l'affaire.

87 In my view, it is important that, although there is significant public interest in these proceedings, open access to the judicial review application would be only slightly impeded by the order sought. The narrow scope of the order coupled with the highly technical nature of the Confidential Documents significantly temper the deleterious effects the confidentiality order would have on the public interest in open courts.

88 In addressing the effects that the confidentiality order would have on freedom of expression, it should also be borne in mind that the appellant may not have to raise defences under the *CEAA*, in which case the Confidential Documents would be irrelevant to the proceedings, with the result that freedom of expression would be unaffected by the order. However, since the necessity of the Confidential Documents will not be determined for some time, in the absence of a confidentiality order, the appellant would be left with the choice of either submitting the documents in breach of its obligations, or withholding the documents in the hopes that either it will not have to present a defence under the *CEAA*, or that it will be able to mount a successful defence in the absence of these relevant documents. If it chooses the former option, and the defences under the *CEAA* are later found not to apply, then the appellant will have suffered the prejudice of having its confidential and sensitive information released into the public domain, with no corresponding benefit to the public. Although this scenario is far from certain, the possibility of such an occurrence also weighs in favour of granting the order sought.

89 In coming to this conclusion, I note that if the appellant is not required to invoke the relevant defences under the *CEAA*, it is also true that the appellant's fair trial right will not be impeded, even if the confidentiality order is not granted. However, I do not take this into account as a factor which weighs in favour of denying the order because, if the order is granted and the Confidential Documents are not required, there will be no deleterious effects on either the public interest in freedom of expression or the appellant's commercial interests or fair trial right. This neutral result is in contrast with the

À mon avis, il importe de reconnaître que, malgré l'intérêt significatif que porte le public à ces procédures, l'ordonnance demandée n'entraverait que légèrement la publicité de la demande de contrôle judiciaire. La portée étroite de l'ordonnance associée à la nature hautement technique des documents confidentiels tempère considérablement les effets préjudiciables que l'ordonnance de confidentialité pourrait avoir sur l'intérêt du public à la publicité des débats judiciaires.

Pour traiter des effets qu'aurait l'ordonnance de confidentialité sur la liberté d'expression, il faut aussi se rappeler qu'il se peut que l'appelante n'ait pas à soulever de moyens de défense visés par la *LCÉE*, auquel cas les documents confidentiels perdraient leur pertinence et la liberté d'expression ne serait pas touchée par l'ordonnance. Toutefois, puisque l'utilité des documents confidentiels ne sera pas déterminée avant un certain temps, l'appelante n'aurait plus, en l'absence d'ordonnance de confidentialité, que le choix entre soit produire les documents en violation de ses obligations, soit les retenir dans l'espoir de ne pas avoir à présenter de défense en vertu de la *LCÉE* ou de pouvoir assurer effectivement sa défense sans les documents pertinents. Si elle opte pour le premier choix et que le tribunal conclut par la suite que les moyens de défense visés par la *LCÉE* ne sont pas applicables, l'appelante aura subi le préjudice de voir ses renseignements confidentiels et délicats tomber dans le domaine public sans que le public n'en tire d'avantage correspondant. Même si sa réalisation est loin d'être certaine, la possibilité d'un tel scénario milite également en faveur de l'ordonnance sollicitée.

En arrivant à cette conclusion, je note que si l'appelante n'a pas à invoquer les moyens de défense pertinents en vertu de la *LCÉE*, il est également vrai que son droit à un procès équitable ne sera pas entravé même en cas de refus de l'ordonnance de confidentialité. Je ne retiens toutefois pas cela comme facteur militant contre l'ordonnance parce que, si elle est accordée et que les documents confidentiels ne sont pas nécessaires, il n'y aura alors aucun effet préjudiciable ni sur l'intérêt du public à la liberté d'expression ni sur les droits commerciaux ou le droit de l'appelante à un procès

scenario discussed above where the order is denied and the possibility arises that the appellant's commercial interests will be prejudiced with no corresponding public benefit. As a result, the fact that the Confidential Documents may not be required is a factor which weighs in favour of granting the confidentiality order.

In summary, the core freedom of expression values of seeking the truth and promoting an open political process are most closely linked to the principle of open courts, and most affected by an order restricting that openness. However, in the context of this case, the confidentiality order would only marginally impede, and in some respects would even promote, the pursuit of these values. As such, the order would not have significant deleterious effects on freedom of expression.

VII. Conclusion

In balancing the various rights and interests engaged, I note that the confidentiality order would have substantial salutary effects on the appellant's right to a fair trial, and freedom of expression. On the other hand, the deleterious effects of the confidentiality order on the principle of open courts and freedom of expression would be minimal. In addition, if the order is not granted and in the course of the judicial review application the appellant is not required to mount a defence under the *CEAA*, there is a possibility that the appellant will have suffered the harm of having disclosed confidential information in breach of its obligations with no corresponding benefit to the right of the public to freedom of expression. As a result, I find that the salutary effects of the order outweigh its deleterious effects, and the order should be granted.

Consequently, I would allow the appeal with costs throughout, set aside the judgment of the Federal Court of Appeal, and grant the confidentiality order on the terms requested by the appellant under Rule 151 of the *Federal Court Rules, 1998*.

équitable. Cette issue neutre contraste avec le scénario susmentionné où il y a refus de l'ordonnance et possibilité d'atteinte aux droits commerciaux de l'appelante sans avantage correspondant pour le public. Par conséquent, le fait que les documents confidentiels puissent ne pas être nécessaires est un facteur en faveur de l'ordonnance de confidentialité.

90 En résumé, les valeurs centrales de la liberté d'expression que sont la recherche de la vérité et la promotion d'un processus politique ouvert sont très étroitement liées au principe de la publicité des débats judiciaires, et sont les plus touchées par une ordonnance limitant cette publicité. Toutefois, dans le contexte en l'espèce, l'ordonnance de confidentialité n'entraverait que légèrement la poursuite de ces valeurs, et pourrait même les favoriser à certains égards. À ce titre, l'ordonnance n'aurait pas d'effets préjudiciables importants sur la liberté d'expression.

VII. Conclusion

91 Dans la pondération des divers droits et intérêts en jeu, je note que l'ordonnance de confidentialité aurait des effets bénéfiques importants sur le droit de l'appelante à un procès équitable et sur la liberté d'expression. D'autre part, les effets préjudiciables de l'ordonnance de confidentialité sur le principe de la publicité des débats judiciaires et la liberté d'expression seraient minimes. En outre, si l'ordonnance est refusée et qu'au cours du contrôle judiciaire l'appelante n'est pas amenée à invoquer les moyens de défense prévus dans la *LCÉE*, il se peut qu'elle subisse le préjudice d'avoir communiqué des renseignements confidentiels en violation de ses obligations sans avantage correspondant pour le droit du public à la liberté d'expression. Je conclus donc que les effets bénéfiques de l'ordonnance l'emportent sur ses effets préjudiciables, et qu'il y a lieu d'accorder l'ordonnance.

92 Je suis donc d'avis d'accueillir le pourvoi avec dépens devant toutes les cours, d'annuler l'arrêt de la Cour d'appel fédérale, et d'accorder l'ordonnance de confidentialité selon les modalités demandées par l'appelante en vertu de la règle 151 des *Règles de la Cour fédérale (1998)*.

Appeal allowed with costs.

Solicitors for the appellant: Osler, Hoskin & Harcourt, Toronto.

Solicitors for the respondent Sierra Club of Canada: Timothy J. Howard, Vancouver; Franklin S. Gertler, Montréal.

Solicitor for the respondents the Minister of Finance of Canada, the Minister of Foreign Affairs of Canada, the Minister of International Trade of Canada and the Attorney General of Canada: The Deputy Attorney General of Canada, Ottawa.

Pourvoi accueilli avec dépens.

Procureurs de l'appelante : Osler, Hoskin & Harcourt, Toronto.

Procureurs de l'intimé Sierra Club du Canada : Timothy J. Howard, Vancouver; Franklin S. Gertler, Montréal.

Procureur des intimés le ministre des Finances du Canada, le ministre des Affaires étrangères du Canada, le ministre du Commerce international du Canada et le procureur général du Canada : Le sous-procureur général du Canada, Ottawa.

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*

Succession de Bernard Sherman et fiduciaires de la succession et Succession de Honey Sherman et fiduciaires de la succession *Appelants*

c.

Kevin Donovan et Toronto Star Newspapers Ltd. *Intimés*

et

Procureur général de l'Ontario, procureur général de la Colombie-Britannique, Association canadienne des libertés civiles, Centre d'action pour la sécurité du revenu, Ad IDEM/Canadian Media Lawyers Association, Postmedia Network Inc., CTV, une division de Bell Média 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, Réseau juridique VIH et Mental Health Legal Committee *Intervenants*

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

RÉPERTORIÉ : SHERMAN (SUCCESSION) *c.* DONOVAN

2021 CSC 25

N° du greffe : 38695.

2020 : 6 octobre; 2021 : 11 juin.

Présents : Le juge en chef Wagner et les juges Moldaver, Karakatsanis, Brown, Rowe, Martin et Kasirer.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Tribunaux — Principe de la publicité des débats judiciaires — Ordonnances de mise sous scellés — Limites

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

discrétionnaires à la publicité des débats judiciaires — Intérêt public important — Vie privée — Dignité — Sécurité physique — Décès inexpliqué d'un couple important suscitant une vive attention chez le public et amenant les fiduciaires des successions à demander la mise sous scellés des dossiers d'homologation — Les préoccupations en matière de vie privée et de sécurité physique soulevées par les fiduciaires des successions constituent-elles des intérêts publics importants qui sont à ce point sérieusement menacés qu'ils justifient le prononcé d'ordonnances de mise sous scellés?

Un couple important a été retrouvé mort dans sa résidence. Les décès apparemment inexpliqués ont suscité un vif intérêt chez le public. À ce jour, l'identité et le mobile des personnes responsables demeurent inconnus, et les décès font l'objet d'une enquête pour homicides. Les fiduciaires des successions ont cherché à réfréner l'attention médiatique intense provoquée par les événements en sollicitant des ordonnances visant à mettre sous scellés les dossiers d'homologation. Les ordonnances de mise sous scellés ont au départ été accordées, puis ont été contestées par un journaliste qui avait rédigé des articles sur le décès du couple, ainsi que par le journal pour lequel il écrivait. Le juge de première instance a fait placer sous scellés les dossiers d'homologation, concluant que les effets bénéfiques des ordonnances de mise sous scellés sur les intérêts en matière de vie privée et de sécurité physique l'emportaient sensiblement sur leurs effets préjudiciables. La Cour d'appel à l'unanimité a accueilli l'appel et levé les ordonnances de mise sous scellés. Elle a conclu que l'intérêt en matière de vie privée qui avait été soulevé ne comportait pas la qualité d'intérêt public, et qu'il n'y avait aucun élément de preuve d'un risque réel pour la sécurité physique de quiconque.

Arrêt : Le pourvoi est rejeté.

Les fiduciaires des successions n'ont pas établi l'existence d'un risque sérieux pour un intérêt public important en vertu du test applicable en matière de limites discrétionnaires à la publicité des débats judiciaires. Par conséquent, les ordonnances de mise sous scellés n'auraient pas dû être rendues. La publicité des débats judiciaires peut être source d'inconvénients et d'embarras, mais ce désagrément n'est pas, en règle générale, suffisant pour permettre de réfuter la forte présomption de publicité des débats. Cela dit, la diffusion de renseignements personnels dans le cadre de débats judiciaires publics peut être plus qu'une source de désagrément et peut aussi entraîner une atteinte

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.

à la dignité d'une personne. Dans la mesure où elle sert à protéger les personnes contre une telle atteinte, la vie privée constitue un intérêt public important et un tribunal peut faire une exception au principe de la publicité des débats judiciaires si elle est sérieusement menacée. Dans la présente affaire, on ne peut pas dire que le risque pour la vie privée et pour la sécurité physique est suffisamment sérieux.

Les procédures judiciaires sont présumées accessibles au public. La publicité des débats judiciaires, qui est protégée par la garantie constitutionnelle de la liberté d'expression, est essentielle au bon fonctionnement de la démocratie canadienne. On dit souvent de la liberté de la presse de rendre compte des procédures judiciaires qu'elle est indissociable du principe de publicité. Le principe de la publicité des débats judiciaires s'applique dans toutes les procédures judiciaires, quelle que soit leur nature. Les questions soulevées dans un dossier d'homologation ne sont pas typiquement de nature privée ou fondamentalement de nature administrative. L'obtention d'un certificat de nomination à titre de fiduciaire d'une succession en Ontario est une procédure judiciaire qui met en cause la raison d'être fondamentale de la publicité des débats — décourager les actes malveillants et garantir la confiance dans l'administration de la justice par la transparence —, de sorte que la forte présomption de publicité s'applique.

Le test des limites discrétionnaires à la publicité des débats judiciaires vise à maintenir la présomption tout en offrant suffisamment de souplesse aux tribunaux pour leur permettre de protéger d'autres intérêts publics lorsqu'ils entrent en jeu. Pour obtenir gain de cause, la personne qui demande au tribunal d'exercer son pouvoir discrétionnaire de façon à limiter la présomption de publicité doit établir ce qui suit : (1) la publicité des débats judiciaires pose un risque sérieux pour un intérêt public important; (2) l'ordonnance sollicitée est nécessaire pour écarter ce risque sérieux pour l'intérêt mis en évidence, car d'autres mesures raisonnables ne permettront pas d'écarter ce risque; et (3) du point de vue de la proportionnalité, les avantages de l'ordonnance l'emportent sur ses effets négatifs.

La portée reconnue des intérêts qui pourraient justifier une exception discrétionnaire à la publicité des débats judiciaires s'est élargie au fil du temps et s'étend désormais en général aux intérêts publics importants. L'étendue de cette catégorie transcende les intérêts des parties au litige et offre une grande souplesse pour remédier à l'atteinte aux valeurs fondamentales de notre société qu'une publicité absolue des procédures judiciaires pourrait causer. Bien qu'il n'y ait aucune liste exhaustive des intérêts publics importants, les tribunaux doivent faire preuve de prudence

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

et avoir pleinement conscience de l'importance fondamentale de la règle de la publicité des débats judiciaires lorsqu'ils les constatent. Déterminer ce qu'est un intérêt public important peut se faire dans l'abstrait sur le plan des principes généraux qui vont au-delà des parties à un litige donné. En revanche, la conclusion sur la question de savoir si un risque sérieux menace cet intérêt est une conclusion factuelle qui est nécessairement prise eu égard au contexte. Le fait de constater un intérêt important et celui de constater le caractère sérieux du risque auquel cet intérêt est exposé sont donc en théorie des opérations séparées et qualitativement distinctes.

La vie privée a été défendue en tant que considération fondamentale d'une société libre et son importance pour le public a été reconnue dans divers contextes. Bien que la vie privée d'une personne soit d'une importance primordiale pour celle-ci, la protection de la vie privée est également dans l'intérêt de la société dans son ensemble. La vie privée ne saurait donc être rejetée en tant que simple préoccupation personnelle : il y a chevauchement entre certaines préoccupations personnelles relatives à la vie privée et les intérêts du public.

Cependant, si la vie privée est définie trop largement, la reconnaissance d'un intérêt public en matière de vie privée pourrait menacer la forte présomption de publicité. La vie privée des personnes sera menacée dans de nombreuses procédures judiciaires. De plus, la vie privée est une notion complexe et contextuelle, de sorte qu'il est difficile pour les tribunaux de la mesurer. La reconnaissance d'un intérêt important à l'égard de la notion générale de vie privée serait donc irréalisable.

Le caractère public de l'intérêt en matière de vie privée consiste plutôt à protéger les gens contre la menace à leur dignité. La dignité en ce sens comporte le droit de présenter des aspects fondamentaux de soi-même aux autres de manière réfléchie et contrôlée; il s'agit de l'expression de la personnalité ou de l'identité unique d'une personne. Cet intérêt est conforme à l'accent mis par la Cour sur l'importance de la vie privée, tout en permettant de maintenir la forte présomption de publicité des débats.

Se fondant sur la dignité, la vie privée sera sérieusement menacée dans des circonstances limitées. Ni la susceptibilité des gens ni le fait que la publicité soit désavantageuse, embarrassante ou pénible pour certaines personnes ne justifieront généralement, à eux seuls, une atteinte à la publicité des débats judiciaires. La dignité ne sera sérieusement menacée que lorsque les renseignements qui seraient diffusés en raison de la publicité des débats sont suffisamment sensibles ou privés pour que l'on puisse démontrer que la publicité porte atteinte de

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.

façon significative au cœur même des renseignements biographiques de la personne d'une manière qui menace son intégrité. Il faut se demander si les renseignements révèlent quelque chose d'intime et de personnel sur la personne, son mode de vie ou ses expériences.

Dans les cas où les renseignements sont suffisamment sensibles pour toucher au cœur même des renseignements biographiques d'une personne, le tribunal doit alors se demander si le contexte factuel global de l'affaire permet d'établir l'existence d'un risque sérieux pour l'intérêt en cause. La mesure dans laquelle les renseignements sont diffusés et font déjà partie du domaine public, ainsi que la probabilité que la diffusion se produise réellement, peuvent avoir une incidence sur le caractère sérieux du risque. Il incombe au demandeur de démontrer que la vie privée, considérée au regard de la dignité, est sérieusement menacée; cela permet d'établir un seuil, tributaire des faits, compatible avec la présomption de publicité des débats.

Il existe également un intérêt public important dans la protection des personnes contre un préjudice physique, mais une ordonnance discrétionnaire ayant pour effet de limiter la publicité des débats judiciaires ne peut être rendue qu'en présence d'un risque sérieux pour cet intérêt public important. Une preuve directe n'est pas nécessairement exigée pour démontrer qu'un intérêt public important est sérieusement menacé, car il est possible d'établir l'existence d'un préjudice objectivement discernable sur la base d'inférences logiques. Or, ce raisonnement inférentiel ne permet pas de se livrer à des conjectures inadmissibles. Ce n'est pas seulement la probabilité du préjudice appréhendé qui est pertinente lorsqu'il s'agit d'évaluer si un risque est sérieux, mais également la gravité du préjudice lui-même. Lorsque le préjudice appréhendé est particulièrement sérieux, il n'est pas nécessaire de démontrer que la probabilité que ce préjudice se matérialise est vraisemblable, mais elle doit tout de même être plus que négligeable, fantaisiste ou conjecturale. Le simple fait d'invoquer un préjudice physique grave n'est donc pas suffisant.

Il faut démontrer, outre un risque sérieux pour un intérêt important, que l'ordonnance particulière demandée est nécessaire pour écarter le risque et que, du point de vue de la proportionnalité, les avantages de l'ordonnance l'emportent sur ses effets négatifs. Cette pondération contextuelle, éclairée par l'importance du principe de la publicité des débats judiciaires, constitue un dernier obstacle sur la route de ceux qui cherchent à faire limiter de façon discrétionnaire la publicité des débats judiciaires aux fins de la protection de la vie privée.

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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En l'espèce, le risque pour l'intérêt public important en matière de vie privée, défini au regard de la dignité, n'est pas sérieux. Les renseignements contenus dans les dossiers d'homologation ne révèlent rien de particulièrement privé ni de très sensible. Il n'a pas été démontré qu'ils toucheraient au cœur même des renseignements biographiques des personnes touchées d'une manière qui minerait leur contrôle sur l'expression de leur identité. De plus, le dossier ne démontre pas l'existence d'un risque sérieux de préjudice physique. Les fiduciaires des successions ont demandé au juge de première instance d'inférer non seulement le fait qu'un préjudice serait causé aux personnes touchées, mais également qu'il existe une ou des personnes qui souhaitent leur faire du mal. Déduire tout cela en se fondant sur les décès et sur les liens unissant les personnes touchées aux défunts ne constitue pas une inférence raisonnable, mais une conjecture.

Même si les fiduciaires des successions avaient réussi à démontrer l'existence d'un risque sérieux pour la vie privée, une interdiction de publication — moins contraignante à l'égard de la publicité des débats que les ordonnances de mise sous scellés — aurait probablement été suffisante en tant qu'autre option raisonnable pour écarter ce risque. Comme dernier obstacle, les fiduciaires des successions auraient eu à démontrer que les avantages de toute ordonnance nécessaire à la protection contre un risque sérieux pour l'intérêt public important l'emportaient sur ses effets préjudiciables.

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Arrêt appliqué : *Sierra Club du Canada c. Canada (Ministre des Finances)*, 2002 CSC 41, [2002] 2 R.C.S. 522; **arrêts mentionnés :** *Société Radio-Canada c. Nouveau-Brunswick (Procureur général)*, [1996] 3 R.C.S. 480; *Vancouver Sun (Re)*, 2004 CSC 43, [2004] 2 R.C.S. 332; *Khuja c. Times Newspapers Ltd.*, [2017] UKSC 49, [2019] A.C. 161; *Edmonton Journal c. Alberta (Procureur général)*, [1989] 2 R.C.S. 1326; *Dagenais c. Société Radio-Canada*, [1994] 3 R.C.S. 835; *R. c. Mentuck*, 2001 CSC 76, [2001] 3 R.C.S. 442; *Lavigne c. Canada (Commissariat aux langues officielles)*, 2002 CSC 53, [2002] 2 R.C.S. 773; *Dagg c. Canada (Ministre des Finances)*, [1997] 2 R.C.S. 403; *R. c. Henry*, 2009 BCCA 86, 270 B.C.A.C. 5; *Procureur général de la Nouvelle-Écosse c. MacIntyre*, [1982] 1 R.C.S. 175; *A.B. c. Bragg Communications Inc.*, 2012 CSC 46, [2012] 2 R.C.S. 567; *Toronto Star Newspapers Ltd. c. Ontario*, 2005 CSC 41, [2005] 2 R.C.S. 188; *Re Southam Inc. and The Queen (No.1)* (1983), 41 O.R. (2d) 113; *R. c. Oakes*,

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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.

Rochette, Sébastien, et Jean-François Côté. « Article 12 », dans Luc Chamberland, dir. *Le grand collectif : Code de procédure civile — Commentaires et annotations*, vol. 1, 5e éd., Montréal, Yvon Blais, 2020.

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Chantelle Cseh et *Timothy Youdan*, pour les appelants.

Iris Fischer et *Skye A. Sepp*, pour les intimés.

Peter Scrutton, pour l'intervenant le procureur général de l'Ontario.

Jaqueline Hughes, pour l'intervenant le procureur général de la Colombie-Britannique.

Ryder Gilliland, pour l'intervenante l'Association canadienne des libertés civiles.

Ewa Krajewska, pour l'intervenant le Centre d'action pour la sécurité du revenu.

Robert S. Anderson, *c.r.*, pour les intervenants Ad IDEM/Canadian Media Lawyers Association, Postmedia Network Inc., CTV, une division de Bell Média 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, pour l'intervenante British Columbia Civil Liberties Association.

Khalid Janmohamed, pour les intervenants HIV & AIDS Legal Clinic Ontario, le Réseau juridique VIH et 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

Version française du jugement de la Cour rendu par

LE JUGE KASIRER —

I. Survol

[1] La Cour a toujours fermement reconnu que le principe de la publicité des débats judiciaires est protégé par le droit constitutionnel à la liberté d'expression, et qu'il représente à ce titre un élément fondamental d'une démocratie libérale. En règle générale, le public peut assister aux audiences et consulter les dossiers judiciaires, et les médias — les yeux et les oreilles du public — sont libres de poser des questions et de formuler des commentaires sur les activités des tribunaux, ce qui contribue à rendre le système judiciaire équitable et responsable.

[2] Par conséquent, il existe une forte présomption en faveur de la publicité des débats judiciaires. Il est entendu que cela permet un examen public minutieux qui peut être source d'inconvénients, voire d'embarras, pour ceux qui estiment que leur implication dans le système judiciaire entraîne une atteinte à leur vie privée. Cependant, ce désagrément n'est pas, en règle générale, suffisant pour permettre de réfuter la forte présomption voulant que le public puisse assister aux audiences, et que les dossiers judiciaires puissent être consultés et leur contenu rapporté par une presse libre.

[3] Malgré cette présomption, il se présente des circonstances exceptionnelles où des intérêts opposés justifient de restreindre le principe de la publicité des débats judiciaires. Lorsqu'un demandeur sollicite une ordonnance judiciaire discrétionnaire limitant le principe constitutionnalisé de la publicité des procédures judiciaires — par exemple, une ordonnance de mise sous scellés, une interdiction de publication, une ordonnance excluant le public d'une audience ou une ordonnance de caviardage —, il doit démontrer, comme condition préliminaire, que la publicité des débats en cause présente un risque sérieux pour un intérêt opposé qui revêt une importance pour le public. Le fait que cette condition soit considérée comme un seuil élevé vise à assurer

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,

le maintien de la forte présomption de publicité des débats judiciaires. En outre, la protection accordée à la publicité des débats ne s'arrête pas là. Le demandeur doit encore démontrer que l'ordonnance est nécessaire pour écarter le risque et que, du point de vue de la proportionnalité, les avantages de cette ordonnance restreignant la publicité l'emportent sur ses effets négatifs.

[4] Le présent pourvoi porte sur la question de savoir si les préoccupations soulevées par les personnes qui demandent qu'une exception soit faite à la publicité habituelle des dossiers judiciaires dans le cadre de procédures d'homologation successorale — à savoir les préoccupations concernant la vie privée et la sécurité physique des personnes touchées — constituent des intérêts publics importants qui sont à ce point sérieusement menacés que les dossiers devraient être mis sous scellés. Les parties au présent pourvoi conviennent que la sécurité physique constitue un intérêt public important qui pourrait justifier une ordonnance de mise sous scellés, mais elles ne s'entendent pas sur la question de savoir si cet intérêt serait sérieusement menacé, dans les circonstances de l'espèce, advenant la levée des scellés. Elles sont également en désaccord sur la question de savoir si la vie privée constitue en elle-même un intérêt important qui pourrait justifier une ordonnance de mise sous scellés. Les appelants affirment que la vie privée est un intérêt public suffisamment important pouvant justifier l'imposition de limites à la publicité des débats judiciaires, plus particulièrement à la lumière des menaces auxquelles les gens sont exposés dans un contexte où la technologie facilite la diffusion à grande échelle de renseignements personnels sensibles. Ils font valoir que la Cour d'appel a eu tort d'affirmer que les préoccupations personnelles en matière de vie privée, à elles seules, ne comportent pas l'élément d'intérêt public qui relève à juste titre d'une ordonnance de mise sous scellés.

[5] Notre Cour a, dans différents contextes, défendu de manière constante la vie privée en tant que considération fondamentale d'une société libre. Invoquant des arrêts rendus dans d'autres contextes, les appelants soutiennent que la vie privée devrait être reconnue en l'espèce comme un intérêt public qui, au vu des faits de la présente affaire, étaye leur

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.

plaidoyer en faveur du prononcé d'ordonnances de mise sous scellés des dossiers d'homologation. Les intimés s'opposent à ce que de telles ordonnances soient rendues, rappelant que la protection de la vie privée est généralement considérée comme une faible justification à une exception à la publicité des débats. Ils affirment qu'après tout, presque chaque procédure judiciaire entraîne un certain dérangement dans la vie des personnes concernées et que ces atteintes à la vie privée doivent être tolérées parce que la publicité des débats judiciaires est essentielle à une saine démocratie.

[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.

[6] Le présent pourvoi offre donc l'occasion de trancher la question de savoir si la vie privée peut constituer un intérêt public suivant la jurisprudence relative à la publicité des débats judiciaires et, dans l'affirmative, si la publicité des débats menace sérieusement la vie privée en l'espèce au point de justifier le type d'ordonnances demandé par les appelants.

[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.

[7] Pour les motifs qui suivent, je propose de reconnaître qu'un aspect de la vie privée constitue un intérêt public important pour l'application du test pertinent énoncé dans l'arrêt *Sierra Club du Canada c. Canada (Ministre des Finances)*, 2002 CSC 41, [2002] 2 R.C.S. 522. La tenue de procédures judiciaires publiques peut mener à la diffusion de renseignements personnels très sensibles, laquelle entraînerait non seulement un désagrément ou de l'embarras pour la personne touchée, mais aussi une atteinte à sa dignité. Dans les cas où il est démontré que cette dimension plus restreinte de la vie privée, qui me semble tirer son origine de l'intérêt du public à la protection de la dignité humaine, est sérieusement menacée, une exception au principe de la publicité des débats judiciaires peut être justifiée.

[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.

[8] Dans la présente affaire, et en gardant cet intérêt à l'esprit, on ne peut pas dire que le risque pour la vie privée est suffisamment sérieux pour permettre de réfuter la forte présomption de publicité des débats judiciaires. Il en est de même du risque pour la sécurité physique en l'espèce. Dans les circonstances, la Cour d'appel a eu raison d'annuler les ordonnances de mise sous scellés et je suis donc d'avis de rejeter le pourvoi.

II. Background

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

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

[11] When the time came to obtain certificates of appointment of estate trustee from the Superior Court of Justice, the Trustees sought a sealing order so that the estate trustees and beneficiaries ("affected individuals") might be spared any further intrusions into their privacy and be protected from what was alleged to be a risk to their safety. The Trustees argued that if the information in the court files was revealed to the public, the safety of the affected individuals would be at risk and their privacy compromised as long as the deaths were unexplained and those responsible for the tragedy remained at large. In support of their request, they argued that there was a real and substantial risk that the affected individuals would suffer serious harm from the public exposure of the materials in the circumstances.

[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.

II. Contexte

[9] Bernard Sherman et Honey Sherman, figures importantes du monde des affaires et de la philanthropie, ont été retrouvés morts dans leur résidence de Toronto en décembre 2017. Leur décès apparemment inexpliqué a suscité un vif intérêt chez le public et une attention médiatique intense. En janvier de l'année suivante, le service de police de Toronto a annoncé que les décès faisaient l'objet d'une enquête pour homicides. Au moment où l'affaire a été portée devant les tribunaux, l'identité et le mobile des personnes responsables demeuraient inconnus.

[10] Les successions du couple et les fiduciaires des successions (collectivement les « fiduciaires »)[1] ont cherché à réfréner l'attention médiatique intense provoquée par les événements. Les fiduciaires souhaitaient veiller au transfert harmonieux des biens du couple, à distance de ce qu'ils percevaient comme un intérêt morbide du public pour les décès inexpliqués et la curiosité suscitée par les importantes sommes d'argent apparemment en jeu.

[11] Quand le temps est venu d'obtenir auprès de la Cour supérieure de justice leurs certificats de nomination à titre de fiduciaires des successions, les fiduciaires ont sollicité une ordonnance de mise sous scellés dans le but d'épargner aux fiduciaires des successions et aux bénéficiaires (« personnes touchées ») de nouvelles atteintes à leur vie privée, et de les protéger contre ce qui, selon les allégations, aurait constitué un risque pour leur sécurité. Les fiduciaires ont soutenu que, si les renseignements contenus dans les dossiers judiciaires étaient révélés au public, la sécurité des personnes touchées serait menacée et leur vie privée compromise tant et aussi longtemps que les décès demeureraient inexpliqués et que les personnes responsables de la tragédie seraient en liberté. À l'appui de leur demande, ils ont fait valoir qu'il existait un risque réel et important que les personnes touchées subissent un préjudice sérieux en raison de la diffusion publique des documents dans les circonstances.

[1] Comme l'indique l'intitulé de la cause, les appelants en l'espèce ont, tout au long des procédures, été désignés comme suit : « succession de Bernard Sherman et fiduciaires de la succession et succession de Honey Sherman et fiduciaires de la succession ». Dans les présents motifs, les appelants sont appelés les « fiduciaires » par souci de commodité.

[12] Initially granted, the sealing orders were challenged by Kevin Donovan, a journalist who had written a series of articles on the couple's deaths, and Toronto Star Newspapers Ltd., for which he wrote (collectively the "Toronto Star").[2] The Toronto Star said the orders violated its constitutional rights of freedom of expression and freedom of the press, as well as the attending principle that the workings of the courts should be open to the public as a means of guaranteeing the fair and transparent administration of justice.

III. Proceedings Below

A. *Ontario Superior Court of Justice, 2018 ONSC 4706, 41 E.T.R. (4th) 126 (Dunphy J.)*

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

[14] The application judge considered whether the Trustees' interests would be served by granting the sealing orders. In his view, the Trustees had correctly identified two legitimate interests in support of making an exception to the open court principle: "protecting the privacy and dignity of victims of crime and their loved ones" and "a reasonable apprehension

[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.

[12] Les ordonnances de mise sous scellés ont au départ été accordées, puis ont été contestées par Kevin Donovan, un journaliste qui avait rédigé une série d'articles sur le décès du couple, ainsi que par Toronto Star Newspapers Ltd., le journal pour lequel il écrivait (collectivement le « Toronto Star »)[2]. Le Toronto Star a affirmé que les ordonnances portaient atteinte à ses droits constitutionnels à la liberté d'expression et à la liberté de la presse, ainsi qu'au principe corollaire selon lequel les activités des tribunaux devraient être accessibles au public comme moyen de garantir l'équité et la transparence de l'administration de la justice.

III. Historique judiciaire

A. *Cour supérieure de justice de l'Ontario, 2018 ONSC 4706, 41 E.T.R. (4th) 126 (le juge Dunphy)*

[13] Examinant la question de savoir si les circonstances justifiaient une atteinte au principe de la publicité des débats judiciaires, le juge de première instance s'est appuyé sur l'arrêt *Sierra Club* de notre Cour. Il a souligné qu'une ordonnance de confidentialité ne devrait être accordée que si [TRADUCTION] : « (1) elle est nécessaire [. . .] pour écarter un risque sérieux pour un intérêt important en l'absence d'autres options raisonnables pour écarter ce risque, et (2) ses effets bénéfiques l'emportent sur ses effets préjudiciables, y compris ses effets sur la liberté d'expression et l'intérêt du public à la publicité des débats judiciaires » (par. 13(d)).

[14] Le juge de première instance a examiné la question de savoir si les intérêts des fiduciaires seraient servis par l'octroi des ordonnances de mise sous scellés. À son avis, les fiduciaires avaient correctement mis en évidence deux intérêts légitimes à l'appui d'une exception au principe de la publicité des débats judiciaires, à savoir [TRADUCTION] « la

[2] L'utilisation du terme « Toronto Star » pour désigner collectivement les deux intimés ne devrait pas être interprétée comme indiquant que seule la société Toronto Star Newspapers Ltd. participe au présent pourvoi. Monsieur Donovan est le seul intimé à avoir été une partie devant toutes les cours. Toronto Star Newspapers Ltd. a participé à la première instance, mais, sur consentement, elle a été retirée comme partie à la Cour d'appel. Par une ordonnance de la juge Karakatsanis datée du 25 mars 2020, Toronto Star Newspapers Ltd. a été ajoutée en tant qu'intimée devant notre Cour.

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.*).

protection de la vie privée et de la dignité des victimes d'actes criminels ainsi que de leurs êtres chers », et « une crainte raisonnable d'un risque de préjudice chez les personnes connues comme ayant un intérêt à recevoir ou à administrer les biens des défunts » (par. 22-25). S'agissant du premier intérêt, le juge de première instance a conclu que [TRADUCTION] « le degré d'atteinte à cette vie privée et à cette dignité est déjà extrême et [. . .] insoutenable » (par. 23). En ce qui a trait au deuxième intérêt, bien qu'il ait souligné qu'« il aurait été préférable d'inclure des éléments de preuve objectifs de la gravité de ce risque, obtenus, par exemple, auprès des policiers responsables de l'enquête », il a conclu que « l'absence de tels éléments de preuve n'est pas fatale » (par. 24). Les inférences nécessaires pouvaient plutôt être tirées des circonstances, notamment [TRADUCTION] « la volonté de la personne ou des personnes ayant perpétré les crimes de recourir à une violence extrême pour obéir à un mobile quelconque » (*ibid.*). Il a conclu que [TRADUCTION] « l'incertitude actuelle » était source d'une crainte raisonnable du risque de préjudice, et qu'en outre, le préjudice prévisible était « 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.

[15] Le juge de première instance a finalement accepté l'argument des fiduciaires selon lequel ces intérêts [TRADUCTION] « l'emportent très fortement » sur ce qu'il a qualifié d'intérêt public proportionnellement restreint à l'égard des « dossiers essentiellement administratifs » en cause (par. 31 et 33). Il a donc conclu que les effets bénéfiques des ordonnances de mise sous scellés sur les droits et les intérêts des personnes touchées l'emportaient sensiblement sur leurs effets préjudiciables.

[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.

[16] Enfin, le juge de première instance a examiné la question de savoir quelle ordonnance protégerait les personnes touchées tout en portant le moins possible atteinte au principe de la publicité des débats judiciaires. Il a décidé que, si l'on devait apporter aux deux dossiers le caviardage nécessaire à la protection des intérêts qu'il avait constatés, il n'en resterait plus aucun passage digne d'intérêt susceptible d'être divulgué. Des ordonnances de mise sous scellés d'une durée indéterminée ne lui semblaient toutefois pas une bonne solution. Le juge de première instance a donc fait placer sous scellés les dossiers pour une période initiale de deux ans, avec possibilité de renouvellement.

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.

B. *Cour d'appel de l'Ontario, 2019 ONCA 376, 47 E.T.R. (4th) 1 (les juges Doherty, Rouleau et Hourigan)*

[17] L'appel interjeté par le Toronto Star a été accueilli à l'unanimité et les ordonnances de mise sous scellés ont été levées.

[18] La Cour d'appel a examiné les deux intérêts qui avaient été soulevés devant le juge de première instance au soutien des ordonnances visant à mettre sous scellés les dossiers d'homologation. En ce qui concerne la nécessité de protéger la vie privée et la dignité des victimes de crimes violents et de leurs êtres chers, elle a rappelé que le type d'intérêt qui est à juste titre protégé par une ordonnance de mise sous scellés doit comporter un élément d'intérêt public. Citant l'arrêt *Sierra Club*, la Cour d'appel a écrit que [TRADUCTION] « [d]es préoccupations personnelles ne peuvent à elles seules justifier une ordonnance de mise sous scellés de documents qui seraient normalement accessibles au public en vertu du principe de la publicité des débats judiciaires » (par. 10). Elle a conclu que l'intérêt en matière de vie privée à l'égard duquel les fiduciaires sollicitaient une protection ne comportait pas cette qualité d'intérêt public.

[19] Bien qu'elle ait reconnu que la sécurité personnelle des gens constituait, de manière générale, un intérêt public important, la Cour d'appel a écrit qu'il n'y avait aucun élément de preuve en l'espèce permettant de conclure que la divulgation du contenu des dossiers de succession posait un risque réel pour la sécurité physique de quiconque. Le juge de première instance avait commis une erreur sur ce point : [TRADUCTION] « l'idée selon laquelle les bénéficiaires et les fiduciaires sont en quelque sorte en danger parce que les Sherman ont été assassinés n'est pas une inférence, mais une conjecture. Elle ne justifie aucunement l'octroi d'une ordonnance de mise sous scellés » (par. 16).

[20] La Cour d'appel a conclu que les fiduciaires n'avaient pas franchi la première étape du test relatif à l'obtention d'ordonnances de mise sous scellés des dossiers d'homologation. Elle a donc accueilli l'appel et annulé les ordonnances.

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

C. *Procédures subséquentes*

[21] L'ordonnance de la Cour d'appel annulant les ordonnances de mise sous scellés a été suspendue en attendant l'issue du présent pourvoi. Le Toronto Star a présenté une requête pour être autorisé à déposer de nouveaux éléments de preuve dans le cadre du pourvoi, éléments de preuve qui comprennent des documents d'enregistrement des droits immobiliers, des transcriptions du contre-interrogatoire d'un détective sur l'enquête relative aux meurtres ainsi que divers articles de presse. Ces éléments de preuve, affirme-t-il, étayent la conclusion selon laquelle les ordonnances de mise sous scellés devraient être levées. La requête a été renvoyée à notre formation.

IV. Moyens

[22] Les fiduciaires ont interjeté appel devant notre Cour pour demander le rétablissement des ordonnances de mise sous scellés rendues par le juge de première instance. En plus de contester la requête en production de nouveaux éléments de preuve, ils soutiennent que les ordonnances sont nécessaires pour écarter un risque sérieux pour la vie privée et la sécurité physique des personnes touchées, et que les effets bénéfiques de la mise sous scellés des dossiers d'homologation judiciaire l'emportent sur les effets préjudiciables du fait de limiter la publicité des débats judiciaires. Les fiduciaires soutiennent que deux erreurs de droit ont amené la Cour d'appel à conclure autrement.

[23] Premièrement, ils soutiennent que la Cour d'appel a conclu à tort que la vie privée est une préoccupation personnelle qui ne peut, à elle seule, constituer un intérêt important suivant l'arrêt *Sierra Club*. Les fiduciaires affirment que le juge de première instance a qualifié à bon droit la vie privée et la dignité comme un intérêt public important qui, étant exposé à un risque sérieux, justifiait les ordonnances. Ils demandent à notre Cour de reconnaître que la vie privée constitue en elle-même un intérêt public important pour les besoins de l'analyse.

[24] Deuxièmement, les fiduciaires avancent que la Cour d'appel a commis une erreur en infirmant la conclusion du juge de première instance selon

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

laquelle il y avait un risque sérieux de préjudice physique. Ils font valoir que la Cour d'appel n'a pas reconnu que les tribunaux sont habilités à tirer des inférences raisonnables sur le fondement de la raison et de la logique, même en l'absence d'éléments de preuve précis du risque allégué.

[25] Les fiduciaires affirment que ces erreurs ont amené la Cour d'appel à annuler à tort les ordonnances de mise sous scellés. En réponse aux questions qui leur ont été posées à l'audience, les fiduciaires ont reconnu qu'une ordonnance de caviardage de certains documents dans le dossier ou encore une interdiction de publication pourrait contribuer à apaiser certaines de leurs préoccupations, mais ils ont maintenu qu'aucune de ces mesures ne constituait une solution de rechange raisonnable aux ordonnances de mise sous scellés dans les circonstances.

[26] Les fiduciaires font également valoir que la protection de ces intérêts l'emporte sur les effets préjudiciables des ordonnances. Ils soutiennent que la nature des procédures d'homologation successorale dans la présente affaire atténue l'importance du principe de la publicité des débats judiciaires. Étant donné qu'elle n'est ni contentieuse ni, à proprement parler, nécessaire au transfert des biens au décès, l'homologation est une procédure judiciaire de nature [TRADUCTION] « administrative », ce qui réduit la nécessité d'appliquer le principe de la publicité des débats judiciaires à l'espèce (par. 113-114).

[27] Le Toronto Star soutient pour sa part que la Cour d'appel n'a commis aucune erreur en annulant les ordonnances de mise sous scellés et que l'appel devrait être rejeté. Selon le Toronto Star, bien que la vie privée puisse constituer un intérêt important quand elle révèle la présence d'un élément public, les fiduciaires ont seulement fait état d'un désir subjectif de la part des personnes touchées en l'espèce d'éviter toute publicité supplémentaire, laquelle n'est pas préjudiciable en soi. De l'avis du Toronto Star et de certains des intervenants, la position des fiduciaires reviendrait à permettre à cette part d'inconvénients et d'embarras propre à toute instance judiciaire à avoir préséance sur l'intérêt dans la publicité des débats judiciaires, un principe qui est garanti par la *Charte canadienne des droits et libertés* et dans

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

lequel toute la société a un intérêt. Le Toronto Star soutient également que les renseignements contenus dans les dossiers judiciaires ne sont pas de nature très sensible. En ce qui a trait à la question de savoir si les ordonnances de mise sous scellés étaient nécessaires pour protéger les personnes touchées d'un préjudice physique, le Toronto Star fait valoir que la Cour d'appel a eu raison de conclure que les fiduciaires n'avaient pas établi l'existence d'un risque sérieux pour cet intérêt.

[28] Subsidiairement, le Toronto Star affirme que, même s'il existe un risque sérieux pour un intérêt important quelconque, les ordonnances de mise sous scellés ne sont pas nécessaires, car le risque pourrait être écarté par une autre ordonnance moins sévère. De plus, il soutient que les ordonnances ne sont pas proportionnées. En cherchant à minimiser l'importance de la publicité des débats judiciaires dans les procédures d'homologation, les fiduciaires invitent à adopter, à l'égard de la pondération des effets de l'ordonnance, une approche inflexible, incompatible avec le principe de la publicité qui s'applique à toutes les procédures judiciaires. Quoi qu'il en soit, il existe précisément un intérêt public à l'égard de la publicité des débats dans la présente affaire, étant donné que les certificats demandés peuvent avoir une incidence sur les droits de tiers et que la publicité des débats garantit l'équité des procédures, qu'elles soient contestées ou non.

V. Analyse

[29] L'issue du pourvoi dépend de la question de savoir si le juge de première instance aurait dû rendre les ordonnances de mise sous scellés conformément au test applicable en matière de limites discrétionnaires à la publicité des débats judiciaires, test établi par notre Cour dans l'arrêt *Sierra Club*.

[30] La publicité des débats judiciaires, qui est protégée par la garantie constitutionnelle de la liberté d'expression, est essentielle au bon fonctionnement de notre démocratie (*Société Radio-Canada c. Nouveau-Brunswick (Procureur général)*, [1996] 3 R.C.S. 480, par. 23; *Vancouver Sun (Re)*, 2004 CSC 43, [2004] 2 R.C.S. 332, par. 23-26). On dit souvent de la liberté de la presse de rendre compte

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*

des procédures judiciaires qu'elle est indissociable du principe de publicité. [TRADUCTION] « En rendant compte de ce qui a été dit et fait dans un procès public, les médias sont les yeux et les oreilles d'un public plus large qui aurait parfaitement le droit d'y assister, mais qui, pour des raisons purement pratiques, ne peut le faire » (*Khuja c. Times Newspapers Ltd.*, [2017] UKSC 49, [2019] A.C. 161, par. 16, citant *Edmonton Journal c. Alberta (Procureur général)*, [1989] 2 R.C.S. 1326, p. 1339-1340, le juge Cory). Le pouvoir d'imposer des limites à la publicité des débats judiciaires afin de servir d'autres intérêts publics est reconnu, mais il doit être exercé avec modération et en veillant toujours à maintenir la forte présomption selon laquelle la justice doit être rendue au vu et au su du public (*Dagenais c. Société Radio-Canada*, [1994] 3 R.C.S. 835, p. 878; *R. c. Mentuck*, 2001 CSC 76, [2001] 3 R.C.S. 442, par. 32-39; *Sierra Club*, par. 56). Le test des limites discrétionnaires à la publicité des débats judiciaires vise à maintenir cette présomption tout en offrant suffisamment de souplesse aux tribunaux pour leur permettre de protéger ces autres intérêts publics lorsqu'ils entrent en jeu (*Mentuck*, par. 33). Les parties conviennent qu'il s'agit du cadre d'analyse approprié à appliquer pour trancher le présent pourvoi.

[31] Les parties et les tribunaux d'instance inférieure ne s'entendent pas, cependant, sur la façon dont ce test s'applique aux faits de la présente affaire et cela nécessite des éclaircissements sur certains points de l'analyse établie dans l'arrêt *Sierra Club*. Plus fondamentalement, il y a désaccord sur la façon dont un intérêt important à la protection de la vie privée pourrait être reconnu de telle sorte qu'il justifierait des limites à la publicité des débats, et en particulier lorsque la vie privée peut constituer une question d'intérêt public. Les parties font valoir deux principes établis dans la jurisprudence de la Cour à l'appui de leur position respective. Tout d'abord, notre Cour a souvent fait observer que la vie privée est une valeur fondamentale nécessaire au maintien d'une société libre et démocratique (*Lavigne c. Canada (Commissariat aux langues officielles)*, 2002 CSC 53, [2002] 2 R.C.S. 773, par. 25; *Dagg c. Canada (Ministre des Finances)*, [1997] 2 R.C.S. 403, par. 65-66, le juge La Forest (dissident, mais non sur ce point); *Nouveau-Brunswick*, par. 40).

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.

Dans certains cas, les tribunaux ont invoqué la vie privée pour justifier l'application d'une exception à la publicité des débats judiciaires conformément au test établi dans *Sierra Club* (voir, p. ex., *R. c. Henry*, 2009 BCCA 86, 270 B.C.A.C. 5, par. 11 et 17). En même temps, la jurisprudence reconnaît qu'un certain degré d'atteinte à la vie privée — qui entraîne des inconvénients, voire de la contrariété ou de l'embarras — est inhérent à toute instance judiciaire accessible au public (*Nouveau-Brunswick*, par. 40). Par conséquent, le maintien de la présomption de la publicité des débats judiciaires signifie reconnaître que ni la susceptibilité individuelle ni le simple désagrément personnel découlant de la participation à des procédures judiciaires ne sont susceptibles de justifier l'exclusion du public des tribunaux (*Procureur général de la Nouvelle-Écosse c. MacIntyre*, [1982] 1 R.C.S. 175, p. 185; *Nouveau-Brunswick*, par. 41). Déterminer le rôle de la vie privée dans le cadre de l'analyse prévue dans l'arrêt *Sierra Club* exige de concilier ces deux idées, et c'est là le nœud du désaccord entre les parties. Le droit à vie privée n'est pas absolu et le principe de la publicité des débats judiciaires n'est pas sans exception.

[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.

[32] Pour les motifs qui suivent, je ne suis pas d'accord avec les fiduciaires pour dire que l'intérêt en matière de vie privée apparemment illimité qu'ils invoquent constitue un intérêt public important au sens de *Sierra Club*. Leur revendication large n'est pas axée sur les éléments de la vie privée qui méritent une protection publique dans le contexte de la publicité des débats judiciaires. Cela ne veut pas dire, cependant, que la protection de la vie privée ne peut jamais justifier une mesure exceptionnelle comme les ordonnances de mise sous scellés sollicitées en l'espèce. Bien que le simple embarras causé par la diffusion de renseignements personnels dans le cadre d'une procédure judiciaire publique ne suffise pas à justifier une limite à la publicité des débats judiciaires, il existe des circonstances où un aspect de la vie privée d'une personne revêt une dimension d'intérêt public manifeste.

[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

[33] La diffusion de renseignements personnels dans le cadre de débats judiciaires publics peut être plus qu'une source de désagrément et peut aussi entraîner une atteinte à la dignité d'une personne.

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.

Dans la mesure où elle sert à protéger les personnes contre une telle atteinte, la vie privée constitue un intérêt public important qui est pertinent selon *Sierra Club*. La dignité en ce sens est une préoccupation connexe à la vie privée en général, mais elle est plus restreinte que celle-ci; elle transcende les intérêts individuels et, comme d'autres intérêts publics importants, c'est une question qui concerne la société en général. Un tribunal peut faire une exception au principe de la publicité des débats judiciaires, malgré la forte présomption en faveur de son application, si l'intérêt à protéger les aspects fondamentaux de la vie personnelle des individus qui se rapportent à leur dignité est sérieusement menacé par la diffusion de renseignements suffisamment sensibles. La question est de savoir non pas si les renseignements sont « personnels » pour la personne concernée, mais si, en raison de leur caractère très sensible, leur diffusion entraînerait une atteinte à sa dignité que la société dans son ensemble a intérêt à protéger.

[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.

[34] Cet intérêt du public à l'égard de la vie privée axe à juste titre l'analyse sur l'incidence de la diffusion de renseignements personnels sensibles, plutôt que sur le simple fait de cette diffusion, intérêt qui est fréquemment menacé dans les procédures judiciaires et qui est nécessaire dans un système qui privilégie la publicité des débats judiciaires. Il s'agit d'un seuil élevé — plus élevé et plus précis que le vaste intérêt en matière de vie privée invoqué en l'espèce par les fiduciaires. Cet intérêt public ne sera sérieusement menacé que lorsque les renseignements en question portent atteinte à ce que l'on considère parfois comme l'identité fondamentale de la personne concernée : des renseignements si sensibles que leur diffusion pourrait porter atteinte à la dignité de la personne d'une manière que le public ne tolérerait pas, pas même au nom du principe de la publicité des débats judiciaires.

[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

[35] Je m'empresse de dire que la personne qui demande une ordonnance visant à faire exception au principe de la publicité des débats judiciaires ne peut se contenter d'affirmer sans fondement que cet intérêt du public à l'égard de la dignité est compromis, pas plus qu'elle ne le pourrait si c'était son intégrité physique qui était menacée. Selon *Sierra Club*, le demandeur doit démontrer, au vu des faits de l'affaire,

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

qu'il y a un « risque sérieux » pour cette dimension de sa vie privée liée à sa dignité. Pour l'application du test des limites discrétionnaires à la publicité des débats judiciaire, le demandeur doit donc démontrer que les renseignements contenus dans le dossier judiciaire sont suffisamment sensibles pour que l'on puisse dire qu'ils touchent au cœur même des renseignements biographiques de la personne et, dans un contexte plus large, qu'il existe un risque sérieux d'atteinte à la dignité de la personne concernée si une ordonnance exceptionnelle n'est pas rendue.

[36] En l'espèce, les renseignements contenus dans les dossiers judiciaires ne revêtent pas ce caractère si sensible qu'on pourrait dire qu'ils touchent à l'identité fondamentale des personnes concernées; les fiduciaires n'ont pas démontré en quoi la levée des ordonnances de mise sous scellés met en jeu la dignité des personnes touchées. Je ne suis donc pas convaincu que l'atteinte à leur vie privée soulève un risque sérieux pour un intérêt public important, comme l'exige *Sierra Club*. De plus, comme je tenterai de l'expliquer, il n'y avait pas de risque sérieux que les personnes visées subissent un préjudice physique en raison de la levée des ordonnances de mise sous scellés. Par conséquent, la présente affaire n'est pas un cas où il convient de rendre des ordonnances de mise sous scellés ni aucune ordonnance limitant l'accès aux dossiers judiciaires en cause. Dans les circonstances, la question de l'admissibilité des nouveaux éléments de preuve du Toronto Star est théorique. Je suis d'avis de rejeter le pourvoi.

A. *Le test des limites discrétionnaires à la publicité des débats judiciaires*

[37] Les procédures judiciaires sont présumées accessibles au public (*MacIntyre*, p. 189; *A.B. c. Bragg Communications Inc.*, 2012 CSC 46, [2012] 2 R.C.S. 567, par. 11).

[38] Le test des limites discrétionnaires à la publicité présumée des débats judiciaires a été décrit comme une analyse en deux étapes, soit l'étape de la nécessité et celle de la proportionnalité de l'ordonnance proposée (*Sierra Club*, par. 53). Après un examen, cependant, je constate que ce test repose sur trois conditions préalables fondamentales dont une

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*,

personne cherchant à faire établir une telle limite doit démontrer le respect. La reformulation du test autour de ces trois conditions préalables, sans en modifier l'essence, aide à clarifier le fardeau auquel doit satisfaire la personne qui sollicite une exception au principe de la publicité des débats judiciaires. Pour obtenir gain de cause, la personne qui demande au tribunal d'exercer son pouvoir discrétionnaire de façon à limiter la présomption de publicité doit établir que :

(1) la publicité des débats judiciaires pose un risque sérieux pour un intérêt public important;

(2) l'ordonnance sollicitée est nécessaire pour écarter ce risque sérieux pour l'intérêt mis en évidence, car d'autres mesures raisonnables ne permettront pas d'écarter ce risque; et

(3) du point de vue de la proportionnalité, les avantages de l'ordonnance l'emportent sur ses effets négatifs.

Ce n'est que lorsque ces trois conditions préalables sont remplies qu'une ordonnance discrétionnaire ayant pour effet de limiter la publicité des débats judiciaires — par exemple une ordonnance de mise sous scellés, une interdiction de publication, une ordonnance excluant le public d'une audience ou une ordonnance de caviardage — pourra dûment être rendue. Ce test s'applique à toutes les limites discrétionnaires à la publicité des débats judiciaires, sous réserve uniquement d'une loi valide (*Toronto Star Newspapers Ltd. c. Ontario*, 2005 CSC 41, [2005] 2 R.C.S. 188, par. 7 et 22).

[39] Le pouvoir discrétionnaire est ainsi structuré et contrôlé de manière à protéger le principe de la publicité des débats judiciaires, qui est considéré comme étant constitutionnalisé sous le régime du droit à la liberté d'expression garanti par l'al. 2b) de la *Charte* (*Nouveau-Brunswick*, par. 23). Reposant sur la liberté d'expression, le principe de la publicité des débats judiciaires est l'un des fondements de la liberté de la presse étant donné que l'accès aux tribunaux est un élément essentiel de la collecte d'information. Notre Cour a souvent souligné l'importance de la publicité pour maintenir l'indépendance et l'impartialité des tribunaux, la confiance du

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

public à l'égard de leur travail et sa compréhension de celui-ci, et, au bout du compte, la légitimité du processus (voir, p. ex., *Vancouver Sun*, par. 23-26). Dans l'arrêt *Nouveau-Brunswick*, le juge La Forest a expliqué que la présomption en faveur de la publicité des débats judiciaires était devenue « [TRADUCTION] "l'une des caractéristiques d'une société démocratique" » (citant *Re Southam Inc. and The Queen (No.1)* (1983), 41 O.R. (2d) 113 (C.A.), p. 119), qui « fait en sorte que la justice est administrée de manière non arbitraire, conformément à la primauté du droit [. . .], situation qui favorise la confiance du public dans la probité du système judiciaire et la compréhension de l'administration de la justice » (par. 22). Le caractère fondamental de ce principe pour le système judiciaire sous-tend la forte présomption — quoique réfutable — en faveur de la tenue de procédures judiciaires publiques (par. 40; *Mentuck*, par. 39).

[40] Le test fait en sorte que les ordonnances discrétionnaires ne soient pas assujetties à une norme moins exigeante que la norme à laquelle seraient assujetties des dispositions législatives qui limiteraient la publicité des débats judiciaires (*Mentuck*, par. 27; *Sierra Club*, par. 45). À cette fin, la Cour a élaboré un cadre d'analyse par analogie avec le test de l'arrêt *Oakes*, que les tribunaux utilisent pour déterminer si une limite imposée par un texte de loi à un droit garanti par la *Charte* est raisonnable et si sa justification peut se démontrer dans le cadre d'une société libre et démocratique (*Sierra Club*, par. 40, citant *R. c. Oakes*, [1986] 1 R.C.S. 103; voir également *Dagenais*, p. 878; *Vancouver Sun*, par. 30).

[41] La portée reconnue des intérêts qui pourraient justifier une exception discrétionnaire à la publicité des débats judiciaires s'est élargie au fil du temps. Dans l'arrêt *Dagenais*, le juge en chef Lamer a parlé de la nécessité d'un risque « que le procès soit inéquitable » (p. 878). Dans *Mentuck*, le juge Iacobucci a étendu cette condition à un risque « pour la bonne administration de la justice » (par. 32). Enfin, dans *Sierra Club*, le juge Iacobucci, s'exprimant encore une fois au nom de la Cour à l'unanimité, a reformulé le test de manière à englober tout risque sérieux pour un « intérêt important, y compris un intérêt commercial, dans le contexte d'un litige » (par. 53). Il a en

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

même temps précisé que l'intérêt important doit être exprimé en tant qu'intérêt public. Par exemple, à la lumière des faits de cette affaire, le préjudice causé à un intérêt commercial particulier n'aurait pas été suffisant, mais « l'intérêt commercial général dans la protection des renseignements confidentiels » constituait un intérêt important en raison de son caractère public (par. 55). Cette conclusion est compatible avec le fait que ce test a été élaboré à l'égard de la jurisprudence relative à l'arrêt *Oakes*, laquelle met l'accent sur l'objectif « urgen[t] et rée[l] » d'un texte de loi d'application générale (*Oakes*, p. 138-139; voir également *Mentuck*, par. 31). L'expression « intérêt important » vise donc un large éventail d'objectifs d'intérêt public.

[42] Bien qu'il n'y ait aucune liste exhaustive des intérêts publics importants pour l'application de ce test, je partage l'opinion du juge Iacobucci, exprimée dans *Sierra Club*, selon laquelle les tribunaux doivent faire preuve de « prudence » et « avoir pleinement conscience de l'importance fondamentale de la règle de la publicité des débats judiciaires », même à la toute première étape lorsqu'ils constatent les intérêts publics importants (par. 56). Déterminer ce qu'est un intérêt public important peut se faire dans l'abstrait sur le plan des principes généraux qui vont au-delà des parties à un litige donné (par. 55). En revanche, la conclusion sur la question de savoir si un « risque sérieux » menace cet intérêt est une conclusion factuelle qui, pour le juge qui examine le caractère approprié d'une ordonnance, est nécessairement prise eu égard au contexte. En ce sens, le fait de constater, d'une part, un intérêt important et celui de constater, d'autre part, le caractère sérieux du risque auquel cet intérêt est exposé sont, en théorie du moins, des opérations séparées et qualitativement distinctes. Une ordonnance peut donc être refusée du simple fait qu'un intérêt public important valide n'est pas sérieusement menacé au vu des faits de l'affaire ou, à l'inverse, parce que les intérêts constatés, qu'ils soient ou non sérieusement menacés, ne présentent pas le caractère public important requis sur le plan des principes généraux.

[43] Le test énoncé dans *Sierra Club* continue d'être un guide approprié en ce qui a trait à l'exercice du pouvoir discrétionnaire des tribunaux dans des

"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

affaires comme en l'espèce. L'étendue de la catégorie d'« intérêt important » transcende les intérêts des parties au litige et offre une grande souplesse pour remédier à l'atteinte aux valeurs fondamentales de notre société qu'une publicité absolue des procédures judiciaires pourrait causer (voir, p. ex., P. M. Perell et J. W. Morden, *The Law of Civil Procedure in Ontario* (4e éd. 2020), par. 3.185; J. Bailey et 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 *R.D. Ottawa* 143, p. 154-155). Parallèlement, cependant, l'obligation de démontrer l'existence d'un risque sérieux pour un intérêt important établit un seuil valable nécessaire au maintien de la présomption de publicité des débats. S'ils devaient tout simplement mettre en balance les avantages et les effets négatifs de l'imposition d'une limite à la publicité des débats judiciaires, les décideurs appelés à examiner les incidences concrètes pour les personnes qui comparaissent devant eux pourraient avoir du mal à accorder un poids suffisant aux effets négatifs moins immédiats sur le principe de la publicité des débats. Une telle pondération pourrait échapper à un contrôle efficace en appel. À mon avis, le cadre d'analyse fourni par les arrêts *Dagenais*, *Mentuck* et *Sierra Club* demeure approprié et devrait être confirmé.

[44] Enfin, je rappelle que le principe de la publicité des débats judiciaires s'applique dans toutes les procédures judiciaires, quelle que soit leur nature (*MacIntyre*, p. 185-186; *Vancouver Sun*, par. 31). Je suis en désaccord avec les fiduciaires dans la mesure où ils affirment, dans leurs arguments sur les effets négatifs des ordonnances de mise sous scellés, que l'homologation successorale en Ontario ne fait pas intervenir le principe de la publicité des procédures judiciaires ou que la publicité de ces procédures n'a pas de valeur pour le public. Les certificats que les fiduciaires ont demandés au tribunal sont délivrés sous le sceau de ce tribunal, portant ainsi l'imprimatur du pouvoir judiciaire. La décision du tribunal, même si elle est rendue dans un contexte non contentieux, aura une incidence sur des tiers, par exemple en déterminant l'écrit testamentaire qui constitue un testament valide (voir *Otis c. Otis* (2004), 7 E.T.R. (3d) 221 (C.S. Ont.), par. 23-24). Contrairement

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

à ce que les fiduciaires soutiennent, les questions soulevées dans un dossier d'homologation ne sont pas typiquement de nature privée ou fondamentalement de nature administrative. L'obtention d'un certificat de nomination à titre de fiduciaire d'une succession en Ontario est une procédure judiciaire, et la raison d'être fondamentale de la publicité des débats — décourager les actes malveillants et garantir la confiance dans l'administration de la justice par la transparence — s'applique aux procédures d'homologation et donc au transfert de biens sous l'autorité d'un tribunal ainsi qu'à d'autres questions touchées par ce recours judiciaire.

[45] Il est vrai que d'autres mécanismes de planification successorale non assujettis à une procédure d'homologation peuvent permettre que le transfert du patrimoine soit effectué en dehors des voies ordinaires de la succession testamentaire ou *ab intestat* — c'est le cas, par exemple, de certaines assurances et prestations de retraite, et de certains biens détenus en copropriété. Cependant, cela ne change rien au caractère nécessairement public des procédures d'homologation. Le fait que les transferts non assujettis à une procédure d'homologation soustraient aux regards du public certains renseignements se rapportant à l'administration d'une succession ne signifie pas que les fiduciaires en l'espèce, en demandant au tribunal de leur délivrer des certificats, ne font pas d'une façon ou d'une autre intervenir ce principe. Les fiduciaires sollicitent les avantages qui découlent de la procédure judiciaire publique d'homologation : la transparence garantit que le tribunal successoral exerce son pouvoir de manière équitable et efficace (*Vancouver Sun*, par. 25; *Nouveau-Brunswick*, par. 22). La forte présomption en faveur de la publicité des débats judiciaires s'applique manifestement aux procédures d'homologation et les fiduciaires doivent satisfaire au test des limites discrétionnaires à cette publicité.

B. *L'importance pour le public de la protection de la vie privée*

[46] Comme il a été mentionné précédemment, je ne suis pas d'accord avec les fiduciaires pour dire qu'un intérêt illimité en matière de vie privée constitue un intérêt public important au sens du test des

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.

limites discrétionnaires à la publicité des débats judiciaires. Pourtant, dans certaines de ses manifestations, la vie privée revêt une importance sociale allant au-delà de la personne la plus immédiatement touchée. Sur ce fondement, elle ne peut être exclue en tant qu'intérêt qui pourrait justifier, dans les circonstances appropriées, une limite à la publicité des débats judiciaires. En fait, la Cour a dans divers contextes reconnu l'importance pour le public de la vie privée, ce qui permet de mieux comprendre pourquoi l'aspect plus restreint de la vie privée lié à la protection de la dignité constitue un intérêt public important.

[47] Soit dit en tout respect, je ne puis souscrire à la manière dont la Cour d'appel a statué sur l'allégation des fiduciaires selon laquelle il existe un risque sérieux pour l'intérêt à la protection de la vie privée personnelle dans la présente affaire. Pour les juges d'appel, les préoccupations en matière de vie privée soulevées par les fiduciaires équivalent à des [TRADUCTION] « [p]réoccupations personnelles » qui ne peuvent, « à elles seules », satisfaire à l'exigence énoncée dans *Sierra Club* voulant qu'un intérêt important soit exprimé en tant qu'intérêt public (par. 10). Au paragraphe 10 de ses motifs dans l'affaire qui nous occupe, la Cour d'appel s'est appuyée sur l'arrêt *H. (M.E.) c. Williams*, 2012 ONCA 35, 108 O.R. (3d) 321, où il a été conclu que [TRADUCTION] « [d]es intérêts purement personnels ne peuvent justifier des ordonnances de non-publication ou de mise sous scellés » (par. 25). Citant les arrêts *MacIntyre* et *Sierra Club* de notre Cour comme des décisions faisant autorité à cet égard, la cour a poursuivi en soulignant que « les préoccupations personnelles d'une partie, y compris les préoccupations relatives à la détresse émotionnelle et à l'embarras bien réels que peuvent subir les parties quand la justice est rendue en public, ne satisferont pas à elle seules au volet nécessité du test » (par. 25). En toute déférence, j'estime que la Cour d'appel a eu tort de mettre l'accent sur les préoccupations personnelles pour décider que les ordonnances de mise sous scellés ne satisfaisaient pas à l'exigence de la nécessité dans la présente affaire et dans *Williams*. Les préoccupations personnelles qui s'attachent à des aspects de la vie privée de la personne qui comparaît devant les tribunaux peuvent coïncider avec un intérêt public à la confidentialité.

[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.

[48] À l'instar de la Cour d'appel, je souscris à l'opinion exprimée en particulier dans *MacIntyre*, une affaire antérieure à la *Charte*, selon laquelle lorsque la publicité des débats judiciaires entraîne une atteinte à la vie privée qui perturbe « la susceptibilité des personnes en cause » (p. 185), cette préoccupation est généralement insuffisante pour justifier une ordonnance de mise sous scellés ou une ordonnance semblable et ne constitue pas un intérêt public important suivant l'arrêt *Sierra Club*. Cependant, je ne suis pas d'accord avec la Cour d'appel dans la présente affaire et dans *Williams* pour dire que c'est parce que l'atteinte n'occasionne que des [TRADUCTION] « préoccupations personnelles ». Certaines préoccupations personnelles — même « à elles seules » — peuvent coïncider avec des intérêts publics importants au sens de *Sierra Club*. Pour reprendre l'expression du juge Binnie dans *F.N. (Re)*, 2000 CSC 35, [2000] 1 R.C.S. 880, par. 10, il y a un « droit du public à la confidentialité » qui touche, d'abord et avant tout, la personne concernée et qui est très certainement une préoccupation personnelle. Même dans *Williams*, la Cour d'appel a pris soin de souligner que lorsque, sans protection de la vie privée, une personne serait exposée à [TRADUCTION] « un risque important de préjudice émotionnel [. . .] débilitant », une exception à la publicité des débats devrait être permise (par. 29-30). Pour savoir si un intérêt en matière de vie privée reflète un « droit du public à la confidentialité », il ne s'agit donc pas de se demander si l'intérêt est le reflet ou tire sa source de « préoccupations personnelles » relatives à la vie privée des personnes concernées. Il y a chevauchement entre certaines préoccupations personnelles relatives à la vie privée et les intérêts du public en matière de confidentialité. Ces intérêts relatifs à la vie privée peuvent, à mon avis, être des intérêts publics importants au sens de *Sierra Club*. Il est vrai que la vie privée d'une personne est d'une importance primordiale pour celle-ci. Cependant, notre Cour reconnaît depuis longtemps que la protection de la vie privée est, dans divers contextes, dans l'intérêt de la société dans son ensemble.

[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

[49] La proposition selon laquelle la vie privée est importante, non seulement pour la personne touchée, mais également pour notre société, est profondément enracinée dans la jurisprudence de la Cour en dehors

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).

du contexte du test des limites discrétionnaires à la publicité des débats judiciaires. Cela aide à expliquer pourquoi la vie privée ne saurait être rejetée en tant que simple préoccupation personnelle. Cependant, les différences clés dans ces contextes sont telles que l'importance pour le public de la vie privée ne saurait être transposée sans adaptation dans le contexte de la publicité des débats judiciaires. Seuls certains aspects particuliers des intérêts en matière de vie privée peuvent constituer des intérêts publics importants suivant l'arrêt *Sierra Club*.

[50] Dans le contexte de l'art. 8 de la *Charte* et des mesures législatives sur la protection de la vie privée dans le secteur public, le juge La Forest a cité un universitaire américain spécialiste de la vie privée, Alan F. Westin, à l'appui de la thèse selon laquelle la vie privée est une valeur fondamentale de l'État moderne; il l'a fait d'abord dans *R. c. Dyment*, [1988] 2 R.C.S. 417, p. 427-428 (motifs concordants), puis dans *Dagg*, par. 65 (dissident, mais non sur ce point). Dans ce dernier arrêt, le juge La Forest a écrit : « La protection de la vie privée est une valeur fondamentale des États démocratiques modernes. Étant l'expression de la personnalité ou de l'identité unique d'une personne, la notion de vie privée repose sur l'autonomie physique et morale — la liberté de chacun de penser, d'agir et de décider pour lui-même » (par. 65 (références omises)). Notre Cour a entériné à l'unanimité cette déclaration dans *Lavigne*, par. 25.

[51] De plus, dans l'arrêt *Alberta (Information and Privacy Commissioner) c. Travailleurs et travailleuses unis de l'alimentation et du commerce, section locale 401*, 2013 CSC 62, [2013] 3 R.C.S. 733 (« *TTUAC* »), qui a été jugé dans le contexte d'une loi régissant l'utilisation de renseignements par des organisations, il a été reconnu que l'objectif de fournir à une personne un certain droit de regard sur les renseignements la concernant était « intimement lié à son autonomie, à sa dignité et à son droit à la vie privée, des valeurs sociales dont l'importance va de soi » (par. 24). L'importance de la vie privée, son « caractère quasi constitutionnel » et son rôle dans la protection de l'autonomie morale continuent de trouver écho dans notre jurisprudence récente (voir, p. ex., *Lavigne*, par. 24; *Bragg*, par. 18, la juge Abella, citant *Toronto Star Newspaper Ltd. c. R.*,

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,

[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.

2012 ONCJ 27, 289 C.C.C. (3d) 549, par. 40-41 et 44; *Douez c. Facebook, Inc.*, 2017 CSC 33, [2017] 1 R.C.S. 751, par. 59). Dans l'arrêt *Douez*, les juges Karakatsanis, Wagner (maintenant juge en chef) et Gascon ont insisté sur le même point, ajoutant que « la croissance d'Internet — un réseau quasi atemporel au rayonnement infini — a exacerbé le préjudice susceptible d'être infligé à une personne par une atteinte à son droit à la vie privée » (par. 59).

[52] La protection de la vie privée en tant qu'intérêt public est mise en évidence par des aspects particuliers de cette protection présents dans les lois fédérales et provinciales (voir, p. ex., *Loi sur la protection des renseignements personnels*, L.R.C. 1985, c. P-21; *Loi sur la protection des renseignements personnels et les documents électroniques*, L.C. 2000, c. 5 (« LPRPDE »); *Loi sur l'accès à l'information et la protection de la vie privée*, L.R.O. 1990, c. F.31; *Charte des droits et libertés de la personne*, RLRQ, c. C-12, art. 5; *Code civil du Québec*, art. 35 à 41)[3]. En outre, en examinant la constitutionnalité d'une exception législative au principe de la publicité des débats judiciaires, notre Cour a reconnu que la protection de la vie privée de la personne pouvait constituer un objectif urgent et réel (*Edmonton Journal*, p. 1345, le juge Cory; voir également les motifs concordants de la juge Wilson, à la p. 1354, dans lesquels a explicitement été souligné « l'intérêt public à la protection de la vie privée de l'ensemble des parties aux affaires matrimoniales par rapport à l'intérêt public à la publicité du processus judiciaire »). L'importance sociale et publique de la vie privée de la personne trouve également un appui continu dans la doctrine (voir, p. ex., 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, p. 41; K. Hughes, « A Behavioural Understanding of Privacy and its Implications for Privacy Law » (2012), 75 *Mod. L. Rev.* 806, p. 823; P. Gewirtz,

[3] Au moment de la rédaction des présents motifs, la Chambre des communes étudiait un projet de loi destiné à remplacer la première partie de la *LPRPDE* : le projet de loi C-11, *Loi édictant la Loi sur la protection de la vie privée des consommateurs et la Loi sur le Tribunal de la protection des renseignements personnels et des données et apportant des modifications corrélatives et connexes à d'autres lois*, 2e sess., 43e lég., 2020.

however, that privacy generally is an important public interest in the context of limits on court openness.

[53] The fact that the case before the application judge concerned individuals who were advancing their own privacy interests, which were undeniably important to them as individuals, does not mean that there is no public interest at stake. In *F.N. (Re)*, this was the personal interest that young offenders had in remaining anonymous in court proceedings as a means of encouraging their personal rehabilitation (para. 11). All of society had a stake, according to Binnie J., in the young person's personal prospect for rehabilitation. This same idea from *F.N. (Re)* was cited in support of finding the interest in *Sierra Club* to be a public interest. That interest, rooted first in an agreement of personal concern to the contracting parties involved, was a private matter that evinced, alongside its personal interest to the parties, a "public interest in confidentiality" (*Sierra Club*, at para. 55). Similarly, while the Trustees have a personal interest in preserving their privacy, this does not mean that the public has no stake in this same interest because — as this Court has made clear — it is related to moral autonomy and dignity which are pressing and substantial concerns.

[54] In this appeal, the Toronto Star suggests that legitimate privacy concerns would be effectively protected by a discretionary order where there is "something more" to elevate them beyond personal concerns and sensibilities (R.F., at para. 73). The Income Security Advocacy Centre, by way of example, submits that privacy serves the public interests of preventing harm and of ensuring individuals are not dissuaded from accessing the courts. I agree that these concepts are related, but in my view care must be taken not to conflate the public importance of

« Privacy and Speech », [2001] *Sup. Ct. Rev.* 139, p. 139). Il est donc inapproprié, en toute déférence, de rejeter l'intérêt du public à la protection de la vie privée au motif qu'il s'agit d'une simple préoccupation personnelle. Cela ne signifie pas, cependant, que la vie privée est, de façon générale, un intérêt public important dans le contexte de l'imposition de limites à la publicité des débats judiciaires.

[53] Le fait que l'affaire dont était saisi le juge de première instance concernait des personnes défendant leurs propres intérêts en matière de vie privée, intérêts qui étaient indéniablement importants pour elles en tant qu'individus, ne signifie pas qu'il n'y a aucun intérêt public en jeu. Dans *F.N. (Re)*, il était question de l'intérêt personnel que les jeunes contrevenants avaient à garder l'anonymat dans les procédures judiciaires afin de favoriser leur réadaptation personnelle (par. 11). Selon le juge Binnie, la société dans son ensemble avait un intérêt dans les perspectives personnelles de réadaptation de l'adolescent visé. Cette même idée exposée dans *F.N. (Re)* a été citée à l'appui de la conclusion selon laquelle l'intérêt en cause dans *Sierra Club* était un intérêt public. Cet intérêt, qui prenait tout d'abord sa source dans une entente touchant personnellement les parties contractantes concernées, était une question de nature privée qui, en plus de son intérêt personnel pour les parties, faisait état d'un « intérêt public à la confidentialité » (*Sierra Club*, par. 55). De même, si les fiduciaires ont un intérêt personnel à protéger leur vie privée, cela ne signifie pas que le public n'a pas un intérêt à cet égard, car — comme l'a clairement souligné la Cour —, cet intérêt est lié à l'autonomie morale et à la dignité, lesquelles constituent des préoccupations urgentes et réelles.

[54] Dans le présent pourvoi, le Toronto Star avance que les préoccupations légitimes en matière de vie privée seraient efficacement protégées par une ordonnance discrétionnaire dans le cas où il y aurait [TRADUCTION] « quelque chose de plus » pour les élever au-delà des préoccupations et de la susceptibilité personnelles (m.i., par. 73). Le Centre d'action pour la sécurité du revenu, par exemple, soutient que la protection de la vie privée sert les intérêts du public qui consistent à prévenir les préjudices et à faire en sorte que les particuliers ne soient pas

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.

dissuadés de recourir aux tribunaux. Je reconnais que ces notions sont liées, mais il faut, à mon avis, prendre soin de ne pas confondre l'importance pour le public de la vie privée avec l'importance pour le public d'autres intérêts; des aspects de la vie privée, comme la dignité, peuvent constituer des intérêts publics importants en soi. Un risque pour la vie privée personnelle peut être lié à un risque de préjudice psychologique, comme c'était le cas dans l'affaire *Bragg* (par. 14; voir également J. Rossiter, *Law of Publication Bans, Private Hearings and Sealing Orders* (feuilles mobiles), section 2.4.1). Cependant, il se peut que les préoccupations relatives à la vie privée ne coïncident pas toujours avec le désir d'éviter un préjudice psychologique et soient plutôt axées, par exemple, sur la protection de la réputation professionnelle d'une personne (voir, p. ex., *R. c. Paterson* (1998), 102 B.C.A.C. 200, par. 76, 78 et 87-88). De même, il peut y avoir des circonstances où la perspective de devoir communiquer les renseignements personnels nécessaires à la poursuite d'une action en justice peut dissuader une personne d'intenter cette action (voir *S. c. Lamontagne*, 2020 QCCA 663, par. 34-35 (CanLII)). De la même manière, la perspective de devoir communiquer des renseignements commerciaux sensibles aurait nui à la conduite de la défense d'une partie dans *Sierra Club* (par. 71), ou pourrait inciter une personne à régler un litige prématurément (K. Eltis, *Courts, Litigants, and the Digital Age* (2e éd. 2016), p. 86). Cependant, cela ne signifie pas nécessairement qu'un intérêt public en matière de vie privée est entièrement subsumé dans de telles préoccupations. Je tiens à souligner, par exemple, que les préoccupations relatives à l'accès à la justice ne s'appliquent pas lorsque l'intérêt à protéger en matière de vie privée est celui d'un tiers au litige, comme un témoin, dont l'accès aux tribunaux n'est pas en cause et à qui il n'est pas loisible de mettre fin au litige et d'éviter toute incidence sur sa vie privée (voir, p. ex., *Himel c. Greenberg*, 2010 ONSC 2325, 93 R.F.L. (6th) 357, par. 58; voir également Rossiter, section 2.4.2(2)). En tout état de cause, la reconnaissance de ces importants intérêts publics connexes et valides ne permet pas de savoir si certains aspects de la vie privée constituent en eux-mêmes des intérêts publics importants et ne diminue en rien le caractère public distinctif de la vie privée, examiné précédemment.

[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.

[55] En fait, les atteintes particulières à la vie privée ayant été occasionnées par la publicité des débats judiciaires ne sont pas passées inaperçues et n'ont pas non plus été écartées au motif qu'il s'agissait de simples préoccupations personnelles. Les tribunaux ont exercé leur pouvoir discrétionnaire de limiter la publicité des débats judiciaires afin de protéger les renseignements personnels de la publicité, y compris pour empêcher que soient divulgués l'orientation sexuelle d'une personne (voir, p. ex., *Paterson*, par. 76, 78 et 87-88), sa séropositivité (voir, p. ex., *A.B. c. Canada (Citoyenneté et Immigration)*, 2017 CF 629, par. 9 (CanLII)), et ses antécédents de toxicomanie et de criminalité (voir, p. ex., *R. c. Pickton*, 2010 BCSC 1198, par. 11 et 20 (CanLII)). Notre Cour a souligné cette nécessité de concilier l'intérêt du public à l'égard de la vie privée et le principe de la publicité des débats judiciaires (voir, p. ex., *Edmonton Journal*, p. 1353, la juge Wilson). Dans un article de doctrine, la juge en chef McLachlin a expliqué que [TRADUCTION] « [s]i nous nous préoccupons sérieusement de la vie intime des gens, nous devons protéger un minimum de vie privée. De même, si nous nous préoccupons sérieusement de notre système judiciaire, les débats judiciaires doivent être publics. La question est de savoir comment concilier ces deux impératifs d'une manière qui soit équitable et raisonnée » (« Courts, Transparency and Public Confidence – To the Better Administration of Justice » (2003), 8 *Deakin L. Rev.* 1, p. 4). En cherchant à concilier ces deux impératifs, il faut alors se demander si la dimension de la vie privée en cause constitue un intérêt public important qui, lorsqu'il est sérieusement menacé, justifierait de réfuter la forte présomption en faveur de la publicité des débats judiciaires.

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

C. *L'intérêt public important en matière de vie privée se rapporte à la protection de la dignité de la personne*

[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

[56] Bien que l'importance pour le public de la protection de la vie privée ait clairement été reconnue par la Cour dans divers contextes, la prudence est de mise lorsqu'il s'agit d'utiliser cette notion dans le cadre du test des limites discrétionnaires à la publicité des débats judiciaires. Il est bien établi en droit que les procédures judiciaires publiques, de par leur

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

nature, peuvent être une source de désagrément et d'embarras, et l'on considère généralement que ces atteintes à la vie privée ne sont pas suffisamment importantes pour réfuter la présomption de publicité des débats. Le Toronto Star a exprimé la crainte que la reconnaissance de la vie privée en tant qu'intérêt public important n'allège le fardeau de preuve incombant aux demandeurs, car la vie privée des parties à un litige sera, à certains égards, toujours menacée dans les procédures judiciaires. Je conviens que l'exigence de démontrer l'existence d'un risque sérieux pour un intérêt important est un élément préliminaire clé de l'analyse qui doit être maintenu afin de protéger le principe de la publicité des débats judiciaires. La reconnaissance d'un intérêt public en matière de vie privée pourrait menacer la forte présomption de publicité si la vie privée est définie trop largement sans tenir compte de son caractère public.

[57] La vie privée pose des défis dans l'application du test des limites discrétionnaires à la publicité des débats judiciaires en raison de la diffusion nécessaire de renseignements que supposent des procédures publiques. Il convient de rappeler que lorsqu'il a écrit, dans l'arrêt *MacIntyre*, que « le secret est l'exception et que la publicité est la règle », le juge Dickson, plus tard juge en chef, examinait explicitement un argument relatif à la vie privée en revenant sur un point de vue préconisé maintes fois auparavant devant les tribunaux selon lequel « le droit des parties au litige de jouir de leur vie privée exige des audiences à huis clos » (p. 185 (je souligne)), et en rejetant celui-ci. Le juge Dickson a rejeté l'opinion selon laquelle les préoccupations personnelles en matière de vie privée exigent des audiences à huis clos, expliquant qu'« [e]n règle générale, la susceptibilité des personnes en cause ne justifie pas qu'on exclut le public des procédures judiciaires » (*ibid.*).

[58] Bien qu'il ait rendu sa décision avant le prononcé de l'arrêt *Dagenais* et qu'il ne commente donc pas les étapes précises de l'analyse telles que nous les comprenons aujourd'hui, j'estime que le juge Dickson a, à juste titre, reconnu que le principe de la publicité des débats judiciaires apporte des limites nécessaires au droit à la vie privée. Quoique les particuliers puissent s'attendre à ce que les renseignements qui les concernent ne soient pas révélés

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

dans le cadre de procédures judiciaires, le principe de la publicité des débats judiciaires s'oppose par présomption à cette attente. Par exemple, dans l'arrêt *Lac d'Amiante du Québec Ltée c. 2858-0702 Québec Inc.*, 2001 CSC 51, [2001] 2 R.C.S. 743, le juge LeBel a conclu que la « partie qui engage un débat judiciaire renonce, à tout le moins en partie, à la protection de sa vie privée » (par. 42). L'arrêt *MacIntyre* et les jugements similaires reconnaissent — en affirmant que la publicité est la règle et le secret, l'exception — que le droit à la vie privée, quelle qu'en soit la définition, cède le pas, dans une certaine mesure, à l'idéal de la publicité des débats judiciaires. Je partage le point de vue selon lequel le principe de la publicité des débats suppose que cette limite au droit à la vie privée est justifiée.

[59] Le Toronto Star a donc raison d'affirmer que la vie privée des personnes sera très souvent en quelque sorte menacée dans les procédures judiciaires. Les litiges entre et concernant des particuliers qui se déroulent dans le cadre de débats judiciaires publics révèlent nécessairement des renseignements qui pourraient autrement être restés à l'abri des regards du public. En fait, tout comme la Cour d'appel en l'espèce, les tribunaux ont explicitement fait mention de cette préoccupation lorsqu'ils ont conclu que de simples inconvénients ne suffisaient pas à franchir le seuil initial du test (voir, p. ex., *3834310 Canada inc. c. Chamberland*, 2004 CanLII 4122 (C.A. Qc), par. 30). Affirmer que toute incidence sur la vie privée d'une personne suffit à établir un risque sérieux pour un intérêt public important pour l'application du test des limites discrétionnaires à la publicité des débats judiciaires pourrait rendre cette exigence préliminaire théorique. Le sort de nombreuses causes dépendrait de la pondération à l'étape de la proportionnalité. Une telle évolution reviendrait à déroger à l'arrêt *Sierra Club*, qui constitue le cadre approprié à appliquer, lequel doit être maintenu.

[60] De plus, la reconnaissance d'un intérêt important à l'égard de la notion générale de vie privée pourrait s'avérer trop indéterminée et difficile à appliquer. La vie privée est une notion complexe et contextuelle (*Dagg*, par. 67; voir également B. McIsaac, K. Klein et S. Brown, *The Law of Privacy in Canada* (feuilles mobiles), vol. 1, p. 1-4; D. J.

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 multifaceted 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

Solove, « Conceptualizing Privacy » (2002), 90 *Cal. L. Rev.* 1087, p. 1090). En fait, notre Cour a décrit la nature des limites à la vie privée comme étant dans un état de « confusion [. . .] sur le plan théorique » (*R. c. Spencer*, 2014 CSC 43, [2014] 2 R.C.S. 212, par. 35). Cela dépend en grande partie du contexte dans lequel la vie privée est invoquée. Je suis d'accord avec le Toronto Star pour dire que la reconnaissance de la vie privée, sans nuances, comme un intérêt important dans le contexte du test des limites discrétionnaires à la publicité des débats judiciaires, ainsi que le revendiquent les fiduciaires en l'espèce, susciterait énormément de confusion. Il serait difficile pour les tribunaux de mesurer un risque sérieux pour un tel intérêt, en raison de ses multiples facettes.

[61] Bien que je reconnaisse la validité de ces préoccupations, je ne suis pas d'accord pour dire qu'elles exigent que la vie privée ne soit jamais prise en considération lorsqu'il s'agit de décider s'il existe un risque sérieux pour un intérêt public important. J'arrive à cette conclusion pour deux raisons. Premièrement, il est possible d'atténuer le problème de la complexité de la vie privée en se concentrant sur l'objectif qui sous-tend la protection publique de la vie privée, lequel est pertinent dans le cadre du processus judiciaire, de manière à s'en tenir précisément à l'aspect qui transcende les intérêts des parties dans ce contexte. Cette dimension plus restreinte de la vie privée est la protection de la dignité, un intérêt public important qui peut être menacé par la publicité des débats judiciaires. D'ailleurs, plutôt que d'essayer d'appliquer une notion unique et complexe de la vie privée à tous les contextes, notre Cour s'est généralement arrêtée sur des intérêts plus précis en matière de vie privée adaptés à la situation particulière en cause (*Spencer*, par. 35; *Edmonton Journal*, p. 1362, la juge Wilson). C'est ce qu'il faut faire en l'espèce, en vue de cerner l'aspect public de la vie privée que la publicité des débats risque de miner indûment.

[62] Deuxièmement, je rappelle que, pour franchir la première étape de l'analyse, il ne suffit pas d'invoquer un intérêt important, mais il faut aussi réfuter la présomption de publicité des débats en démontrant l'existence d'un risque sérieux pour cet intérêt. Le

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.

fardeau d'établir l'existence d'un risque pour un tel intérêt au vu des faits d'une affaire donnée constitue le véritable seuil initial à franchir pour la personne cherchant à restreindre la publicité. Il n'est jamais suffisant d'alléguer la seule existence d'un intérêt public important reconnu. Démontrer l'existence d'un risque sérieux pour cet intérêt demeure toujours nécessaire. Ce qui importe, c'est que l'intérêt soit précisément défini de manière à ce qu'il n'englobe que les aspects de la vie privée qui font entrer en jeu des objectifs publics légitimes, de sorte que le seuil à franchir pour établir l'existence d'un risque sérieux pour cet intérêt demeure élevé. De cette manière, les tribunaux peuvent efficacement maintenir la garantie de la présomption de publicité des débats.

[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).

[63] Plus particulièrement, pour maintenir l'intégrité du principe de la publicité des débats judiciaires, un intérêt public important à l'égard de la protection de la dignité devrait être considéré sérieusement menacé seulement dans des cas limités. Rien en l'espèce n'écarte le principe selon lequel le secret en matière de procédures judiciaires doit être exceptionnel. Ni la susceptibilité des gens ni le fait que la publicité soit désavantageuse, embarrassante ou pénible pour certaines personnes ne justifieront généralement, à eux seuls, une atteinte au principe de la publicité des débats judiciaires (*MacIntyre*, p. 185; *Nouveau-Brunswick*, par. 40; *Williams*, par. 30; *Coltsfoot Publishing Ltd. c. Foster-Jacques*, 2012 NSCA 83, 320 N.S.R. (2d) 166, par. 97). Ces principes n'empêchent pas de reconnaître l'importance du caractère public d'un intérêt en matière de vie privée quand celui-ci est lié à la protection de la dignité. Ils obligent simplement à faire la preuve de l'existence d'un risque sérieux pour cet intérêt de manière à justifier, à titre exceptionnel, une restriction à la publicité des débats, comme c'est le cas pour tout intérêt public important au regard de l'arrêt *Sierra Club*. Comme l'expliquent les professeures Sylvette Guillemard et Séverine Menétrey, « [l]a confidentialité des débats peut se justifier notamment pour protéger la vie privée des parties [. . .] La jurisprudence affirme cependant que l'embarras ou la honte ne sont pas des motifs suffisants pour ordonner le huis clos ou la non-publication » (*Comprendre la procédure civile québécoise* (2e éd. 2017), 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).

[64] Comment devrait-on considérer que l'intérêt en matière de vie privée en cause soulève un intérêt public important qui est pertinent pour les besoins du test des limites discrétionnaires à la publicité des débats judiciaires dans le présent contexte? Il est utile de rappeler que les ordonnances rendues en première instance avaient été demandées pour limiter l'accès aux documents et aux renseignements figurant dans les dossiers judiciaires. L'argument des fiduciaires sur ce point était directement axé sur le risque de diffusion immédiate et à grande échelle, par le Toronto Star, de renseignements permettant d'identifier des personnes ainsi que d'autres renseignements sensibles contenus dans les documents placés sous scellés. Les fiduciaires soutiennent que cette diffusion constituerait une atteinte injustifiée à la vie privée des personnes touchées, qui s'ajouterait à la contrariété qu'elles ont déjà subie en raison de la publicité ayant entouré le décès des Sherman.

[65] À mon avis, il est bon de laisser les personnes libres de fixer des limites quant à savoir à quel moment les renseignements très sensibles les concernant seront communiqués à d'autres personnes dans la sphère publique, et de quelle manière et dans quelle mesure ils le seront. En effet, en choisissant la manière dont on se présente en public, on protège son autonomie morale et sa dignité en tant que personne. La Cour a eu l'occasion de faire ressortir le lien entre l'intérêt en matière de vie privée mis en jeu par la tenue de procédures judiciaires publiques et la protection de la dignité plus particulièrement. Par exemple, dans l'arrêt *Edmonton Journal*, la juge Wilson a souligné que la disposition contestée, qui devait avoir pour effet de limiter la publication de détails sur des procédures matrimoniales, portait sur « un aspect un peu différent de la vie privée, un aspect qui se rapproche davantage de la protection de la dignité personnelle [. . .], c'est-à-dire l'angoisse et la perte de dignité personnelle qui peuvent résulter de la publication dans les journaux de détails gênants de la vie privée d'une personne » (p. 1363-1364). Citons comme autre exemple l'affaire *Bragg*, dans laquelle la protection de la capacité des jeunes à contrôler des renseignements sensibles avait été considérée comme favorisant le respect [TRADUCTION] « de leur dignité, de leur intégrité personnelle et de leur autonomie » (par. 18, citant *Toronto Star Newspaper Ltd.*, par. 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

[66] Conformément à cette jurisprudence, je relève, par exemple, que le législateur québécois a expressément fait ressortir la protection de la dignité lorsque le test énoncé dans l'arrêt *Sierra Club* a été codifié dans le *Code de procédure civile*, RLRQ, c. C-25.01 (« *C.p.c.* »), art. 12 (voir Ministère de la Justice, *Commentaires de la ministre de la Justice : Code de procédure civile, chapitre C-25.01* (2015), art. 12). Selon l'art. 12 *C.p.c.*, un tribunal peut faire exception de façon discrétionnaire au principe de la publicité si « l'ordre public, notamment la protection de la dignité des personnes concernées par une demande, ou la protection d'intérêts légitimes importants » l'exige.

[67] La notion d'ordre public témoigne d'une souplesse analogue à la notion d'intérêt public important suivant l'arrêt *Sierra Club*; elle rappelle pourtant que l'intérêt invoqué transcende, en ce qui a trait à son importance et à ses conséquences, la susceptibilité purement subjective des personnes touchées. Tout comme l'« intérêt public important » qui doit être sérieusement menacé pour justifier des ordonnances de mise sous scellés dans le présent pourvoi, l'ordre public englobe un large éventail de principes généraux et de normes impératives qu'un législateur et les tribunaux considèrent comme fondamentaux pour une société donnée (voir *Goulet c. Cie d'Assurance-Vie Transamerica du Canada*, 2002 CSC 21, [2002] 1 R.C.S. 719, par. 42-44, citant *Godbout c. Longueuil (Ville de)*, [1995] R.J.Q. 2561 (C.A.), p. 2570, conf. par [1997] 3 R.C.S. 844). Comme l'a écrit un juge québécois en renvoyant à l'arrêt *Sierra Club* avant l'adoption de l'art. 12 *C.p.c.*, l'intérêt doit être considéré comme étant défini « en termes d'intérêt public à la confidentialité » (voir *3834310 Canada inc.*, par. 24, le juge Gendreau s'exprimant au nom de la Cour d'appel). Parmi les diverses considérations qui composent la notion d'ordre public et d'autres intérêts légitimes évoqués par l'art. 12 *C.p.c.*, il est significatif que la dignité, et non une référence générale à la vie privée, au préjudice ou à l'accès à la justice, se soit vu accorder une place de choix. En effet, c'est cet aspect restreint de la vie privée considéré comme un droit fondamental que les tribunaux ont retenu avant l'adoption de l'art. 12 *C.p.c.* — « ce qui fait partie de la vie intime de la personne, bref ce qui constitue un

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.

cercle personnel irréductible » (*Godbout*, p. 2569, le juge Baudouin; voir également *A. c. B.*, 1990 CanLII 3132 (C.A. Qc), par. 20, le juge Rothman).

[68] La « protection de la dignité des personnes concernées » est désormais consacrée comme l'archétype de l'intérêt d'ordre public à l'art. 12 *C.p.c.* C'est le modèle de l'intérêt public important à la confidentialité de *Sierra Club* qui sert à justifier une exception à la publicité des débats (S. Rochette et J.-F. Côté, « Article 12 », dans L. Chamberland, dir., *Le grand collectif : Code de procédure civile — Commentaires et annotations* (5e éd. 2020), vol. 1, p. 102; D. Ferland et B. Emery, *Précis de procédure civile du Québec* (6e éd. 2020), vol. 1, par. 1-111). La dignité donne une expression concrète à cet intérêt d'ordre public parce que toute la société a intérêt à ce qu'elle soit protégée, malgré ses liens personnels avec les personnes touchées. Cette codification de la notion d'intérêt public important de *Sierra Club* souligne l'importance primordiale de la dignité humaine et la pertinence de limiter la publicité des débats judiciaires sur ce fondement au lieu de donner une interprétation trop large à la vie privée qui pourrait par ailleurs ne pas convenir au contexte de la publicité des débats.

[69] Dans le même ordre d'idée, on a fait valoir qu'il est utile de considérer que la vie privée se fonde sur la dignité dans le contexte des défis que posent les communications numériques (K. Eltis, « The Judicial System in the Digital Age : Revisiting the Relationship between Privacy and Accessibility in the Cyber Context » (2011), 56 *R.D. McGill* 289, p. 314).

[70] Il est également significatif, à mon avis, que le juge de première instance en l'espèce ait explicitement reconnu, en réponse aux arguments pertinents des fiduciaires, un intérêt à [TRADUCTION] « la protection de la vie privée et de la dignité des victimes d'actes criminels ainsi que de leurs êtres chers » (par. 23 (je souligne)). Cela montre clairement que la préoccupation centrale des personnes touchées à cet égard n'est pas simplement de protéger leur vie privée en tant que telle, mais bien de protéger leur vie privée là où elle coïncide avec le caractère public de leurs intérêts en matière de dignité.

[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

[71] Les atteintes à la vie privée qui entraînent une perte de contrôle à l'égard de renseignements personnels fondamentaux peuvent porter préjudice à la dignité d'une personne, car elles minent sa capacité à présenter de manière sélective certains aspects de sa personne aux autres (D. Matheson, « Dignity and Selective Self-Presentation », dans I. Kerr, V. Steeves et C. Lucock, dir., *Lessons from the Identity Trail : Anonymity, Privacy and Identity in a Networked Society* (2009), 319, p. 327-328; L. M. Austin, « Re-reading Westin » (2019), 20 *Theor. Inq. L.* 53, p. 66-68; Eltis (2016), p. 13). La dignité, employée dans ce contexte, est un concept social qui consiste à présenter des aspects fondamentaux de soi-même aux autres de manière réfléchie et contrôlée (voir de manière générale Matheson, p. 327-328; Austin, p. 66-68). La dignité est minée lorsque les personnes perdent le contrôle sur la possibilité de fournir des renseignements sur elles-mêmes qui touchent leur identité fondamentale, car un aspect très sensible de qui elles sont qu'elles n'ont pas décidé consciemment de communiquer est désormais accessible à autrui et risque de façonner la manière dont elles sont perçues en public. Cela a même été évoqué par le juge La Forest, dissident mais non sur ce point, dans l'arrêt *Dagg*, lorsqu'il a parlé de la notion de vie privée comme « [é]tant l'expression de la personnalité ou de l'identité unique d'une personne » (par. 65).

[72] En cas d'atteinte à la dignité, l'incidence sur la personne n'est pas théorique, mais pourrait entraîner des conséquences humaines réelles, y compris une détresse psychologique (voir de manière générale *Bragg*, par. 23). Dans l'arrêt *Dyment*, le juge La Forest a fait remarquer dans ses motifs concordants que la notion de vie privée est essentielle au bien-être d'une personne (p. 427). Vu sous cet angle, un intérêt en matière de vie privée, lorsqu'il protège les renseignements fondamentaux associés à la dignité qui est nécessaire au bien-être d'une personne, commence à ressembler beaucoup à l'intérêt relatif à la sécurité physique également soulevé en l'espèce, dont la nature importante et publique n'est pas débattue, et n'est pas non plus, selon moi, sérieusement discutable. Lorsque le fonctionnement des tribunaux menace le bien-être physique d'une

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

personne, l'administration de la justice en souffre, car un système judiciaire responsable est sensible aux dommages physiques qu'il inflige aux individus et s'efforce d'éviter de tels effets. De même, j'estime qu'un tribunal responsable doit être sensible et attentif aux dommages qu'il cause à d'autres éléments fondamentaux du bien-être individuel, notamment la dignité individuelle. Ce parallèle aide à comprendre que la dignité est une dimension plus limitée de la vie privée, pertinente en tant qu'intérêt public important dans le contexte de la publicité des débats judiciaires.

[73] Je suis donc d'avis que protéger les gens contre la menace à leur dignité qu'entraîne la diffusion de renseignements révélant des aspects fondamentaux de leur vie privée dans le cadre de procédures judiciaires publiques constitue un intérêt public important pour l'application du test.

[74] Insister sur la valeur sous-jacente de la vie privée lorsqu'il s'agit de protéger la dignité d'une personne de la diffusion de renseignements privés dans le cadre de débats judiciaires publics permet de surmonter les critiques selon lesquelles la vie privée sera toujours menacée dans un tel cadre et constitue une notion théoriquement complexe. La publicité des débats donne lieu à des atteintes à la vie privée personnelle dans presque tous les cas, mais la dignité en tant qu'intérêt public dans la protection de la sensibilité fondamentale d'une personne entre plus rarement en jeu. Plus précisément, et conformément à l'approche prudente servant à reconnaître des intérêts publics importants, cet intérêt en matière de vie privée, bien qu'il soit déterminé par rapport au contexte factuel plus large, ne sera sérieusement menacé que lorsque le caractère sensible des renseignements touche à l'aspect le plus intime de la personne.

[75] S'il porte essentiellement sur la protection de la dignité d'une personne, cet intérêt sera miné dans le cas de renseignements qui révèlent quelque chose de sensible sur elle en tant qu'individu, par opposition à des renseignements d'ordre général révélant peu ou rien sur ce qu'elle est en tant que personne. Par conséquent, les renseignements qui

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

seront révélés en raison de la publicité des débats judiciaires doivent être constitués de détails intimes ou personnels concernant une personne — ce que notre Cour a décrit, dans sa jurisprudence relative à l'art. 8 de la *Charte*, comme le cœur même des « renseignements biographiques » — pour qu'un risque sérieux pour un intérêt public important soit reconnu dans ce contexte (*R. c. Plant*, [1993] 3 R.C.S. 281, p. 293; *R. c. Tessling*, 2004 CSC 67, [2004] 3 R.C.S. 432, par. 60; *R. c. Cole*, 2012 CSC 53, [2012] 3 R.C.S. 34, par. 46). La dignité transcende les inconvénients personnels en raison de la nature très sensible des renseignements qui pourraient être révélés. Notre Cour a tracé dans l'arrêt *Cole* une ligne de démarcation similaire entre le caractère sensible des renseignements personnels et l'intérêt du public à protéger ces renseignements en ce qui a trait au cœur même des renseignements biographiques. Elle a conclu que « les Canadiens raisonnables et bien informés » seraient plus disposés à reconnaître l'existence d'un intérêt en matière de vie privée lorsque les renseignements pertinents concernent le cœur même des « renseignements biographiques » ou, « [a]utrement dit, plus les renseignements sont personnels et confidentiels » (par. 46). La présomption de publicité des débats signifie que le simple désagrément associé à des atteintes moindres à la vie privée sera généralement toléré. Cependant, il est dans l'intérêt public de veiller à ce que cette publicité n'entraîne pas indûment la diffusion de ces renseignements fondamentaux qui menacent la dignité — même s'ils sont « personnels » pour la personne touchée.

[76] Selon le test des limites discrétionnaires à la publicité des débats judiciaires, il incombe au demandeur de démontrer que l'intérêt public important est sérieusement menacé. Reconnaître que la vie privée, considérée au regard de la dignité, n'est sérieusement menacée que lorsque les renseignements contenus dans le dossier judiciaire sont suffisamment sensibles permet d'établir un seuil compatible avec la présomption de publicité des débats. Ce seuil est tributaire des faits. Il répond à la préoccupation, mentionnée précédemment, portant que les dossiers judiciaires comportent fréquemment des renseignements personnels, mais conclure que cela suffit à franchir le

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

seuil du risque sérieux dans tous les cas mettrait en péril la structure du test. Exiger du demandeur qu'il démontre le caractère sensible des renseignements comme condition nécessaire à la conclusion d'un risque sérieux pour cet intérêt a pour effet de limiter le champ d'application de l'intérêt aux seuls cas où la justification de la non-divulgation des aspects fondamentaux de la vie privée d'une personne, à savoir la protection de la dignité individuelle, est fortement en jeu.

[77] Il n'est aucunement nécessaire en l'espèce de fournir une liste exhaustive de l'étendue des renseignements personnels sensibles qui, s'ils étaient diffusés, pourraient entraîner un risque sérieux. Qu'il suffise de dire que les tribunaux ont démontré la volonté de reconnaître le caractère sensible des renseignements liés à des problèmes de santé stigmatisés (voir, p. ex., *A.B.*, par. 9), à un travail stigmatisé (voir, p. ex., *Work Safe Twerk Safe c. Her Majesty the Queen in Right of Ontario*, 2021 ONSC 1100, par. 28 (CanLII)), à l'orientation sexuelle (voir, p. ex., *Paterson*, par. 76, 78 et 87-88), et au fait d'avoir été victime d'agression sexuelle ou de harcèlement (voir, p. ex., *Fedeli c. Brown*, 2020 ONSC 994, par. 9 (CanLII)). Je prends acte également de l'observation du Centre d'action pour la sécurité du revenu, intervenant, selon laquelle des renseignements détaillés quant à la structure familiale et aux antécédents professionnels pourraient, dans certaines circonstances, constituer des renseignements sensibles. Dans chaque cas, il faut se demander si les renseignements révèlent quelque chose d'intime et de personnel sur la personne, son mode de vie ou ses expériences.

[78] Je marque ici un temps d'arrêt pour souligner que je renvoie ci-dessus aux décisions relatives à l'art. 8 de la *Charte* à seule fin de donner une idée des types de renseignements qui sont plus ou moins personnels et qui méritent donc une protection publique. Pour mesurer avec précision l'incidence de la divulgation sur la dignité, il est essentiel que l'analyse différencie ainsi les renseignements. Ce qui est utile, c'est que l'un des facteurs permettant de déterminer si l'attente subjective d'un demandeur en

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.

matière de vie privée est objectivement raisonnable dans la jurisprudence relative à l'art. 8 met l'accent sur la mesure dans laquelle les renseignements sont privés (voir, p. ex., *R. c. Marakah*, 2017 CSC 59, [2017] 2 R.C.S. 608, par. 31; *Cole*, par. 44-46). Cependant, bien que la consultation de ces décisions puisse être avantageuse à cette fin précise, cela ne veut pas dire que le reste de l'analyse relative à l'art. 8 est pertinent pour l'application du test des limites discrétionnaires à la publicité des débats. Par exemple, demander aux fiduciaires quelle était leur attente raisonnable en matière de vie privée en l'espèce pourrait entraîner une analyse circulaire visant à déterminer s'ils s'attendaient raisonnablement à ce que leurs dossiers judiciaires soient accessibles au public ou s'ils s'attendaient raisonnablement à réussir à obtenir leur mise sous scellés. En conséquence, la jurisprudence relative à l'art. 8 n'est utile qu'à la fin décrite ci-dessus.

[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.

[79] Dans les cas où les renseignements sont suffisamment sensibles pour toucher au cœur même des renseignements biographiques d'une personne, le tribunal doit alors se demander si le contexte factuel global de l'affaire permet d'établir l'existence d'un risque sérieux pour l'intérêt en cause. Bien qu'il s'agisse manifestement d'une question de fait, il est possible de faire certaines observations générales en l'espèce pour guider cette appréciation.

[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,

[80] Je souligne que la mesure dans laquelle les renseignements seraient diffusés en l'absence d'une exception au principe de la publicité des débats judiciaires peut avoir une incidence sur le caractère sérieux du risque. Si le demandeur invoque le risque que les renseignements personnels en viennent à être connus par un large segment de la population en l'absence d'une ordonnance, il s'agit manifestement d'un risque plus sérieux que si le résultat était qu'une poignée de personnes prendrait connaissance des mêmes renseignements, toutes autres choses étant égales par ailleurs. Par le passé, l'obligation d'être physiquement présent pour obtenir des renseignements dans le cadre de débats judiciaires publics ou à partir d'un dossier judiciaire signifiait que les renseignements étaient, dans une certaine

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).

mesure, protégés parce qu'ils n'étaient [TRADUCTION] « pratiquement pas connus » (D. S. Ardia, « Privacy and Court Records : Online Access and the Loss of Practical Obscurity » (2017), 4 *U. Ill. L. Rev.* 1385, p. 1396). Cependant, aujourd'hui, les tribunaux devraient prendre en considération le contexte des technologies de l'information, qui a facilité la communication de renseignements et le renvoi à ceux-ci (voir Bailey et Burkell, p. 169-170; Ardia, p. 1450-1451). Dans ce contexte, il peut fort bien être difficile pour les tribunaux d'avoir la certitude que les renseignements ne seront pas largement diffusés en l'absence d'une ordonnance.

[81] Il y aura lieu, bien sûr, d'examiner la mesure dans laquelle les renseignements font déjà partie du domaine public. Si la tenue de procédures judiciaires publiques ne fait que rendre accessibles ce qui est déjà largement et facilement accessible, il sera difficile de démontrer que la divulgation des renseignements dans le cadre de débats judiciaires publics entraînera effectivement une atteinte significative à cet aspect de la vie privée se rapportant à l'intérêt en matière de dignité auquel je fais référence en l'espèce. Cependant, le seul fait que des renseignements soient déjà accessibles à un segment de la population ne signifie pas que les rendre accessibles dans le cadre d'une procédure judiciaire n'exacerbera pas le risque pour la vie privée. La vie privée n'est pas une notion binaire, c'est-à-dire que les renseignements ne sont pas simplement soit privés, soit publics, d'autant plus que, en raison de la technologie en particulier, il vaut mieux considérer la confidentialité absolue comme difficile à atteindre (voir, de manière générale, *R. c. Quesnelle*, 2014 CSC 46, [2014] 2 R.C.S. 390, par. 37; TTUAC, par. 27). Le fait que certains renseignements soient déjà accessibles quelque part dans la sphère publique n'empêche pas qu'une diffusion additionnelle de ceux-ci puisse nuire davantage à l'intérêt en matière de vie privée, en particulier si la diffusion appréhendée de renseignements très sensibles est plus large ou d'accès plus facile (voir de manière générale Solove, p. 1152; Ardia, p. 1393-1394; E. Paton-Simpson, « Privacy and the Reasonable Paranoid : The Protection of Privacy in Public Places » (2000), 50 *U.T.L.J.* 305, 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).

[82] De plus, la probabilité que la diffusion évoquée par le demandeur se produise réellement a également une incidence sur le caractère sérieux du risque. Je m'empresse de dire qu'il est implicite dans la notion de risque que le demandeur n'a pas besoin d'établir que la diffusion appréhendée se produira assurément. Cependant, plus la probabilité de diffusion des renseignements est grande, plus le risque pour l'intérêt en matière de vie privée lié à la protection de la dignité sera sérieux. Bien qu'elle l'ait fait dans un contexte différent, la Cour a déjà conclu que l'ampleur du risque est le fruit de la gravité du préjudice appréhendé et de sa probabilité (*R. c. Mabior*, 2012 CSC 47, [2012] 2 R.C.S. 584, par. 86).

[83] Cela dit, la probabilité que les renseignements personnels très sensibles d'une personne soient diffusés en l'absence de mesures de protection de la vie privée sera difficile à quantifier avec précision. Il convient également de souligner que la probabilité dans ce contexte n'a pas à être quantifiée en termes mathématiques ou numériques. Les tribunaux peuvent plutôt simplement déterminer cette probabilité à la lumière de l'ensemble des circonstances et mettre en balance ce facteur avec d'autres facteurs pertinents.

[84] Enfin, rappelons que la susceptibilité individuelle à elle seule, même si elle peut théoriquement être associée à la notion de « vie privée », est généralement insuffisante pour justifier de restreindre la publicité des débats judiciaires lorsqu'elle ne surpasse pas les inconvénients et les désagréments inhérents à la publicité des débats (*MacIntyre*, p. 185). Un demandeur ne pourra établir que le risque est suffisant pour justifier une limite à la publicité des débats que dans des cas exceptionnels, lorsque la perte de contrôle appréhendée des renseignements le concernant est fondamentale au point de porter atteinte de manière significative à sa dignité individuelle. Ces circonstances mettent en jeu « des valeurs sociales qui ont préséance », qui vont au-delà des atteintes plus ordinaires propres à la participation à une procédure judiciaire et qui, comme l'a reconnu le juge Dickson, pourraient justifier de restreindre la publicité des débats (p. 186-187).

[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

[85] En résumé, l'intérêt public important en matière de vie privée, tel qu'il est considéré dans le contexte des limites à la publicité des débats, vise à permettre aux personnes de garder un contrôle sur leur identité fondamentale dans la sphère publique dans la mesure nécessaire pour protéger leur dignité. Le public a certainement un intérêt dans la publicité des débats, mais il a aussi un intérêt dans la protection de la dignité : l'administration de la justice exige que, lorsque la dignité est menacée de cette façon, des mesures puissent être prises pour tenir compte de cette préoccupation en matière de vie privée. Bien qu'il soit évalué en fonction des faits de chaque cas, le risque pour cet intérêt ne sera sérieux que lorsque les renseignements qui seraient diffusés en raison de la publicité des débats judiciaires sont suffisamment sensibles pour que l'on puisse démontrer que la publicité porte atteinte de façon significative au cœur même des renseignements biographiques de la personne d'une manière qui menace son intégrité. La reconnaissance de cet intérêt est conforme à l'accent mis par la Cour sur l'importance de la vie privée et de la valeur sous-jacente de la dignité individuelle, tout en permettant aussi de maintenir la forte présomption de publicité des débats.

D. *Les fiduciaires n'ont pas établi l'existence d'un risque sérieux pour un intérêt public important*

[86] Comme il a été clairement indiqué dans *Sierra Club*, une ordonnance discrétionnaire ayant pour effet de limiter la publicité des débats judiciaires ne peut être rendue qu'en présence d'un risque sérieux pour un intérêt public important. Les arguments soulevés dans le présent pourvoi portaient sur la question de savoir si la vie privée constitue un intérêt public important et si les faits en l'espèce révèlent l'existence de risques sérieux pour la vie privée et la sécurité. Bien que le large intérêt en matière de vie privée que font valoir les fiduciaires ne puisse être invoqué pour justifier une limite à la publicité des débats, la notion plus restreinte de vie privée considérée au regard de la dignité constitue un intérêt public important pour l'application du test. Je reconnais aussi qu'un risque pour la sécurité physique représente un intérêt public important, un point qui n'est pas

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

contesté en l'espèce. Par conséquent, la question pertinente à la première étape est celle de savoir s'il existe un risque sérieux pour l'un de ces intérêts ou pour ces deux intérêts. Pour les motifs qui suivent, les fiduciaires n'ont pas établi l'existence d'un risque sérieux pour l'un ou l'autre de ces intérêts. Cela suffit en soi pour conclure que les ordonnances de mise sous scellés n'auraient pas dû être rendues.

(1) Le risque pour la vie privée allégué en l'espèce n'est pas sérieux

[87] Comme je l'ai déjà dit, l'intérêt public important en matière de vie privée doit être considéré comme un intérêt propre à la protection de la dignité individuelle et non comme l'intérêt largement défini que les fiduciaires ont demandé à la Cour de reconnaître. Pour établir l'existence d'un risque sérieux à l'égard de cet intérêt, les renseignements contenus dans les dossiers judiciaires qui préoccupent les fiduciaires doivent être suffisamment sensibles du fait qu'ils touchent au cœur même des renseignements biographiques des personnes touchées. Si ce n'est pas le cas, il n'y a pas de risque sérieux qui justifierait une exception à la publicité des débats. Si, par contre, c'est le cas, il faut alors se demander si les faits de l'espèce permettent d'établir l'existence d'un risque sérieux.

[88] Le juge de première instance n'a jamais explicitement constaté de risque sérieux pour l'intérêt en matière de vie privée qu'il a relevé, mais, dans la mesure où il est implicitement arrivé à cette conclusion, je ne puis, en toute déférence, partager son point de vue. Sa conclusion se limitait à l'observation selon laquelle [TRADUCTION] « [l]e degré d'atteinte à cette vie privée et à cette dignité [c.-à-d. celle des victimes et de leurs êtres chers] est déjà extrême et, j'en suis sûr, insoutenable » (par. 23). Cependant, l'attention intense dont les Sherman ont fait l'objet jusqu'à la présentation de leur demande n'est qu'une partie de l'équation. Comme les ordonnances de mise sous scellés ne peuvent qu'offrir une protection contre la divulgation des renseignements contenus dans les dossiers judiciaires se rapportant à l'homologation, le juge de première instance était tenu d'examiner le

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.

caractère sensible des renseignements précis qu'ils contenaient. Or, il n'a pas procédé à une telle appréciation. Sa conclusion sur le caractère sérieux du risque s'est alors entièrement concentrée sur le risque de préjudice physique, alors que rien n'indiquait qu'il avait conclu que les fiduciaires s'étaient acquittés de leur fardeau quant à la démonstration d'un risque sérieux pour l'intérêt en matière de vie privée. En toute déférence, et en sachant qu'il ne disposait pas du cadre d'analyse précédemment exposé, j'estime qu'en n'examinant pas le caractère sensible des renseignements, le juge de première instance a omis de se pencher sur un élément nécessaire du test juridique. Cela justifiait une intervention en appel.

[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.

[89] En appliquant le cadre approprié aux faits de la présente affaire, je conclus que le risque pour l'intérêt public important à l'égard de la vie privée des personnes touchées, que j'ai défini précédemment au regard de la dignité, n'est pas sérieux. Les renseignements que les fiduciaires cherchent à protéger ne sont pas très sensibles, ce qui suffit en soi pour conclure qu'il n'y a pas de risque sérieux pour l'intérêt public important en matière de vie privée ainsi défini.

[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.

[90] Il y a peu de controverse en l'espèce sur la probabilité de diffusion des renseignements contenus dans les dossiers de succession et sur l'étendue de cette diffusion. Il est presque certain que le Toronto Star publiera au moins certains aspects des dossiers de succession si on lui en donne l'accès. Compte tenu de l'important auditoire de l'entreprise médiatique en cause et de la nature très médiatisée des événements entourant la mort des Sherman, je n'ai aucune difficulté à conclure que les personnes touchées perdraient, dans une large mesure, le contrôle des renseignements en question si les dossiers étaient rendus accessibles.

[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

[91] Cependant, en ce qui concerne le caractère sensible des renseignements, ceux contenus dans ces dossiers ne révèlent rien de particulièrement privé sur les personnes touchées. Ce qui serait révélé pourrait bien causer des inconvénients et peut-être de l'embarras, mais il n'a pas été démontré que la divulgation toucherait au cœur même des renseignements

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

biographiques de ces personnes d'une manière qui minerait leur contrôle sur l'expression de leur identité. Leur vie privée serait certes perturbée, mais il n'a pas été démontré que l'intérêt pertinent en matière de vie privée se rapportant à la dignité des personnes touchées serait sérieusement menacé. Tout au plus, les renseignements contenus dans ces dossiers pourraient-ils révéler quelque chose sur la relation entre les défunts et les personnes touchées, en ce qu'ils pourraient dévoiler à qui les défunts ont confié l'administration de leur succession respective, et qui ils voulaient voir ou étaient présumés vouloir voir devenir héritiers de leurs biens à leur décès. Ils pourraient également révéler certaines données personnelles de base, par exemple des adresses. On peut à juste titre présumer qu'il se peut fort bien que certains des bénéficiaires portent un nom de famille autre que Sherman. Je suis conscient que les décès font l'objet d'une enquête pour homicides par le service de police de Toronto. Cependant, même dans ce contexte, aucun de ces renseignements ne donne des indications importantes sur qui ils sont en tant que personnes, et aucun d'eux n'entraînerait non plus un changement fondamental dans leur capacité à contrôler la façon dont ils sont perçus par les autres. Le fait pour des personnes d'être liées par des documents de succession aux victimes d'un meurtre non résolu n'est pas en soi un renseignement très sensible. Il peut être la source de désagréments, mais il n'a pas été démontré qu'il constitue une atteinte à la dignité, en ce qu'il ne touche pas au cœur même des renseignements biographiques de ces personnes. En conséquence, les fiduciaires n'ont pas établi l'existence d'un risque sérieux pour un intérêt public important comme l'exige l'arrêt *Sierra Club*.

[92] Le fait que certaines des personnes touchées puissent être mineures ne suffit pas non plus à franchir le seuil du caractère sérieux. Bien que le droit reconnaisse que les mineurs sont particulièrement vulnérables aux atteintes à la vie privée (voir *Bragg*, par. 17), le simple fait que des renseignements concernent des mineurs n'écarte pas l'analyse généralement applicable (voir, p. ex., *Bragg*, par. 11). Même en tenant compte de la vulnérabilité accrue des mineurs pouvant être des personnes touchées

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.

dans les dossiers d'homologation, rien dans la preuve n'indique qu'ils perdraient le contrôle des renseignements les concernant qui révèlent quelque chose se rapprochant du cœur de leur identité. Le simple fait d'associer les bénéficiaires ou les fiduciaires à la mort inexpliquée des Sherman ne suffit pas à constituer un risque sérieux pour l'intérêt public important en matière de dignité ayant été constaté, intérêt défini au regard de la dignité.

[93] De plus, bien qu'elle indique que les renseignements seraient probablement largement diffusés, l'intense attention médiatique dont a fait l'objet la famille à la suite des décès n'est pas en soi révélatrice du caractère sensible des renseignements contenus dans les dossiers d'homologation.

[94] Démontrer que les renseignements qui seraient révélés en raison de la publicité des débats judiciaires sont suffisamment sensibles et privés pour toucher au cœur même des renseignements biographiques des personnes touchées est une condition préalable nécessaire pour établir l'existence d'un risque sérieux pour l'aspect pertinent de la vie privée relatif à l'intérêt public. Les fiduciaires n'ont pas fait valoir de raison précise pour laquelle le contenu de ces dossiers serait plus sensible qu'il n'y paraît à première vue. Lorsque l'on affirme qu'il existe un risque pour la vie privée, il est essentiel de démontrer non seulement que les renseignements qui concernent des personnes échapperont au contrôle de celles-ci — ce qui sera vrai dans tous les cas —, mais aussi que ces renseignements concernent ce qu'elles sont en tant que personnes, d'une manière qui mine leur dignité. Or, les fiduciaires n'ont pas fait cette preuve.

[95] Par conséquent, même si certains des éléments contenus dans les dossiers judiciaires peuvent fort bien être largement diffusés, il n'a pas été démontré que la nature des renseignements en cause entraîne un risque sérieux pour l'intérêt public important en matière de vie privée, qui a été défini adéquatement dans le présent contexte au regard de la dignité. Pour cette seule raison, je conclus que les fiduciaires n'ont pas établi l'existence d'un risque sérieux pour cet intérêt.

(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

(2) Le risque pour la sécurité physique allégué en l'espèce n'est pas sérieux

[96] Contrairement à ce qu'il en est pour l'intérêt en matière de vie privée soulevé en l'espèce, nul n'a contesté l'existence d'un intérêt public important dans la protection des personnes contre un préjudice physique. Il convient de souligner que le juge de première instance a correctement traité la protection contre un préjudice physique comme un intérêt important distinct de l'intérêt à l'égard de la protection de la vie privée, et a conclu que ce risque était [TRADUCTION] « prévisible » et « grave » (par. 22-24). La question consiste à savoir si les fiduciaires ont établi que cet intérêt est sérieusement menacé pour l'application du test des limites discrétionnaires à la publicité des débats judiciaires. Le juge de première instance a fait remarquer qu'il aurait été préférable d'inclure des éléments de preuve objectifs du caractère sérieux du risque fournis par le service de police menant l'enquête pour homicides. Il a néanmoins conclu que la preuve de risque pour la sécurité physique des personnes touchées était suffisante pour que le test soit respecté. Selon la Cour d'appel, il s'agit d'une mauvaise interprétation de la preuve, et, de son côté, le Toronto Star convient que la conclusion du juge de première instance quant à l'existence d'un risque sérieux pour la sécurité constitue une simple conjecture.

[97] D'entrée de jeu, je souligne qu'une preuve directe n'est pas nécessairement exigée pour démontrer qu'un intérêt important est sérieusement menacé. Notre Cour a statué qu'il est possible d'établir l'existence d'un préjudice objectivement discernable sur la base d'inférences logiques (*Bragg*, par. 15-16). Or, ce raisonnement inférentiel ne permet pas de se livrer à des conjectures inadmissibles. Une inférence doit tout de même être fondée sur des faits circonstanciels objectifs qui permettent raisonnablement de tirer la conclusion par inférence. Lorsque celle-ci ne peut raisonnablement être tirée à partir des circonstances, elle équivaut à une conjecture (*R. c. Chanmany*, 2016 ONCA 576, 352 O.A.C. 121, par. 45).

[98] Comme le soutiennent à juste titre les fiduciaires, ce n'est pas seulement la probabilité du

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

préjudice appréhendé qui est pertinente lorsqu'il s'agit d'évaluer si un risque est sérieux, mais également la gravité du préjudice lui-même. Lorsque le préjudice appréhendé est particulièrement sérieux, il n'est pas nécessaire de démontrer que la probabilité que ce préjudice se matérialise est vraisemblable, mais elle doit tout de même être plus que négligeable, fantaisiste ou conjecturale. La question consiste finalement à savoir si le présent dossier permettait au juge de première instance de discerner de manière objective l'existence d'un risque sérieux de préjudice physique.

[99] Il n'était pas loisible au juge de première instance de tirer cette conclusion au vu du dossier. Nul ne conteste que le préjudice physique appréhendé est grave. Je conviens cependant avec le Toronto Star que la probabilité que ce préjudice se produise était conjecturale. La conclusion du juge de première instance quant au caractère sérieux du risque de préjudice physique était fondée sur ce qu'il a appelé [TRADUCTION] « le degré de mystère qui persiste en ce qui concerne à la fois le coupable et le mobile » en lien avec la mort des Sherman et sur sa supposition que ce mobile pourrait être « transposé » aux fiduciaires et aux bénéficiaires (par. 5; voir aussi par. 19 et 23). L'étape suivante du raisonnement, selon laquelle le fait de lever les scellés sur les dossiers de succession amènerait les coupables à commettre leur prochain crime contre une personne mentionnée dans les dossiers, repose sur des conjectures, et non sur les éléments de preuve par affidavit présentés, et ne peut être considérée comme une inférence appropriée ou un quelconque préjudice ou risque de préjudice objectivement discerné. Si tel était le cas, le dossier de succession de chaque victime d'un meurtre non résolu franchirait le seuil initial du test applicable pour déterminer si une ordonnance de mise sous scellés peut être rendue.

[100] En outre, je rappelle que la question à trancher en l'espèce n'est pas de savoir si les personnes touchées sont exposées à un risque pour leur sécurité en général, mais plutôt si la publicité des présents dossiers judiciaires les expose à un tel risque. À la lumière du contenu des dossiers en l'espèce, les

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*,

fiduciaires devaient avancer une autre raison pour laquelle le risque que posait le fait que ces renseignements deviennent accessibles au public était plus que négligeable.

[101] Le caractère conjectural du raisonnement menant à la conclusion selon laquelle il existe un risque sérieux de préjudice physique en l'espèce ressort des différences entre les faits en cause et ceux des affaires invoquées par les fiduciaires. Dans *X. c. Y.*, 2011 BCSC 943, 21 B.C.L.R. (5th) 410, le tribunal a inféré le risque de préjudice physique au motif que le demandeur était un policier qui avait enquêté sur des [TRADUCTION] « affaires portant sur la violence des gangs et des armes à feu dangereuses » et qui avait rédigé des rapports de détermination de la peine pour ces contrevenants, rapports dans lesquels il était identifié par son nom au complet (par. 6). Dans *R. c. Esseghaier*, 2017 ONCA 970, 356 C.C.C. (3d) 455, le juge Watt a considéré qu'il était [TRADUCTION] « évident » que la divulgation d'éléments permettant d'identifier un agent d'infiltration travaillant dans le domaine du contre-terrorisme compromettrait la sécurité de l'agent (par. 41). Dans les deux cas, le danger découlait de faits établissant que les demandeurs entretenaient des relations antagonistes avec de prétendues organisations criminelles ou terroristes. Cependant, dans l'affaire qui nous occupe, les fiduciaires ont demandé au juge de première instance d'inférer non seulement le fait qu'un préjudice serait causé aux personnes touchées, mais également qu'il existe une ou des personnes qui souhaitent leur faire du mal. Il n'est pas raisonnablement possible au vu du dossier en l'espèce d'inférer tout cela en se fondant sur le décès des Sherman et sur les liens unissant les personnes touchées aux défunts. Il ne s'agit pas d'une inférence raisonnable, mais, comme l'a souligné la Cour d'appel, d'une conclusion reposant sur des conjectures.

[102] Si le simple fait d'invoquer un préjudice physique grave suffisait à démontrer un risque sérieux pour un intérêt important, il n'y aurait pas de seuil valable dans l'analyse. Le test exige plutôt que le risque sérieux invoqué soit bien appuyé par le dossier ou les circonstances de l'espèce (*Sierra*

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

Club, par. 54; *Bragg*, par. 15), ce qui contribue au maintien de la forte présomption de publicité des débats judiciaires.

[103] Encore une fois, dans d'autres affaires, des faits circonstanciels pourraient permettre à un tribunal d'inférer l'existence d'un risque sérieux de préjudice physique. Les demandeurs n'ont pas nécessairement à retenir les services d'experts qui attesteront l'existence du risque physique ou psychologique lié à la divulgation. Cependant, sur la foi du présent dossier, le simple fait d'affirmer qu'un tel risque existe ne permet pas de franchir le seuil requis pour établir l'existence d'un risque sérieux de préjudice physique. La conclusion contraire tirée par le juge de première instance était une erreur justifiant l'intervention de la Cour d'appel.

E. *Il y aurait des obstacles additionnels à l'octroi d'une ordonnance de mise sous scellés fondée sur le risque d'atteinte à la vie privée allégué*

[104] Bien que cela ne soit pas nécessaire pour trancher le pourvoi, il convient de mentionner que les fiduciaires auraient eu à faire face à des obstacles additionnels en cherchant à obtenir les ordonnances de mise sous scellés sur la base de l'intérêt en matière de vie privée qu'ils ont fait valoir. Je rappelle que, pour satisfaire au test des limites discrétionnaires à la publicité des débats judiciaires, une personne doit démontrer, outre un risque sérieux pour un intérêt important, que l'ordonnance particulière demandée est nécessaire pour écarter le risque et que, du point de vue de la proportionnalité, les avantages de l'ordonnance l'emportent sur ses effets négatifs (*Sierra Club*, par. 53).

[105] Même si les fiduciaires avaient réussi à démontrer l'existence d'un risque sérieux pour l'intérêt en matière de vie privée qu'ils invoquent, une interdiction de publication — moins contraignante à l'égard de la publicité des débats que les ordonnances de mise sous scellés — aurait probablement été suffisante en tant qu'autre option raisonnable pour écarter ce risque. La condition selon laquelle l'ordonnance doit être nécessaire oblige le tribunal à examiner s'il existe des mesures autres que l'ordonnance demandée et à restreindre l'ordonnance autant

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

qu'il est raisonnablement possible de le faire pour écarter le risque sérieux (*Sierra Club*, par. 57). Une ordonnance imposant une interdiction de publication pourrait restreindre la diffusion de renseignements personnels aux seules personnes qui consultent le dossier judiciaire pour elles-mêmes et interdire à celles-ci de diffuser davantage les renseignements. Comme je l'ai mentionné, la probabilité et l'étendue de la diffusion peuvent être des facteurs pertinents lorsqu'il s'agit de déterminer le caractère sérieux d'un risque pour la vie privée dans ce contexte. Alors que le Toronto Star serait en mesure de consulter les dossiers faisant l'objet d'une interdiction de publication, par exemple, ce qui pourrait l'aider dans ses enquêtes, il ne pourrait publier, et ainsi diffuser largement, le contenu des dossiers. Une interdiction de publication semble offrir une protection contre ce dernier préjudice, qui a été au centre de l'argumentation des fiduciaires, tout en permettant un certain accès au dossier, ce qui n'est pas possible aux termes des ordonnances de mise sous scellés. En conséquence, même si un risque sérieux pour l'intérêt en matière de vie privée avait été établi, ce risque n'aurait probablement pas justifié une ordonnance de mise sous scellés, car une ordonnance moins sévère aurait probablement suffi à atténuer ce risque de manière efficace. Je m'empresse cependant d'ajouter qu'une interdiction de publication ne peut être prononcée en l'espèce, puisque, comme il a été souligné, le caractère sérieux du risque pour l'intérêt en matière de vie privée en jeu n'a pas été établi.

[106] De plus, les fiduciaires auraient eu à démontrer que les avantages de toute ordonnance nécessaire à la protection contre un risque sérieux pour l'intérêt public important l'emportaient sur ses effets préjudiciables, y compris l'incidence négative sur le principe de la publicité des débats judiciaires (*Sierra Club*, par. 53). Pour mettre en balance les intérêts en matière de vie privée et le principe de la publicité des débats judiciaires, il importe de se demander si les renseignements que l'ordonnance vise à protéger sont accessoires ou essentiels au processus judiciaire (par. 78 et 86; *Bragg*, par. 28-29). Il y aura sans doute des affaires où les renseignements présentant un risque sérieux pour la vie privée, du fait qu'ils toucheront à la dignité individuelle, seront essentiels au litige. Cependant, l'intérêt à ce

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.

que des renseignements importants et juridiquement pertinents soient diffusés dans le cadre de débats judiciaires publics pourrait bien prévaloir sur toute préoccupation à l'égard des intérêts en matière de vie privée relativement à ces mêmes renseignements. Cette pondération contextuelle, éclairée par l'importance du principe de la publicité des débats judiciaires, constitue un dernier obstacle sur la route de ceux qui cherchent à faire limiter de façon discrétionnaire la publicité des débats judiciaires aux fins de la protection de la vie privée.

VI. Conclusion

[107] La conclusion selon laquelle les fiduciaires n'ont pas établi l'existence d'un risque sérieux pour un intérêt public important met fin à l'analyse. En de telles circonstances, les fiduciaires n'ont droit à aucune ordonnance discrétionnaire limitant le principe de la publicité des débats judiciaires, y compris les ordonnances de mise sous scellés qu'ils ont initialement obtenues. La Cour d'appel a conclu à juste titre qu'il n'y avait aucune raison de demander un caviardage parce que les fiduciaires n'avaient pas franchi cette étape du test des limites discrétionnaires à la publicité des débats judiciaires. Cette conclusion est déterminante quant à l'issue du pourvoi. La décision d'annuler les ordonnances de mise sous scellés rendues par le juge de première instance devrait être confirmée. Étant donné que je suis d'avis de rejeter le pourvoi eu égard au dossier existant, je rejetterais la requête en production de nouveaux éléments de preuve présentée par le Toronto Star au motif que celle-ci est théorique.

[108] Pour les motifs qui précèdent, je rejetterais le pourvoi. Le Toronto Star ne sollicite aucuns dépens, compte tenu des importantes questions d'intérêt public en litige. Dans les circonstances, aucuns dépens ne seront adjugés.

Pourvoi rejeté.

Procureurs des appelants : Davies Ward Phillips & Vineberg, Toronto.

Procureurs des intimés : Blake, Cassels & Graydon, Toronto.

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

Procureur de l'intervenant le procureur général de l'Ontario : Procureur général de l'Ontario, Toronto.

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

Procureur de l'intervenant le procureur général de la Colombie-Britannique : Procureur général de la Colombie-Britannique, Vancouver.

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

Procureurs de l'intervenante l'Association canadienne des libertés civiles : DMG Advocates, Toronto.

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

Procureurs de l'intervenant le Centre d'action pour la sécurité du revenu : 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.

Procureurs des intervenants Ad IDEM/Canadian Media Lawyers Association, Postmedia Network Inc., CTV, une division de Bell Média 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.

Procureurs de l'intervenante 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.

Procureurs des intervenants HIV & AIDS Legal Clinic Ontario, le Réseau juridique VIH and Mental Health Legal Committee : HIV & AIDS Legal Clinic Ontario, Toronto.

Court of Queen's Bench of Alberta

Citation: Dow Chemical Canada ULC v Nova Chemicals Corporation, 2015 ABQB 81

Date: 20150205
Docket: 0601 07921
Registry: Calgary

Between:

Dow Chemical Canada ULC and Dow Europe GmbH

Plaintiffs/Defendants by Counterclaim

- and -

Nova Chemicals Corporation

Defendant/Plaintiff by Counterclaim

Reasons for Decision
of the
Honourable Madam Justice B.E. Romaine

I. Introduction

[1] The plaintiffs/defendants by counterclaim Dow Chemical Canada ULC and Dow Europe GmbH and the defendant/plaintiff by counterclaim Nova Chemicals Corporation both apply for orders restricting access to certain documents and records to be entered as evidence at trial and the court proceedings involving those documents and records. They disagree, however, over the nature and extent of such sealing and protective orders. These competing applications raise the issue of whether the documents and proceedings proposed to be preserved as confidential from all but opposing counsel, expert witnesses and certain designated employees of the opposing

party meet the tests of necessity and proportionality set out in ***Sierra Club of Canada v Canada (Minister of Finance)***, [2002] 2 S.C.R. 522. Specifically, the issue is whether the interests sought to be protected constitute "important commercial interests" sufficient to meet the necessity branch of the test, and whether the interests of litigants in a fair trial process are sufficiently addressed by the proposed orders.

II. Nature of litigation

[2] Dow and Nova are the two principal manufacturers of petrochemical products in Alberta. They are joint owners of the E-3 plant located in Joffre, Alberta where ethane is processed to manufacture ethylene and related petro-chemical products, including various liquid co-products. Nova is the sole owner of two additional ethylene production facilities in Joffre ("E1" and "E2"). Since 2001, Dow Canada owns or has owned ethylene facilities in Fort Saskatchewan and Prentiss, Alberta, in Sarnia, Ontario and in Quebec. Dow and Nova are each other's largest competitors for the purchase of ethane and the supply of ethylene in Canada.

[3] Dow Canada and Dow Europe are part of a group of corporations directly or indirectly owned or controlled by the Dow Chemical Company. The Dow group owns a number of ethylene facilities all over the world.

[4] Dow Canada owns a gas polyethylene plant at Prentiss, Alberta which processes the Plaintiffs' ethylene from E3 into polyethylene. In addition to the ethylene produced at E3, Dow Canada has access to other sources of ethylene.

[5] Pursuant to a number of agreements between Nova and Dow Canada, Nova is the operator of E3. Dow Canada and Dow Europe allege that Nova has unlawfully taken for its own use and advantage a portion of their ethylene and other products produced at E3, and that Nova failed to optimize production at E3, resulting in a further loss of ethylene and other products. In relation to the allegation that Nova unlawfully took a portion of their ethylene, Dow Canada and Dow Europe claim damages "equal to the market value of the ethylene and other products ... as well as the profit Dow would have made by upgrading the ethylene into other derivative products."

[6] Nova defends against Dow's claims on the basis that there was a shortage of ethane in the province and, as a result, Dow's purchases of ethane in the area caused or contributed to the ethane shortage experienced by Nova. Nova alleges that it has been unable to acquire sufficient ethane to operate E1, E2 and E3 at their nameplate capacities, and that this requires an allocation of ethane amongst E1, E2 and E3 and thus resulting ethylene amongst Nova and Dow.

III. Positions of the Parties

[7] Pre-trial proceedings in this litigation were conducted under a series of confidentiality orders that were carefully negotiated and consented to by both parties. According to these orders, the parties agreed that certain documents to be disclosed pre-trial were confidential, not in the public domain and involved trade secrets, proprietary or confidential information, strategic interests, research, development or commercial know-how. "Confidential Records" as defined in the primary pre-trial order meant records that contained information that the producing party in good faith believed was so commercially sensitive or proprietary that its disclosure to a non-producing party could cause significant harm to the producing party.

[8] These Confidential Records included:

a) information relating to the acquisition of feedstock for, and the production and sale of ethylene, co-products, and polyethylene;

b) trade secrets, proprietary production and manufacturing methods, pricing information or customer data used in connection with the business of the producing party; and

c) business and marketing plans.

[9] The orders provided that these Confidential Records be disclosed only to:

a) the Court;

b) in-house counsel for the opposing party and their respective corporate parents;

c) outside counsel for the same parties;

d) up to two employees or former employees of the opposing party, provided that such employees not have a role in future business activities that would provide them with an opportunity to use or rely on the confidential information; and

e) experts or consultants retained by the parties who executed confidentiality undertakings.

[10] The orders provided a mechanism for disagreement on designation of documents as confidential.

[11] The parties have agreed that Confidential Records designated as such under the pre-trial orders that are not intended to be presented as evidence at trial will continue to be deemed confidential under the existing orders.

[12] With respect to previously designated Confidential Records that are to be entered as evidence at trial, Dow proposes that the following categories of trial records should be designated as confidential and should be governed by the same constraints with respect to disclosure as set out in the pre-trial orders;

a) ethane purchase agreements as listed in a schedule to the order and communications relating to such agreements;

b) ethylene sales agreements as listed in a schedule to the order and communications relating to such agreements;

c) sales arrangements for polyethylene and co-products as listed in a schedule to the order and communications relating to such agreements;

d) records containing pricing, volume or cost information for ethane, ethylene, polyethylene and co-products;

e) a “basket” category of documents that may become relevant during trial and that meet the tests for confidentiality;

f) any record created by counsel, experts or the parties using the contents of or information in confidential trial records;

g) portions of testimony or transcripts that would reveal the content of a confidential trial record; and

h) portions of briefs, memorandum or documents filed during or after the trial that contain confidential trial records or reveal the contents of confidential trial records.

[13] Dow also submits that the trial confidentiality order should contain a protocol for identifying when a document or record may be sought to be entered by counsel either in examination in chief or cross-examination. This protocol would require the party intending to rely on such document to give opposing counsel at least an hour's advance notice, so as to allow opposing counsel to raise any confidentiality issues. It also requires counsel to alert the Court and opposing counsel to the intended use of a document that falls within the categories of confidential trial records to allow the Court to take measures to ensure that the document is not disclosed other than to those permitted to see it.

[14] Nova proposes a narrower order. It submits that the Joffre Site Manufacturing Infrastructure Historian and any record derived therefrom should be a confidential trial record, and Dow agrees. Nova also proposes that certain agreements listed in a schedule to a draft order that appear to be primarily ethane supply and sale agreements and ethylene sales agreements should be confidential. It says that these agreements are different from the categories of ethane purchase agreements and ethylene sales agreements sought to be protected by Dow as they are agreements with third parties that include confidentiality clauses.

[15] The Nova draft order also contains a "basket" provision for records sought to be adduced at trial, and includes, as Dow's draft order does, confidentiality provisions relating to testimony and transcripts and briefs or memoranda, although Nova suggests the redaction of portions of such briefs and memorandum, rather than the protection of such document as a whole. Dow agrees to redaction rather than wholesale protection. Nova's draft order does not include an advance notice protocol.

[16] The list of Nova agreements sought to be designated as confidential include a pipeline agreement and the "Comonomer Purchase and Sales Agreement", both of which Dow agrees should be confidential.

[17] In summary, Nova does not agree that ethane purchase and ethylene sales agreements that do not involve a third-party and contain a confidentiality clause should be designated as confidential. It also submits that a confidentiality order should only cover agreements currently in force and not ones that it characterizes as "stale," in the sense that they are historical and no longer in force. Nova does not agree that sales arrangements for polyethylene or co-products should be confidential, nor records containing information with respect to prices, volumes or costs of ethane, ethylene, polyethylene or co-products.

[18] It must be noted that the orders sought by both Dow and Nova involve two aspects:

a) the denial of public access to documents designated as confidential trial documents and records by way of "sealing orders"; and

b) restrictions on access to certain documents or portions thereof to the opposing party other than designated persons such as counsel, experts and nominated employees, which can be characterized as "protective orders".

[19] The proposed orders do not propose to deny access to the trial by the public, other than when testimony with respect to confidential trial records is being heard.

IV. The Sierra Club Test

[20] The Supreme Court's decision in ***Sierra Club*** is the governing authority on when a confidentiality order should be granted in civil and commercial cases.

[21] The Sierra Club was the applicant in a judicial review of the federal government's decision to provide financial assistance to the construction and sale to China of two CANDU nuclear reactors by Atomic Energy of Canada Ltd. It opposed any restriction on publication of certain environmental reports attached to documents sought to be entered in evidence in the proceeding. The documents were the property of the Chinese authorities, who agreed to disclose them only on the condition that they be protected by a confidentiality order. The sealing order sought by Atomic Energy of Canada Ltd. related only to access to the public, not to the parties.

[22] Iacobucci, J. for the Court confirmed that a discussion of the general approach to be taken in the exercise of judicial discretion to grant a confidentiality order should begin with the principles set out in ***Dagenais v Canadian Broadcasting Corp.,*** [1994] 3 S.C.R. 35. He noted that there were "strong similarities" between publication bans in a criminal case and confidentiality orders: para 37. In each case, the fundamental question is whether, in the circumstances, the right to freedom of expression should be compromised.

[23] The Court in ***Sierra Club*** noted that the ***Dagenais*** principles should be tailored to the specific rights and interests engaged in each case: para 38. After reviewing ***Dagenais*** and subsequent cases, Justice Iacobucci concluded at para 53 that a confidentiality order should only be granted in a case such as the one before him when:

a) an order is necessary "in order to prevent a serious risk to an important interest, including a commercial interest," because reasonable alternative measures would not prevent the risk (the "necessity" test); and

b) the salutary effects of the order, "including the effects on the right of civil litigants to a fair trial", would outweigh the deleterious effects of the order, "including the effects on the right to free expression, which ... includes the public interest in open and accessible court proceedings" (the "proportionality" test).

[24] In paras 53 – 57 of the decision, Justice Iacobucci noted that three important elements were subsumed under the necessity branch of the test:

a) the risk at issue must be real and substantial, well-grounded in the evidence and posing a serious threat to the commercial interest in question;

b) in order to be an important commercial interest, the interest in question "cannot merely be specific to the party requesting the order: the interest must be one which can be expressed in terms of a public interest in confidentiality;" and

c) a court must consider not only whether reasonable alternatives to a confidentiality order are available, but should restrict the order as much as is reasonably possible while preserving the commercial interest in question.

[25] The Court's attempt to clarify the phrase "important commercial interest" is of particular importance in this case. In explaining that an interest cannot merely be specific to the party requesting the order, the Court gave as an example that "a private company could not argue simply that the existence of a particular contract should not be made public because to do so would cause the company to lose business, thus harming its commercial interests". However, Justice Iacobucci noted that, as in the case before him, if "exposure of information would cause a breach of a confidentiality agreement, then the interest can be characterized more broadly as the general commercial interest of preserving confidential information" (emphasis added). The Court noted that if there is no general principle at stake, there can be no "important commercial interest": para 55.

[26] This requirement of finding a "general principle" at stake has led to some inconsistency in the application of the ***Sierra Club*** test. It must be considered in the context of the Court's comment that "preserving confidential information" is a "general commercial interest" that would meet the test where exposure of information would cause the breach of a confidentiality agreement. It must also be considered in the context of how the Court in ***Sierra Club*** applied the test to the situation before it.

[27] The Court stated that the commercial interest at stake related to the objective of preserving contractual obligations of confidentiality, citing Atomic Energy's argument that it would suffer irreparable harm to its commercial interests if confidential documents were disclosed. Iacobucci, J. commented that "(i)in my view, the preservation of confidential information constitutes a sufficiently important commercial interest to pass the first branch of the test as long as certain criteria relating to the information are met": para 59.

[28] What are those criteria? The Court referred with approval to the following:

a) the order sought was similar in nature to a protective order granted in the context of patent litigation, in that it required the applicant "to demonstrate that the information in question has been treated at all relevant times as confidential and that on a balance of probabilities its proprietary, commercial and scientific interests could reasonably be harmed by the disclosure of the information" (para 60); and

b) the information must be of a confidential nature in that it has been accumulated with a reasonable expectation of it being kept confidential, consistently treated and regarded as such, that would be of interest to the applicant's competitors (para 60 – 61).

[29] As noted by John B. Laskin and Dan W. Puchniak in an article entitled "Sealing Orders after ***Sierra Club***", (2003) 27 Adv. Q 173, at 125, ***Sierra Club*** has lowered the bar for protecting confidential commercial information from public disclosure by acknowledging a litigant's commercial interest as an important value. However, the case law before and after ***Sierra Club*** has been divided, perhaps due to the necessity to consider the contextual background of the application, and perhaps because of certain ambiguities in the ***Sierra Club*** test.

[30] Some authority suggests that ***Sierra Club*** applies only to sealing orders, and not to protective orders governing disclosure between the parties: ***Laskin and Puchniak*** p 192, citing ***Bristol-Myers Squibb Co. v Apotex Inc.,*** [2003] F.C.J. No 143 at para 2. However, many cases like this one will involve applications that seek both sealing orders and protective orders, and

thus the more onerous test for a sealing order set out in ***Sierra Club*** will have to be met in any case. In my view, the better approach is to apply the test to both types of orders at least at the trial stage.

[31] Counsel for Dow has cited cases such as ***GasTOPS Ltd v Forsyth***, 2011 ONCA 186, where the Court found that disclosure of a business plan containing marketing strategy, revenue information and cost structure posed a serious risk to GasTOPS' commercial interest, despite the dated nature of the documents.

[32] In ***Allerex Laboratory Ltd. v Dey Laboratories L.P.,*** [2002] O.J. No. 3168, the Master was satisfied that a sealing order was appropriate, but not a protective order between the parties, apparently on the basis that the parties were not competitors.

[33] Nova cites ***Fairview Donut Inc. v The TDL Group Corp.***, 2010 ONSC 789. That case relies heavily on pre-***Sierra Club*** authority that imposed a "societal values of superordinate importance" hurdle that was not adopted in ***Sierra Club***. The Court also stressed the fact that the litigation was class action litigation, which attracted public attention and interest and the putative class' direct interest in observing and understanding the proceedings.

[34] The Court in ***Fairview Donut*** was clearly unimpressed by the notion that harm would ensue if competitors of Tim Horton's learned "that you must bake a frozen lump of ingredients for a particular length of time at a particular temperature in order to make a muffin".

[35] The disparity in the cases illustrates that the ***Sierra Club*** test must be applied flexibly and contextually.

[36] What is clear is that a decision with respect to whether a sealing or protective order should be granted is an exercise in judicial discretion. The ***Dagenais*** (and thus ***Sierra Club***) test is not meant to be applied mechanically: ***Toronto Star Newspapers Ltd. v Ontario,*** [2005] S.C.J. No. 41 at paras 4, 8 and 31.

[37] Even if the parties have agreed on the scope of a sealing or protective order, where there is no intervener present to argue the interests of the public to free expression, it is incumbent on the Court to take account of these interests without the benefit of argument: ***R v Mentuck***, [2001] S.C.J. NO. 73 at para 38.

V. Application of the Sierra Club Test in this Case

A. Ethane Purchase and Ethylene Sales Agreements

[38] The parties agree that a sealing order and a protective order are appropriate with respect to certain ethane purchase agreements and certain ethylene sales agreements. The difference is that Nova would restrict these orders to agreements with third parties that include a confidentiality provision and that are not "stale" in the sense of still being in force and effect.

[39] Despite their agreement, I must still consider whether these documents meet the ***Sierra Club*** tests of necessity and proportionality, taking into account the public interest.

1. *Necessity*

[40] Nova's submissions are based on Justice Iocobucci's comment in ***Sierra Club*** that, if exposure of information would cause a breach of a confidentiality agreement, the commercial interest can be characterized more broadly as the general commercial interest of preserving

confidential information: para 55. However, ***Sierra Club*** does not restrict the availability of a sealing order to agreements that contain such clauses. In paras 59 – 61, Justice Iacobucci refers to the "sufficiently important commercial interest" of preserving confidential information that meets the criteria of consistently being treated as confidential, the disclosure of which could reasonably be expected to harm proprietary, commercial or scientific interests of the applicant, that was accumulated with a reasonable expectation of being confidential and that would be of interest to the applicant's competitors.

[41] The fact that an agreement includes a standard confidentiality clause is evidence that the parties to the contract had a reasonable expectation that the information would be kept confidential, but the lack of such a clause does not necessarily mean that the information is not confidential. The agreement in question must be reviewed in context, with a view to the kind of information it contains, to determine if it gives rise to the general commercial interest of preserving confidential information and satisfies some or all of the criteria referred to by the Court in ***Sierra Club***. When the agreement contains a confidentiality clause, it is simply easier to conclude that the parties had a reasonable expectation that the information would be treated as confidential.

[42] In this case, narrowing the category of ethane purchase agreements and ethylene sales agreements to those that include third party confidentiality clauses appears to prejudice Dow more than Nova. While Dow's ethane purchase agreements may well include confidentiality clauses, Dow sells ethylene primarily to non arms-length entities, and those agreements may not contain, and may not require, the same contractual provisions of confidentiality that would be standard with an unrelated party. It is difficult, however, to see how the absence of a confidentiality clause in such an agreement would imply that the information is not confidential if it meets the criteria set out in ***Sierra Club***. The distinction appears to be one of form rather than substance. The same kind of confidential pricing and volume information is included in all of these types of purchase and sale agreements and there is evidence that the agreements have consistently been treated as confidential, both between the parties to the specific agreements and by the parties to this litigation during the eight years of pre-trial disclosure.

[43] Specifically, Nova submits that the Ethane Supply Agreement between Dow Chemical Canada Inc. and MEGlobal Canada Inc., a joint venture that is 50% owned by Dow and 50% owned by a third party, should not be protected by a sealing or protective order. The evidence from Dow's affiant, Lorrie Deutscher, is that the parties to that agreement do not want details of it made public. While there may be a question of whether disclosure would create a disadvantage in renegotiation between these related parties, the evidence before the Court is that the agreement has consistently been treated as confidential. I am satisfied, given the nature of the information that the agreement contains, that disclosure would harm Dow's commercial interests and be of interest to Dow's competitors, including Nova.

[44] Nova argues that the pre-trial confidentiality orders do not necessarily lead to a sealing order or protective order during trial, given the open-court principle at trial compared to the inherent confidentiality of pre-trial disclosure. I agree that pre-trial orders should not automatically result in trial confidentiality orders.

[45] Messrs. Laskin and Puchniak note that some cases have held that once a pre-trial protective order is granted, the presumption shifts to the other party to show why the court should not extend the protective order into a sealing order at trial: Laskin and Puchniak at 197,

citing ***AB Hassle v Canada (Minister of National Health and Welfare)*** (1998) 81 C.P.R. (3d) 121 at para 10, affd [2000] 3 F.C. 360 (C.A.). While I do not agree that the onus of justifying a broader sealing and protective order should shift from Dow to Nova, it is a factor that Nova consented to, and in fact argued for, protective orders covering a broad range of agreements, documents and records pre-trial, while now alleging that only some of those documents and records contain a sufficiently important commercial interest to pass the test of necessity. The nature of these agreements, documents and records has not changed and Nova continues to assert confidentiality concerns about Nova's agreements containing substantially the same kind of information on prices, volumes and costs.

[46] Nova also submits that Dow has failed to prove a real and substantial risk to an important commercial interest with respect to the documents it seeks to be protected because Ms. Deutscher does not have direct knowledge of some of the risks of disclosure that she describes in her affidavit, and refers instead to information received from employees directly involved in the type of business activity dealt with in the document.

[47] It is true that, in some instances, Ms. Duetscher's evidence that the proprietary commercial and scientific interests of Dow could reasonably be harmed by the disclosure of the information was weak or indirect. Dow as applicant is obliged to demonstrate this criterion on a balance of probabilities: ***Sierra Club*** para 60. However, Nova provided no evidence to the contrary. In fact Nova submitted before the case management justice or in questioning with respect to pre-trial motions that:

a) information contained in the E1 and E2 historians was proprietary to Nova, confidential to Nova and not shared with its competitors. Nova confirmed that it and Dow are the two largest competitors in the ethane, ethylene, and polyethylene business in Canada;

b) very small differences in manufacturing processes can result in savings, even a quarter of a cent a pound of ethylene, or half a cent a pound of ethylene, that small differences over the vast volumes that these parties produce can result in very significant amounts of money and competitive advantages;

c) the litigation raises confidentiality issues that are different than most cases before the courts, that as the parties are the two largest competitors in the ethane, ethylene, and ethylene derivatives markets in Canada, information about each party's business is closely guarded by such party;

d) there is a strong public interest in preventing the broader dissemination of such highly sensitive data;

e) to provide contract synopses of all Nova's contracts to Dow, which was already buying ethane in the pool area, would give Dow "perfect vision into the total ethane business," which is inappropriate, whether as an issue of competition law or not; and

f) sharing ethane purchase information raises competitive issues, and that access to information as to prices, volumes, and contract durations would have been understood by Nova throughout to have been a serious risk and something Nova would wish to avoid, since access to the information associated with

> prices that have been paid in the past is information that would allow one of the parties to have an advantage over the other.

[48] I am satisfied from a review of the type of information contained in the ethane purchase agreements and ethylene sales agreements presented in evidence, together with Ms. Deutscher's evidence and the previous assertions and submissions of Nova, that the proprietary and commercial interests of Dow could reasonably be harmed by the unrestricted disclosure of these agreements.

[49] However, the evidence is not so clear with respect to agreements that were short in term or dated many years in the past and are no longer in effect, the "stale" information that Nova submits should not be protected. It is difficult to determine at this point of the trial what allegedly "stale" documents may be sought to be produced in evidence by either party, and difficult given this lack of context to impose any rule regarding continued need for confidentiality that may cover all such documents. I will therefore allow submissions to be made on the continued requirement of confidentiality as a result of stale dating or lack of a document's current effect on a document by document basis as the trial proceeds.

[50] In summary, I find as a general rule that the information contained in ethane purchase agreements and ethylene sales agreements is information of a sufficiently important commercial interest to pass the necessity branch of the ***Sierra Club*** test, subject to objections that may be made on the basis of the "staleness" of the documents**.**

[51] In the event that I am wrong, and the information in the agreements does not pass the "important commercial interest" test on the basis of the general commercial interest of preserving confidential information, Dow submits that such disclosure would frustrate the promotion and protection of competition, thus involving a public interest in confidentiality.

[52] Dow notes that confidentiality orders governing both pre-hearing processes and hearings involving competition law are routinely issued by the Competition Tribunal and in litigation involving the Commissioner of Competition. As noted in ***Canada (Commissioner of Competition) v Chatr Wireless Inc.,*** 2011 ONSC 3387 at para 13, in such cases:

> ... the maintenance of confidentiality is important because the disclosure of confidential and competitively-sensitive information to competitors can frustrate the goal of the *Competition Act*, which is the promotion and protection of competition. [This risk] if established, is a "serious risk to the proper administration of justice."

[53] According to the Competition Collaboration Guidelines (Competition Bureau at page 27), competitors exchanging pricing information, costs, trading terms, strategic plans, marketing strategies or other significant competitive variables raise concerns about damage to competitive markets.

[54] It is clear that the promotion and protection of competition is a matter of public interest, and that Dow and Nova are competitors. Dow submits, therefore, that disclosure of confidential information such as that referred to in the Competition Collaboration Guidelines would undermine this public interest.

[55] The Competition Tribunal's insight with respect to confidentiality orders and its usual methods of categorizing confidential information are well illustrated in ***Commissioner v Superior Propane Inc., Petro-Canada, The Chancellor Holdings Corporation and ICG Propane Inc.,*** CT 1998-2, Doc #65, Reasons for Order of McKeown, J. as follows:

> On April 9, 1999, the Tribunal issued an Interim Confidentiality Order ("Confidentiality Order"). Pursuant this order, all documents over which made a confidentiality claim are to be classified as either Level A or Level B. Level A documents can be disclosed to counsel and independent experts while Level B documents can be disclosed to counsel, independent experts and two designated representatives of each party.
>
> The Tribunal is of the opinion that the respondents Superior and ICG shall ... designate all their documents as described in the three categories stated as Level A (restricting disclosure to counsel and Superior's experts). These three categories are:
>
> (a) the commercially sensitive information that would have a material impact on the competitive decision-making of Superior's operational managers and employees. Commercially sensitive information includes, among other things, information relating to individual customers, prices discounts, rebates, customer inducements, marketing strategies, strategic business plans and any other matter that may have a material impact on Superior's competitive decision-making;
>
> (b) ... presentations to the Petro-Canada board on the status of the "Project Wizard" public offering of ICG, documents containing sales volumes and budgets, offers for ICG assets by parties other than Superior, information on supply, market outlook, and for the last three years, information on distribution and costs; and
>
> (c) the branch-specific financial information regarding margins, revenue and profitability.
>
> In coming to this decision, I have tried to balance factors such as the scope of legitimate claims for confidentiality based on commercial sensitivity that would have a material impact on the competitive decision-making of Superior's operational managers and employees in the event that the application of the Commissioner is successful, the integrity of the Tribunal process, and the requirements of counsel for the respondents to consult with their clients in preparing their case.

[56] Nova in its pre-trial submissions appears to have acknowledged the need to preserve the confidentiality of certain commercial information in order to maintain and encourage competition. However, it submits that the Competition Collaboration Guidelines are not appropriate here, as the parties are not collaborators but opponents. While the Guidelines do not deal with the situation of competitors in litigation with each other, the effect of denying a sealing and protective order in this case would be to allow one competitor in a two-competitor market to

acquire confidential business information of the other. This would surely have an effect on competition, with Dow losing confidentiality of significant competitive variables for the benefit of Nova.

[57] I am thus satisfied that the evidence in this case raises the additional public interest concern that denying a sealing and confidentiality order may frustrate the promotion and protection of competition.

[58] I note that Dow has not included a schedule of the agreements that it seeks to have protected under each of the categories at issue, and I direct that they do so within a week of this decision. If there are any surprises in that list, I will hear submissions on the document in question.

[59] With respect to whether alternative measures would satisfy the requirements of confidentiality in the circumstances, I note that, as was the case in ***Sierra Club***, the parties to this litigation are compelled to produce the documents in order to present their case. The pre-trial orders which allowed the opposing party access to the confidential information through counsel, experts who had executed confidentiality agreements, in-house counsel and nominated employees were carefully crafted and thoroughly negotiated. They balance the requirements of disclosure to the opposing party with protection of confidential commercial information between competitors.

[60] Nova submits that the pre-trial orders have created difficulties in obtaining adequate instructions and guidance from its employees directly involved in the business sector in question. I have no doubt that this is a challenge. By definition, the nominated employees must be employees who will no longer be involved in the business sector, thus making them retirees or near-retirees. However, both sides have experts, in-house counsel and outside counsel that have full access to the information and I fail to see any alternative that would not destroy the very confidentiality that the order is seeks to protect.

[61] I am satisfied that there are no reasonable alternative measures to the proposed order, which in any event is agreeable to Nova with respect to the agreements it seeks to protect.

2. *Proportionality*

[62] The salutary effect of an order protecting this category of agreements is that it allows Dow and Nova to present their case while protecting necessary confidential information. This fair trial right affecting both parties must be contrasted with the deleterious effect on Nova's right to present a full defence to Dow's claims of damage while being fettered by restricted access to certain information. Nova submits that this is a serious curtailment of its fair trial rights. The application thus requires me to attempt to balance the fair trial rights of the parties.

[63] On that issue, I must take into account that Dow (and Nova) disclosed confidential information on terms of confidentiality to each other during the pre-trial phase.

[64] Dow gave up the choice of limited disclosure pre-trial, and now faces the reality that the disclosure cannot be reversed, that such disclosure has guided Nova in its defence strategies. Absent a protective order, Dow now risks damage resulting from the disclosure of confidential information it previously disclosed under a pre-trial protective order if it is to proceed with its claims at trial. Practically, its only choice if the protective order it seeks is not granted is to live with the damage of disclosure of confidential information or relinquish certain aspects of its claims by not presenting evidence. While it is true that the pre-trial disclosure orders did not

guarantee a similar outcome at trial, and such orders do not shift the onus from Dow, the balancing of fair trial rights must take into account the consequences to the parties. Although Nova's counsel may find that obtaining instructions and the best guidance from its client may be made more difficult by the proposed process, the balance favours the fair trial rights of Dow.

[65] With respect to the sealing order sought, and the importance of an open court process to the public, the sealing order would have a relatively minor effect on the core values underlying freedom of expression in this case.

[66] While the order would of course impede the public's right to search for truth to some extent, the public will not be excluded from the courtroom for most of the evidence. The public and the media would only be denied access to certain documents and information that contain confidential information in a highly-technical and specialized business.

[67] While this litigation is of great importance to the parties, it is likely of little interest to the media or the public, other than comment that may arise about the large scale of damages claimed. It is for that reason that I exercised my discretion under Rule 6.28 of the Rules of Court to dispense with the application of Division 4 of the Rules relating to notice to the media of the application.

[68] I am satisfied that, given the nature of the information sought to be protected, the important value of the search for truth which underlies freedom of expression and open justice would be better served by allowing the sealing order sought than by denying the order. As noted by Iacobucci, J., the nature of the proceedings is a factor to guide the Court in determining whether a sealing order should issue, and this litigation is an action between private parties involving technical commercial matters giving rise to little public interest: ***Sierra Club*** at para 83, 87.

[69] I am thus satisfied that, balancing the fair trial rights of the parties and the minimal deleterious effects of the orders sought to the open court principle, the order sought by Dow with respect to ethane purchase agreements and ethylene sales agreements as listed in schedules should be granted, subject to submissions at trial on the issue of staleness.

B. Polyethylene and Co-Product Sale Arrangements

[70] The analysis with respect to necessity and proportionality with respect to these sales agreements is substantially the same as with the ethane and ethylene agreements, and need not be repeated here, except as follows.

[71] Nova's objection to the protection of confidential information contained in these sales agreements is based on the fact that Dow sells most all the polyethylene it produces to related companies, although Dow Canada does sell some polyethylene in Canada at arms length. However, Dow has not disclosed polyethylene customer identities pre-trial. Dow submits, however, that it has disclosed polyethylene customer-specific prices in geographic areas and countries. In addition, information with respect to specific customer sales without identities is contained in certain documents, such as the NUR file. Ms. Deutscher states that Dow's polyethylene business employees have informed her that Dow's third-party customers have the expectation of confidentiality. Pricing with Dow entities for these products is done at a discount to what the contracts define as a "local market price," and certain previously disclosed documents and agreements disclose how to arrive at the intercompany transfer price.

[72] Despite the lack of customer identities, I am satisfied that the polyethylene and co-produce sales arrangements and records include payment and pricing strategies of Dow that meet the criteria described in ***Sierra Club,*** in that they contain important commercial information that has been consistently treated as confidential, that could harm Dow's commercial interests and that would be of interest to Dow's competitors. The analysis of the proportionality branch of the test would be the same as for the ethane and ethylene agreements, and the protection and sealing orders sought will be granted, subject again to issues of stale-dated information.

C. Records containing information regarding prices, volumes or costs of ethane, ethylene, polyethylene and co-products.

[73] Dow gives examples of these kinds of records in Ms. Deutscher's affidavit, and she was extensively cross-examined on the information contained in these records. I am satisfied that the records described in Ms. Deutscher's affidavit as examples of this category of confidential information, together with the asset utilization database which contains information as to the utilization of Dow's facilities, including volumes produced and problems encountered, contain information of a sufficiently important commercial interest to pass the necessity test. Dow has demonstrated with respect to these records on a balance of probabilities that its proprietary, commercial and scientific interests could reasonably be harmed by disclosure. However, this is a broad and open-ended category, and any additional records of this type that Dow seeks to protect must be justified on a record-by-record basis.

D. Transcript and Testimony Confidentiality

[74] The parties agree on these provisions, and I am satisfied that they are appropriate in the circumstances, as the protections of a sealing and protective order would be rendered nugatory without them.

E. Basket Clause

[75] Again the parties agree on the need for this provision, and I am satisfied that it is a reasonable way to facilitate applications with respect to documents that may become relevant as the trial unfolds.

F. Expert Reports and Redaction

[76] Dow submits that any record created by counsel, experts, consultants or the parties using the contents of or any information in confidential trial records should also be confidential.

[77] Nova complains that Dow's expert reports have been overly redacted pre-trial on the basis of this principle, illustrating its concerns by reference to one such expert report. Although the pre-trial orders included a mechanism for dealing with issues of over-redaction or disagreements over a confidential designation, no use of this mechanism occurred pre-trial.

[78] Dow submits that this kind of issue can be dealt with by the protocol it wishes the order to include. If counsel are unable to agree on specific redactions to documents intended to be presented in evidence, I accept the protocol as a reasonable method of dealing with the issue. I note that the experts on both sides had access to the same documentation, unredacted, and therefore were not prejudiced in responding to each other's reports.

G. Protocol with respect to Confidential Document Production

[79] It is not clear why Nova opposes the protocol suggested by Dow. However, as I have indicated in my comments relating to records containing information with respect to prices, volumes or costs, and expert reports and redaction, there will be issues that arise as documents are sought to be adduced at trial. The suggested protocol is a reasonable and fair way to ensure that the parties have an opportunity to deal with those issues in a timely and efficient manner.

Conclusion

[80] The draft order produced by Dow is approved, with the following adjustments:

a) Schedules A, B and C shall be produced by Dow within a week of this decision, and the agreements sought to be protected by Nova will be added to the schedules;

b) only the records described in paragraph 16 of Ms. Deutscher's affidavit and the asset utilization database will be protected under category 2(d), of the draft order and other such records must be the subject of applications for confidentiality on a document-by-document basis;

c) redactions made to the category of records set out in paragraph 3 of the draft order should be negotiated by the parties, with leave to apply with respect to the extent of re-daction if no agreement can be reached; and

d) the Joffre Site Manufacturing Infrastructure Historian will be added to the list of confidential trial records.

[81] Costs may be spoken to if necessary.

Heard on the 27th day of January, 2015.
Dated at the City of Calgary, Alberta this 3rd day of February, 2015.

B.E. Romaine
J.C.Q.B.A.

Appearances:

B.C. Yorke-Slader, Q.C.
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A.D. Grosse
for the Plaintiffs/Defendants by Counterclaim
Dow Chemical Canada ULC and Dow Europe GmbH

W.J. Kenny, Q.C.
C.C.J. Feasby
M.E. Comeau
T. Prince
for the Defendant/Plaintiff by Counterclaim
Nova Chemicals Corporation

CITATION: Lewis v. Uber Canada Inc., 2023 ONSC 5134
COURT FILE NO.: CV-21-00659095-00CP
DATE: 20230912

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Lewis

AND:

Uber Canada Inc. et al.

BEFORE: J.T. Akbarali J.

COUNSEL: *Lucy Jackson*, for the plaintiff

Dana Peebles and Geoff Hall, for the defendants

HEARD: September 11, 2023

Proceeding under the *Class Proceedings Act, 1992*

ENDORSEMENT

Overview

[1] The plaintiff in this putative class action seeks damages because, he alleges, the defendants, which operate the food delivery platform UberEats, improperly charge sales tax on the regular purchase price of food orders when promotional discounts are applied. The plaintiff's certification motion is scheduled to be heard on September 27 and 28, 2023.

[2] In advance of the filing of the certification motion material, the defendants seek a protective order. Specifically, they seek a protective order to protect their best evidence about the number of members in the class, which includes evidence about different promotions the defendants offered in different time periods, and the take up of those promotions. The evidence at issue is evidence that the defendants are required to give by virtue of s. 5(3) of the *Class Proceedings Act, 1992*, S.O. 1992, c.6.

[3] The plaintiff does not oppose the motion.

Legal Principles Relevant to a Protective Order

[4] In *Sherman Estate v. Donovan*, 2021 SCC 25, at para. 1, the Supreme Court of Canada wrote:

> 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.

[5] The Court confirmed the "strong presumption in favour of open courts", but allowed that exceptional circumstances arise in which competing interests justify a restriction on the open court principle. In such cases, the applicant must demonstrate first, "as a threshold requirement, that openness presents a serious risk to a competing interest of public importance" – a high bar that serves to maintain the strong presumption of open courts: *Sherman Estate*, paras. 2, 3, 37.

[6] The court has inherent jurisdiction to make a confidentiality order, and jurisdiction under s. 137(2) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, to make an order sealing documents.

[7] The legal test to grant a confidentiality order is set out by the Supreme Court of Canada in *Sherman Estate* at para. 38. There are three prerequisites that a party must establish when it is asking a court to exercise its discretion in a way that limits the open court principle:

a. Public disclosure would pose a serious risk to an important public interest;

b. No reasonable alternative means would prevent this risk; and

c. The benefits of the order outweigh any negative effects.

[8] The Supreme Court of Canada held that only when all of these prerequisites are met can a discretionary limit on openness be ordered. The test applies to all discretionary limits on court openness, such as publication bans, sealing orders, an order excluding the public from a hearing, or a redaction order, subject only to valid legislative enactments: *Sherman Estate*, at para. 38.

Would public disclosure of the alleged confidential information pose a serious risk to an important public interest in this case?

[9] This branch of the test requires that the interest the moving party seeks to protect be one that can be expressed in terms of a public interest in confidentiality: *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, at para. 55.

[10] In *MediaTube Corp. v. Bell Canada*, 2018 FC 355, at para. 22 ("*MediaTube FC*"), Locke J. held that, where a party is compelled by the rules of discovery to divulge sensitive and confidential information, there is a strong public interest in that party being able to maintain the confidentiality of that information, or else no confidential information is safe.

[11] *MediaTube FC* was quoted recently with approval by Associate Justice Robinson in *MediaTube v. Bell Canada*, 2022 ONSC 342, at para. 32 ("*MediaTube SCJ*"). Associate Justice Robinson went on to conclude that "there is an important public interest in ensuring that parties

who are brought into litigation are able to maintain confidentiality over commercially sensitive and confidential information that they are compelled to divulge in order to defend themselves or comply with discovery obligations": see *MediaTube SCJ*, at para. 34.

[12] Defendants have no choice but to be joined in litigation. In class proceedings, defendants have no choice but to adduce their best evidence about the number of class members. To the extent that this requirement forces a defendant to divulge commercially sensitive information, I am satisfied that there is a strong public interest in keeping that information confidential, to promote the integrity and fairness of class proceedings.

[13] In this case, the evidence the defendants seek to protect includes data demonstrating the relative success of different types of promotional offers, which is data a competitor could use to its advantage, and to the defendants' disadvantage.

[14] I also note that the record establishes that the defendants take significant measures to maintain confidentiality over this information, including by maintaining technical and administrative controls to protect the information. These controls limit access to the data to only those employees who require it to do their work. They also require employees to sign confidentiality agreements to keep the data confidential both during and after their term of employment. They monitor access to the data and investigate violations of their data policy. Violations are cause for termination.

[15] The defendants also maintain physical security measures at their headquarters, including through the use of proximity cards, requiring visitors to sign in and taking their photographs, and requiring visitors to sign non-disclosure agreements.

[16] In my view, the first branch of the test is met, in that the principle of court openness poses a serious risk to the strong public interest in keeping confidential commercially sensitive information that the defendants are forced by statute to disclose. I am satisfied that the information at issue is commercially sensitive, and the commercial interests of the defendants could reasonably be harmed by disclosure of it.

Will reasonably available alternative measures prevent the risk?

[17] In my view, no other available alternative measures will prevent the risk in this case. The protective order proposed by the defendants is narrowly tailored to focus only on the commercially sensitive information. The information proposed to be redacted is not at the heart of the contest between the parties on the certification motion, and forms only a small part of the record. The second branch of the test is met.

Is the sealing order proportionate?

[18] At this stage in the analysis, the court asks whether the benefits of granting the sealing order outweigh any deleterious effects: *Sherman Estate*, at para. 106.

[19] As I have already noted, the protective order posed is tailored to the confidential information only. The bulk of the record would remain available, and the ability of the public to understand the issues on the certification motion would not be hampered.

[20] On the other hand, failing to grant the protective order would expose the defendants to a serious risk of harm from their competitors.

[21] In these circumstances, I conclude that the third branch of the test has been met.

Conclusion

[22] I grant the defendants' motion for a protective order. The order shall go in accordance with the draft I have signed.

J.T. Akbarali J.

Date: September 12, 2023